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CALIFORNIA REPORTER

146 PACIFIC REPORTER

26 Cal. App. 161

MILLET et al. v. TAYLOR et al.
(Civ. 1259.)

(District Court of Appeal, Third District, California. Dec. 4, 1914.)

1. EVIDENCE ⚡461 — EXTRINSIC EVIDENCE AFFECTING WRITINGS—LEASE—AMBIGUITY AS TO LESSORS' SHARE OF PROCEEDS.

Where the agreement in a lease was that the lessees should give the lessors "one equal half part of all the proceeds and crops produced on said farm," such language was so indefinite as to whether gross or net proceeds were meant that extrinsic parol evidence was admissible to explain the latent ambiguity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. ⚡461.]

2. EVIDENCE ⚡448 — EXTRINSIC EVIDENCE AFFECTING WRITINGS—LATENT AMBIGUITY.

Where the language in a written contract is ambiguous and fairly susceptible of either of two constructions contended for, the admission of extrinsic parol evidence to explain the ambiguity is proper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. ⚡448.]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Liberty Millet and another against John Alfred Taylor and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

E. S. Bell, of Napa, for appellants. Clarence N. Riggins, of Napa, for respondents.

HART, J. This is an action in unlawful detainer. The complaint alleges that the defendants were in the possession and occupation of a certain tract of land belonging to the plaintiffs, situated in Napa county, under a lease mutually executed by the parties to this action on the 28th day of February, 1910; that said lease provided that the same should remain in force for the term of five years from said 28th day of February, 1910, with an option exercisable by the lessees upon the termination thereof to renew the same for a further period of five years; that, according to the terms of said lease, "the said lessees agreed to render to the said lessors, on the 1st day of January, 1913, a just and true accounting of all of the affairs pertaining to the conduct of the said farm, and to deliver to the said plaintiffs, or their order, one equal half part of all the proceeds and crops produced on said farm and premises; that said defendants, on said 1st day of January, 1913, failed and refused to render such accounting or deliver to the plaintiffs said one

equal half part of all the said proceeds," and "do now fail, refuse, and neglect to furnish said plaintiffs with a just and true accounting of all the affairs pertaining to the conduct of said farm, and to deliver to said plaintiffs, or their order, one equal half part of all the proceeds and crops produced on said farm and premises"; that, on the 7th day of March, 1913, the plaintiffs demanded in writing from the said defendants such an accounting and the delivery to them (the plaintiffs) of an equal one-half part of the proceeds of and crops produced upon said farm from the 1st day of June, 1912, to the 1st day of January, 1913, within three days after the service of said notice upon them (the defendants), or that they surrender the said premises to the said plaintiffs; that "said defendants have neglected and refused for the space of or more than three days after said demand had been served on them, and do still continue to refuse, to render to the said plaintiffs" such accounting or to deliver to them their just proportion of the proceeds and crops produced on said farm during the period mentioned. The complaint contains the further allegation, usual in such cases, of the wrongful withholding by the defendants of the possession of the demised premises after default in the performance of the covenants of the lease and without the permission of the lessors.

The defendants answered the complaint and filed a cross-complaint, in which a reformation of the lease so that it will conform to the intention of the parties is prayed for.

The defendants were given judgment upon the issues made by the complaint and the answer thereto, and this appeal, supported by a bill of exceptions, is prosecuted by the plaintiffs from said judgment and the order denying their motion for a new trial.

The trial court permitted the defendants to explain, by parol testimony, certain language of the written lease, and the ruling so made presents the only question submitted for decision by this appeal.

Those parts of the lease in question which are pertinent to the investigation here read as follows:

"In consideration whereof the said parties of the second part hereby covenant and agree that they will properly till and cultivate the premises above mentioned during the term aforesaid in a farmerlike manner, and that they will not commit any waste or damage or suffer any to be done; that they will at their own cost and expense keep the fences and buildings on said premises in good repair, reasonable wear thereof and damages by the elements excepted; that they will semiannually, on the 1st day of January and June of each year during the term of this lease and at the expiration thereof, render to said first parties a just and true accounting of all of the affairs pertaining to the conduct of the said farm, and that they will deliver to said parties of the first part, or to their order, one equal half part of all the proceeds and crops produced on said farm and premises aforesaid."

At the trial the plaintiffs contended, as they contend here, that, under the terms of the lease, and, according to the true intent of the parties as expressed therein, they were entitled to receive from the defendants, on the 1st day of January and of June of each year during the term of the lease, one equal half part of all the gross proceeds and crops "produced on said farm and premises." That this plainly appears from the lease itself is the contention, and hence, it is argued, the admission of parol or extrinsic evidence disclosing a different agreement would have the effect of varying the terms of the writing.

On the other hand, the defendants insisted in the court below, as they urge here, that the understanding had by both parties of the meaning of the lease, at the time of its execution, and which understanding does not clearly appear from the language of the instrument, was that the defendants were to return to the plaintiffs, at the times specified in the lease, one equal half part of all the net proceeds and crops produced on the leased premises. In other words, the defendants claim that the understanding between all the parties was that the lessees should deliver to the lessors one-half of such proceeds as were realized from the farm as remained after the expense of feeding the stock and the amount of certain products used by the lessees for family or domestic purposes were deducted. Thus it was made to appear to the trial court that the instrument was in that respect characterized by a latent ambiguity, and upon that theory it allowed oral evidence explanatory of the intention of the parties with regard to that covenant of the lease.

[1, 2] There are "gross proceeds" and "net proceeds," and who can say to which of these the parties to the lease in this case intended to refer when they used the language "one equal half part of all the proceeds and crops produced on said farm"? The mere word "proceeds," unaccompanied by some qualifying word or language imparting to it definite scope or signification, cannot itself be said to refer either to gross or to net proceeds, and there is nothing in the language of the other provisions of the lease in the present case which discloses the sense in which the parties intended to use the word or which sheds any light upon the subject. A "one equal half part of all the proceeds and crops" is, indeed, a vague and indefinite phrase, and we think that the ruling of the trial court, in permitting evidence extrinsic to the instrument itself for the purpose of ascertaining what the parties intended to express by the use of that language, was not only perfectly proper, but absolutely necessary. It is true, and, indeed, elementary, that "it is no part of the office of construction to add to the contract or take from it, but it is to ascertain what the parties intended by what they have said. If there be no

ambiguity in the contract, it must speak for itself." *Peterson v. Chaix*, 5 Cal. App. 525, 533, 90 Pac. 948. See, also, section 1858, Code Civ. Proc. But where, as is certainly true here, "the language employed be fairly susceptible of either one of the two interpretations contended for, without doing violence to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining. This is not allowing parol evidence for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intentions of the parties." *Balfour v. Fresno C. & I. Co.*, 109 Cal. 225, 41 Pac. 876; *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 585, 96 Pac. 319. See, also, section 1861, Code Civ. Proc.

As before suggested, in the case at bar it was not possible for the court to determine precisely what the parties meant by the use of the language under consideration, either from the language itself or from other provisions of the lease, and, as before declared, it was obviously necessary to a correct determination of that issue to resort to parol or extrinsic evidence, not, as the cases above cited declare, to vary the terms of the writing or insert therein or add thereto anything not embraced within the intentions of the parties, but to explain what they really intended to express by the use of language susceptible of either one of two interpretations, each of which would in no manner or degree do "violence to the usual and ordinary import" of said language. See *Higgins v. Cal. Petroleum Co.*, 120 Cal. 629, 52 Pac. 1080.

The evidence received under the ruling complained of sufficiently shows that by the use of the language referred to it was intended to express in the lease the actual agreement between the parties; viz., that the lessees were, at the times specifically designated in the writing, to render and deliver to the lessors, in writing, "a just and true accounting of all the affairs pertaining to the conduct of the said farm," and to deliver to the lessors an equal one-half share of the net proceeds and crops produced on the leased premises. The evidence so admitted further shows that, under the agreement, the lessors were authorized and entitled to feed the stock on the farm from the crops of hay, etc., raised thereon, and that the lessees themselves were likewise authorized to use, for their own purposes, such of the produce of the farm—eggs, butter, milk, etc.—as they might reasonably require for themselves or for their family use. It also appeared from the evidence that the lessees rendered a written statement of the business affairs of the farm for the term refer-

red to in the complaint, and delivered to the lessors an equal one-half part of all the net proceeds and crops produced on said premises for the term mentioned in the complaint. The evidence thus referred to sufficiently supports the findings.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

26 Cal. App. 128

PEOPLE v. ROY. (Cr. 365.)

(District Court of Appeal, Second District, California. Dec. 3, 1914.)

CRIMINAL LAW — 1130 — APPEAL — DEFAULT.

Where a transcript was filed by accused August 12, 1914, and the case was set for hearing on October 27th following, of which due notice was given, but appellant's attorneys of record filed no memorandum of points and authorities and did not appear when the case was called for argument, and at the request of another attorney 20 days' additional time was allowed him to file a brief, but none was filed, it would be presumed that no ground for reversal existed and the conviction would be affirmed as authorized by Pen. Code, § 1253.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. — 1130.]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Babu B. Roy was convicted of an offense, and he appeals. Affirmed.

Arthur L. Dorn and Herbert N. Ellis, both of San Diego, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

CONREY, P. J. The circumstances with respect to the prosecution of this appeal are similar to those which appeared in *People v. Measor*, 20 Cal. App. 339, 128 Pac. 1016. The transcript herein was filed in this court on August 12, 1914, and the case duly set down for hearing on the calendar of October 27, 1914; of which hearing due notice was given. The attorneys of record purporting to appear for defendant neglected and failed to file any memorandum of points and authorities and did not appear when the cause was called for argument. At the request of another attorney residing in the county from which this case is appealed, and who offered to appear as counsel for the appellant, we gave him 20 days' time to file a brief on behalf of defendant; but no brief has been filed. Under these circumstances, the court will assume that no ground for reversal exists, and that, as permitted by section 1253 of the Penal Code, the judgment should be affirmed. A general inspection and examination of the transcript has satisfied us that in this case no actual injustice is likely to follow from the enforcement of the rule.

The judgment and order denying a new trial are affirmed.

We concur: JAMES, J.; SHAW, J.

26 Cal. App. 143

PEOPLE v. PEERY. (Cr. 345.)

(District Court of Appeal, Second District, California. Dec. 4, 1914.)

1. CRIMINAL LAW — 1023, 1134 — APPEAL — DECISIONS REVIEWABLE — ORDER DENYING MOTION IN ARREST.

An order denying motion in arrest of judgment is subject to review on appeal from the judgment, but no separate appeal lies from such order.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. — 1023, 1134.]

2. CRIMINAL LAW — 1159 — APPEAL — VERDICT — CONCLUSIVENESS.

A verdict based on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. — 1159.]

3. RAPE — 12 — ELEMENTS OF CRIME — "CONSENT."

Legal "consent," which will be held sufficient in a prosecution for rape, assumes a capacity in the person consenting to understand and appreciate the nature of the act committed, its immoral character, and the probable or natural consequences which may attend it.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 11; Dec. Dig. — 12.]

For other definitions, see Words and Phrases, First and Second Series, Consent.]

4. RAPE — 57 — CONSENT OF PROSECUTRIX — EVIDENCE — QUESTION FOR JURY.

In a prosecution for rape, evidence as to whether prosecutrix was so weak mentally as to be incapable of consent held sufficient for the jury.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. — 57.]

5. CRIMINAL LAW — 788 — INSTRUCTIONS — FAILURE TO CALL WITNESS.

Where, in a prosecution for rape on a weak-minded girl, a request by defendant that the court charge the jury not to draw inferences against him from his failure to call her as a witness, because the information charged that she was too weak-minded to be capable of consent is properly refused; her competency to testify being subject to determination by objection of counsel to her and examination of her by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1855; Dec. Dig. — 788.]

6. CRIMINAL LAW — 829 — INSTRUCTIONS — REFUSAL TO REPEAT.

Where the instructions in a prosecution for rape are full, accurate, and complete, it is not error for the court to refuse defendant's requested instructions, although they correctly state the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. — 829.]

Appeal from Superior Court, Kings County; M. L. Short, Judge.

F. A. Peery was convicted of rape, and he appeals. Affirmed.

E. T. Cosper, of Hanford, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. [1] Appellant was convicted of the crime of rape and sentenced to serve a term of imprisonment in the penitentiary.

Appeals were taken from the judgment and from an order denying a motion for a new trial. Counsel for appellant states that there is an appeal also from an order denying a motion made in arrest of judgment. No separate appeal lies from such an order, although that ruling is subject to review on the appeal taken from the judgment. *People v. Rogers*, 163 Cal. 476, 126 Pac. 143.

[2-4] The female participant in the alleged crime was a girl of about 19 years of age, the daughter, by a former marriage, of appellant's wife. It was alleged that the girl was of unsound mind and incapable of consenting to the illicit act. At a trial previously had appellant admitted the fact as to the intercourse had with the girl, and he at the time of his arrest made the same admission, in effect, to the arresting officer. These statements were proved before the jury. The grandmother of the girl testified that she had known the latter since her birth and had seen her constantly during a great many of the years following that event, and as often as once a week during the five years immediately preceding the trial. She testified that the girl had always been weak mentally; that she could not be taught to read or spell or do sums in arithmetic, although she was sent to school and every effort made to teach her; that she could not count money and did not know the difference in value between a nickel and a 25-cent piece. The physician who attended the girl upon the occasion of the birth of her child testified that she answered his questions vaguely and contradicted herself several times. He said:

"In the dealings I have had with this girl she has appeared to me to be not violently insane or anything of that sort, but she does appear to me to be equipped with a grade of mentality that is insufficient to protect her from the common vicissitudes of life as they are likely to come to us, and on that ground I base my opinion that she is of unsound mind. * * * I don't consider she is in danger of becoming violent or a menace to herself or to her children or a menace to the people around her. She is suffering from a milder grade of not being sound. I think she isn't of the ordinary mentality."

The girl sat in the courtroom and was pointed out and identified by a witness for the benefit of the jury. There was testimony introduced on behalf of appellant in defense of the charge which contradicted that of the prosecution touching the matter of the alleged unsoundness of mind of the girl. With the question as to whether this contradictory testimony was of preponderating weight, this court has nothing to do. The jury in the case had the right, and it was their duty, to finally settle any question arising out of a conflict of the evidence. It is claimed, however, that a question of law is presented on the evidence in the record, for the reason that the proof offered by the prosecution was not sufficient to warrant a finding, as the verdict implies, that the girl was incapable of consenting to an act of sexual intercourse.

Legal consent which will be held sufficient

assumes a capacity in the person consenting to understand and appreciate the nature of the act committed, its immoral character, and the probable or natural consequences which may attend it. Impaired mentality may exist, and yet the individual may be able to exercise reasonable judgment with respect to the particular matter presented to his or her mind. *People v. Griffin*, 117 Cal. 583, 49 Pac. 711, 59 Am. St. Rep. 216.

It will readily appear, then, that the question, as it is involved in the special case presented, becomes peculiarly a matter for the jury to pass upon. We may make answer to the single query: Was there enough of facts, assuming the truth of the testimony, presented by the prosecution from which the jury could have reasonably concluded that the girl was incapable of consenting to the act committed with her by appellant? It must be said that there was some evidence to justify this conclusion. The grandmother gave a fair history of the girl, dating from infancy. She told of the difficulty with which the child had been taught even simple things. The physician gave some facts which were relevant when he referred to the vague answers given him by the girl and the inconsistent statements made by her, and as to his opinion derived from an observation of her while she was under his care. Besides this, there was the evidence afforded by the appearance of the girl, which is not illustrated in the record. We must assume, if need be, that her appearance was such as to afford some evidence material to the issue. When these facts are considered altogether, it cannot be said that the conclusion of the jury in favor of the incapacity of the girl is without support in the evidence.

[5] The girl in question was not called as a witness either by the prosecution or the defendant. In the course of the trial, a juror asked that the girl be examined, and the court responded that that was a matter for the attorneys to decide, and counsel for appellant said:

"The law says that, where they charge incompetency to commit a wrong, she can't testify for the reason that she is incompetent; therefore she isn't a competent witness."

Then, after some further colloquy between the district attorney, court, and counsel for appellant, the latter said:

"We ask the court to instruct the jury that it isn't to be taken as evidence in the case that the defendant doesn't call the witness; that's the law."

No error was committed by the court in refusing to then instruct the jury as desired by appellant. Either party was at liberty to call the girl to the witness chair and have her sworn, and the mere fact that it was alleged in the information that she was incompetent would not debar her from testifying. Whatever the result of counsel's effort may have been in that direction on the former trial, it would not afford any justification for neglecting to take any action which

he deemed essential for the protection of his client at the trial then being had before a different jury. The witness would have been competent to testify unless, upon objection and after examination before the court, it had been determined that she was incompetent. It will be noted that counsel for appellant himself insisted that the witness could not testify because the district attorney had charged that she was incompetent. In this statement he was mistaken as to the law.

Alleged misconduct of the district attorney in his argument to the jury is assigned as ground for the claim of prejudicial error. It does not appear in the record as to what the objectionable remarks of the district attorney were. There are some specifications of error pointing to the alleged misconduct, but none of the statements claimed to have been made by the prosecuting officer are disclosed therein.

In the brief it is set forth that the court erred in the making of several rulings as to the admission of testimony, but, beyond a statement in the form of a specification of error simply, no argument appears in support of the objections made. However, from an examination of the transcript, it does not appear that the rulings complained of were improperly made. They deserve no further consideration.

[6] Refusal to give several instructions offered on behalf of the defendant is next complained of as amounting to an error on the part of the trial court which resulted to the prejudice of appellant. The instructions as given were very full and complete in their statement of the law as applicable to the particular case being considered. Some of the instructions which were refused might properly have been given, but their effect could not have been more than to add emphasis to the propositions which were stated with sufficient clearness in the body of the court's instructions.

We find no error in the record justifying an order of reversal in this case. The appellant appears to have been fairly convicted and to be deserving of the punishment meted out to him.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 96

BRANDON et al. v. UMPQUA LUMBER & TIMBER CO. (Civ. 1303.)

(District Court of Appeal, Third District, California. Dec. 1, 1914.)

1. EASEMENTS ⚡36—ACQUISITION—ADVERSE POSSESSION.

Evidence held to warrant a finding that defendant's user of an alleged easement was permissive, and never became adverse.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88-93; Dec. Dig. ⚡36.]

2. EASEMENTS ⚡8—ACQUISITION—LICENSE—ADVERSE POSSESSION—OUSTER.

Where use of a right of way over plaintiffs' land originated in a license or express permission, the license would be presumed to continue, not only as against the original user, but as against his successors in interest, and the use would not be considered adverse until the license was repudiated and such repudiation brought to the knowledge of the owner of the servient tenement; the burden of proving that the use has become adverse being on the claimant of the easement.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 24, 27-33; Dec. Dig. ⚡8.]

3. EASEMENTS ⚡8—RIGHT TO USE—"ADVERSE POSSESSION."

That the enjoyment of an easement in another's land may be conclusive of the right claimed, it must have been adverse in the legal sense of the term; to wit, the right must have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the land, and must have been uninterrupted.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 24, 27-33; Dec. Dig. ⚡8.]

For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

4. EASEMENTS ⚡8—USER—LICENSE—ADVERSE POSSESSION.

Whether user of an easement is adverse or with the implied license of the owner of the servient estate is a question of fact to be determined in the light of the surrounding circumstances.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 24, 27-33; Dec. Dig. ⚡8.]

5. EASEMENTS ⚡8—ACQUISITION—ADVERSE POSSESSION—OUSTER.

An adverse claimant of an easement can sustain the claim only by proof of assertion of the right in such a manner that the owner of the servient estate shall have knowledge thereof.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 24, 27-33; Dec. Dig. ⚡8.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by David Brandon and another against the Umpqua Lumber & Timber Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 166 Cal. 322, 136 Pac. 62.

Mannon & Mannon, of Ukiah, for appellant. Preston & Preston, of Ukiah, for respondents.

BURNETT, J. The action was brought to quiet title to a certain tract of land in Mendocino county. In the answer defendant sufficiently set forth a claim of an easement by adverse user for a right of way over the land for a railroad for logging purposes in connection with a lumber business. The judgment was for plaintiff as prayed for, based upon sufficient findings which we deem unnecessary to quote.

As stated by respondent, the judgment is predicated upon three grounds: (1) That the user was permissive and never adverse; (2) that the user, conceding it to be adverse, was not for the statutory period to ripen into an easement; (3) the evidence shows an

abandonment of the easement, assuming that it ever existed.

[1] As we are satisfied the court was warranted in finding that the user was never adverse, the other grounds need not be considered at all.

It is not disputed that the road was constructed and its use initiated by one Anson Hilton under a written agreement with plaintiffs' predecessor in ownership, dated January 15, 1903, and providing, among other things, that:

"The party of the first part hereby grants to the party of the second part the exclusive right to occupy and use a strip of land 50 feet in width along the southerly bank of said Wages creek for the purposes of a rail or wagon road or both for such time as he shall continue in the lumber business on said Wages creek, not to exceed 25 years. * * * It is agreed and understood that upon the termination of the lumber business of the second party on the said Wages creek the strip of land occupied by the said party, as aforesaid, shall at once revert to the first party and that this agreement shall bind the heirs, executors, administrators, assigns, and tenants of the parties hereto."

[2] The privilege having thus originated in license or express permission, it is presumed to have so continued until the license was repudiated and the repudiation brought to the knowledge of the licensor. In 22 Am. & Eng. Ency. of Law, p. 1198, the rule is stated as follows:

"The mere fact that the use of an easement was permissive in its inception does not preclude the acquirement of title by prescription if it has subsequently become adverse, and has so continued for the requisite period, but a use which begins under a license will not be considered adverse until the license is repudiated and such repudiation is brought to the knowledge of the owner of the servient tenement; and the burden of proving that the use has become adverse is upon the party claiming the easement."

The rule is clearly not affected by the fact that the privilege is claimed by the successors in interest of said Hilton. Continuing the use begun by him, the presumption would be, in the absence of anything to the contrary, that it was based upon the same right and under the same limitations as characterized his exercise of the privilege. There is not a particle of evidence that this license was ever repudiated or questioned in any manner. Hence the said presumption would justify the court's finding.

[3] Moreover, the evidence as to the use of the way is at least as consistent with the conclusion that it was by permission as under a claim of right.

"In order that the enjoyment of an easement in another's land may be conclusive of the right claimed, it must have been adverse in the legal sense of the term; that is, the right must have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted. The burden of proving this is on the party claiming the easement. If he leaves it doubtful whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor." *American Co. v. Bradford*, 27 Cal. 368.

[4] The question whether or not the user is adverse or with the implied license of the owner of the servient estate is, manifestly, one of fact to be determined in the light of all the surrounding circumstances. *Evans Ditch Co. v. Lakeside Ditch Co.*, 13 Cal. App. 119, 108 Pac. 1027.

[5] It is not sufficient that the claim of right exists only in the mind of the person claiming it. It must in some way be asserted in such a manner that the owner may know the claim. *Clarke v. Clarke*, 133 Cal. 667, 66 Pac. 10. And while it sometimes occurs that evidence of the use itself and of the manner in which it is exercised carries with it a conviction that said use was under a claim of right, and therefore will justify a finding to that effect, each case depends upon its own particular facts, and, unless those facts compel the conclusion that the use is adverse, the court should find in favor of the owner of the record title.

The evidence here in favor of defendant is very meager, and consists in the bare fact of using the road for the purpose for which it was constructed. It does not appear that any claim was ever made that appellant had the right so to use it, or that it asserted any such claim. It does not even appear that the owners of the land ever knew that it was being so used by defendant, or were put upon inquiry to ascertain whether or in what manner it was being used. Without detailing further, it may be said that there is an entire absence of those significant circumstances of hostile assertion usually found where adverse possession is claimed, and, while it is not necessary to hold that a finding to the contrary would be totally unsupported, it is at least plain that the court's conclusion from the evidence is sound and rational.

We think there is no merit in the appeal, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

26 Cal. App. 86

FERNANDEZ v. WATT et al. (Civ. 1410.)

(District Court of Appeal, First District, California. Dec. 1, 1914. Rehearing Denied by Supreme Court Jan. 28, 1915.)

1. TRIAL $\hookrightarrow$ 388—FINDINGS.

Findings on admitted facts are not required.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 908-911, 915; Dec. Dig. $\hookrightarrow$ 388.]

2. APPEAL AND ERROR $\hookrightarrow$ 1071—HARMLESS ERROR—FINDINGS ON ADMITTED FACTS.

Conflict in unnecessary findings, because on admitted facts, is not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. $\hookrightarrow$ 1071.]

3. APPEAL AND ERROR $\hookrightarrow$ 1011—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

There being a substantial conflict in the evidence, the findings cannot be disturbed on

appeal on the ground of weight of evidence and credibility of witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ☞ 1011.]

4. ATTORNEY AND CLIENT ☞166—VALUE OF SERVICES—EVIDENCE—ACCOUNTS RENDERED.

It is some evidence that the value of an attorney's services did not exceed the amount found that, after notified of termination of the relation of attorney and client and a desire to settle his claim, he rendered statements of account not exceeding such amount.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 368-372; Dec. Dig. ☞ 166.]

5. WITNESSES ☞318 — REPUTATION AS TO VERACITY—EVIDENCE.

Testimony merely rebutting the opinion of defendant that a witness for plaintiff was not a capable and clear-headed lawyer is not evidence of such witness' reputation for truth and veracity, inadmissible where his character has not been attacked or his testimony impeached.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1084-1086; Dec. Dig. ☞318.]

6. EVIDENCE ☞155—ADMISSIBILITY—INTRODUCTION OF EVIDENCE BY ADVERSE PARTY.

Mere introduction of testimony, in the absence of objection, does not warrant admission over objection of testimony in reply.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445-458; Dec. Dig. ☞155.]

7. APPEAL AND ERROR ☞1054—HARMLESS ERROR—IMMATERIAL EVIDENCE.

Admission of testimony as to an immaterial matter which could not have had weight with the trial court is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. ☞ 1054.]

8. APPEAL AND ERROR ☞1051—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting testimony of B. as to having exhibited to defendant in their first interview a power of attorney from plaintiff, when the power of attorney was not offered in evidence, was harmless; defendant in a subsequent interview with B., and in all their correspondence, recognizing and treating with B. as plaintiff's duly authorized attorney at law and in fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. ☞ 1051.]

9. APPEAL AND ERROR ☞1052—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Admission of parol evidence of a written agreement is harmless; the writing being subsequently admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. ☞ 1052.]

10. APPEAL AND ERROR ☞1052—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Plaintiff having later, without objection, testified that all the professional services rendered to her by defendant had been paid for in full, admission of her answer to the question, "Do you owe defendant anything for services rendered in connection with the estate of B.?" over objection that it called for a conclusion, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. ☞ 1052.]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Ellen M. Fernandez, formerly Ellen M. Brodies, against James Alva Watt and another. From a judgment for plaintiff, defendant Watt appealed to the Supreme Court, whence the case is transferred to the Court of Appeal. Affirmed.

John F. Clute and James Alva Watt, both of San Francisco, and Wyckoff & Gardner, of Watsonville, for appellant. T. C. Judkins and S. W. Molkenbuhr, both of San Francisco, for respondent.

PER CURIAM. This action comes to this court upon an order of transfer from the Supreme Court. The plaintiff's complaint alleges substantially that she was the owner of 36 shares of the capital stock of the Watsonville Realty Company (a corporation), which, upon March 24, 1905, and ever since, were held in trust for her by the defendant James Alva Watt, an attorney at law. Watt, at the time of the commencement of the action, so the complaint alleged, claimed the right to hold the stock in controversy as security for the payment of an indebtedness due him for professional services alleged to have been rendered to the plaintiff. The plaintiff prayed for an accounting of the dividends paid on the stock in controversy, and alleged to have been retained by the defendant Watt, and for a judgment directing the delivery of the stock to her by the defendant "upon the payment to him of such sum of money as may be determined by the court * * * to be due and payable" to him. The defendant Watt, in his answer and cross-complaint, admitted his possession of the stock, and admitted the plaintiff's title thereto, but alleged a prior agreement with the plaintiff whereby he was employed as her attorney, under the terms of which he had rendered her professional services of the reasonable value of \$1,621.60, in several transactions which culminated in prolonged litigation, and then pleaded the pledge of the stock to him by the plaintiff as security for the payment of the sums alleged to be due him for professional services, together with advancements and disbursements made by him during the litigation in which the plaintiff became involved, in the sum of \$292.10. The defendant prayed for a judgment for the sums claimed to be due him, and that, after crediting the amount of dividends on the stock admitted to have been received and retained by him, a decree be made foreclosing his lien upon the stock and directing a sale thereof to satisfy his claim.

The trial court found that the defendant received and held the stock in trust for the plaintiff; that he had collected the sum of \$1,404 as dividends thereon; that he had rendered professional services to the plaintiff which were reasonably worth only the sum of \$400; and that he in the rendition of such services had expended in the plain-

tiff's behalf only the sum of \$100. Thereupon judgment was entered in favor of the plaintiff for the recovery of the stock and the sum of \$904, which sum represented the difference between the dividends due to the plaintiff and collected and retained by the defendant on the stock and the sum found to be due him for professional services and advances made. Judgment was also rendered in favor of the plaintiff and against the defendant Watsonville Realty Company in the sum of \$144 for a dividend declared to be due and payable on the stock which the court found had not been paid to plaintiff by the corporation defendant nor collected by the defendant Watt. The judgment against the corporation defendant is not assailed; but it is insisted upon behalf of the defendant Watt that the judgment as to him should be reversed, because of errors of law occurring during the trial, and the alleged insufficiency of the evidence to support the findings of the trial court.

[1-3] Incidentally, it is insisted that certain findings are conflicting and contradictory, and that therefore the judgment should be reversed. With reference to the last point, it may be conceded that the findings referred to, which relate to the plaintiff's ownership of the stock, are in a measure conflicting, but, inasmuch as the plaintiff's ownership of the stock was an admitted fact in the case, it is obvious that the claimed conflicting findings were wholly unnecessary, and therefore immaterial to the issues involved in the case. It needs no citation of authority to support the proposition that findings upon admitted facts are not required, and that a judgment will not be disturbed because of a real or apparent conflict in such findings. The argument made in support of the contention that the material findings in favor of the plaintiff upon the subject of the value of the services rendered by the defendant are not supported by the evidence is devoted chiefly to a discussion of the credibility of the plaintiff as a witness in her own behalf, and the weight of the evidence generally adduced upon this phase of the case. The credibility of the witness and the weight of the entire evidence were matters to be determined by the lower court in the first instance upon the trial of the case, and finally upon the hearing and determination of a motion for a new trial. Our examination of the record convinces us that there is some evidence sufficient to sustain the findings complained of, and that the evidence as a whole is in substantial conflict in so far as it relates to the issue of the value of the defendant's services. This being so, the judgment cannot, under the well-settled and generally well-understood rule, be disturbed by this court upon the ground that the evidence is not sufficient to support the findings and judgment. If our examination of the rec-

ord had convinced us that the findings complained of were not, as a matter of law, supported by sufficient or any evidence, we would deem it our duty to narrate in substance and discuss in detail the evidence relied upon by the plaintiff to support the findings and judgment; but, in view of our conclusion, after a full examination of the record, that there exists a substantial conflict in the evidence offered and received in response to the issue of the value of the defendant's services, no useful purpose would be subserved by narrating all of such evidence and then in detail demonstrating its conflict.

[4] In support of the assertion that there is some evidence to support the finding of the court upon the issue of the value of the defendant's services, it will suffice to say that the record shows that on June 8, 1907, the defendant Watt sent to the plaintiff, Mrs. Brodies, a statement of account showing a balance due to him for professional services and money expended in the sum of \$344.30. Subsequently, in May of the following year, Attorney Brueggerhoff, of Austin, Tex., called upon the defendant Watt and exhibited a power of attorney from Mrs. Brodies, which authorized Brueggerhoff to receive the stock in controversy from the defendant Watt and negotiate a settlement of the latter's claim for professional services. Shortly thereafter Watt, recognizing the existence of the relation of attorney and client existing between Mrs. Brodies and Brueggerhoff, wrote to the latter, inclosing another statement of account, which showed a balance due to Watt in the sum of \$331.50. In response to this statement Watt received a letter from Brueggerhoff requesting that the stock be forwarded to him, together with a draft upon Mrs. Brodies for the amount of Watt's bill. This letter from Brueggerhoff, written at the instance of and upon behalf of Mrs. Brodies, indicated clearly enough her desire to terminate the relation of attorney and client existing between her and Watt. The letter last referred to was dated June 22, 1908, and referred to Watt's letter of June, 1907. In September, 1908, another letter from Brueggerhoff was addressed to and received by Watt, asking that Watt draw upon Mrs. Brodies for the amount of his claim as rendered in his previous statement; and thereupon Watt, in reply, on September 17, 1908, mailed another statement to Brueggerhoff, showing a balance due of \$409.60. These statements and correspondence were undoubtedly evidence of the condition of the account between Mrs. Brodies and Watt as understood by the latter in September, 1908. Subsequently, however, on April 1, 1909, Watt rendered another statement of account, showing a balance due of \$759, to a Mr. Judkins, an attorney at law who had become associated with Mr. Brueggerhoff in the transaction, and who had called upon Watt at the in-

stance of Mrs. Brodies. Shortly thereafter the plaintiff brought the action to compel a delivery of the stock; and when issue was joined Watt's claim had advanced to the sum of \$1,913.70. We think it clearly appears from all of the statements rendered by Watt, considered in connection with other evidence, that at least 75 per cent. of his claim was based upon expenses incurred and services rendered after he had been repeatedly, fully, and finally informed that his services were no longer needed by the plaintiff, and after she had repeatedly offered to pay the amount of his claim which, at the time of his dismissal, did not exceed, as evidenced by his own statement, the sum of \$409.60. That there was a very material conflict in the evidence with reference to the propriety of the charges made in the several accounts rendered by Mr. Watt for his per diem and expenses of trips to Watsonville for the claimed purpose of attending meetings of the corporation in which plaintiff was a stockholder is evidenced by the records of the corporation, which show that upon several of the occasions charged for no meeting of the corporation was held, or, if held, the defendant was not present.

[5-7] One of the alleged errors of law relates to the ruling of the trial court admitting, over the objection of the defendant Watt, certain testimony of Mr. Judkins, one of the counsel for plaintiff, which, it is claimed, was offered and improperly received for the purpose of bolstering up the testimony of the witness Brueggerhoff, whose testimony, in deposition form, upon a certain phase of the case, it is claimed, was in conflict with the testimony of the defendant Watt. In this behalf it is the contention of the defendant Watt that the testimony complained of tended to show the good reputation of the witness Brueggerhoff for truth, honesty, and integrity, and therefore, by adding to the credibility of the witness, whose character in the particulars stated had not been previously assailed, gave his testimony greater weight with the trial court than it would otherwise have had. It may be conceded that, as a general rule, evidence is not admissible to show the good character or reputation for truth and veracity of a witness whose character has not been attacked and whose testimony has not been impeached; but, in our opinion, this rule has no application to the situation presented in the record before us. The testimony complained of was merely to the effect that Mr. Judkins had at one time prior to the trial of the present action employed the witness Brueggerhoff as an attorney at law to look up and pass upon certain legal matters in the state of Texas, and that he (Brueggerhoff) had handled these matters with ordinary skill, and at all times conducted himself as a rational and well-balanced gentleman. This testimony was provoked by, and offered in rebuttal of, the testimony of

the defendant Watt, who, when testifying in his own behalf, declared that in his dealings with Attorney Brueggerhoff concerning the transaction in suit, the latter manifested erratic symptoms, and seemed incapable of understanding ordinary transactions, and generally did not deport himself as if he were a person of character and responsibility. In this view of the testimony we see no substantial error in the ruling of the court. While the fact that Watt's opinion as to the legal ability of Brueggerhoff was admitted in evidence without objection would not, in the presence of an objection from the defendant, warrant the introduction of material testimony in reply upon behalf of the plaintiff, nevertheless it is apparent that the testimony complained of, although objectionable, was not intended to show, and did not, strictly speaking, have the effect of showing, the good reputation of Brueggerhoff for truth and veracity. The most that it did was to rebut the opinion of the defendant Watt to the effect that Brueggerhoff was not a capable and clearheaded lawyer. Brueggerhoff's legal ability and mentality, however, were never facts of any importance one way or the other in the case, and did not, so far as we can ascertain from the record, ultimately enter as an essential in the attempted adjustment of the defendant's claim. That this is so is evidenced by the fact that in all of Watt's subsequent dealings with Brueggerhoff, which were conducted by correspondence, the latter's professional ability was never doubted or disputed. Moreover, we are unable to discern any material conflict in the testimony of Watt and Brueggerhoff as to what occurred when they first met to discuss Mrs. Brodies' affairs; and therefore we cannot conceive how the testimony complained of, although immaterial and objectionable, could have weighed against the defendant in the mind of the trial court.

[8] We see no error in the ruling made over the objection of the defendant admitting the testimony of Brueggerhoff to the effect that he had exhibited a power of attorney from Mrs. Brodies at his first interview with Watt, even though the power of attorney was not offered in evidence. The error, if any, in this behalf was harmless, for the reason that the defendant Watt in a subsequent interview with Brueggerhoff, and in all of the correspondence referred to, recognized and treated with Brueggerhoff as the duly authorized attorney at law and in fact of Mrs. Brodies.

[9, 10] The two remaining assignments of error alleged to have been committed by the trial court have no merit. It is not apparent from our examination of the record that parol evidence was admitted to vary the contents of the written agreement of December 4, 1904; but, even if this were so, the result would be harmless in view of the fact that after some preliminary testimony the agreement itself was finally admitted in evidence.

While objection was interposed to the question put to the plaintiff, "Do you owe the defendant anything for services rendered in connection with the estate of James Brodies?" upon the ground that it called for the conclusion of the witness, nevertheless no claim of prejudicial error can be predicated upon the admission of the testimony elicited by the question, because the plaintiff later testified, and apparently without objection, that all of the professional services rendered to her by the defendant Watt had been paid for in full.

We are of the opinion that the evidence sustains the material findings of the lower court, and that no prejudicial error appears in the conduct of the trial.

The judgment and order appealed from are affirmed.

26 Cal. App. 94

PEOPLE v. KING et al. (Cr. 352.)

(District Court of Appeal, Second District, California. Dec. 1, 1914.)

1. LEWDNESS ⇨1—"LIVING IN ADULTERY."

"Living in adultery" means living together as husband and wife and exercising sexual rights and duties implied by such relation when legally created—a counterfeit of the marriage relation. It is not shown by proof of acts of illicit intercourse.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 1-4; Dec. Dig. ⇨1.]

For other definitions, see Words and Phrases, Second Series, Living in State of Cohabitation and Adultery.]

2. LEWDNESS ⇨10—EVIDENCE.

Evidence held not to sustain a conviction of cohabitation and adultery.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. § 15; Dec. Dig. ⇨10.]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Fred T. King and another were convicted of adultery, and they appeal. Reversed.

Shreve, Reed, Sample & Shreve, of San Diego, for appellants. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendants were convicted upon an information charging them with the crime of cohabitation and adultery, as defined by section 269b of the Penal Code. Each defendant appeals from the judgment and from the order of the court denying the motion of defendants and each of them for a new trial.

The case comes clearly within the ruling of this court as declared in *People v. Breedling*, 19 Cal. App. 359, 126 Pac. 179:

"As used in the statute, the words 'living in a state of cohabitation and adultery' mean the living or dwelling together as husband and wife and exercising the sexual rights and duties implied by such relation when legally created—in other words, a counterfeit of the marriage relation."

The evidence shows that defendant King was living apart from his wife and defend-

ant Fernando was living apart from her husband. The defendants, during several weeks or months, were together a great deal, but they were not dwelling together in the same habitation, nor living in the manner of husband and wife together. It was shown that for a short period of time the defendants separately had rooms in the same lodging house. There was no door connecting these rooms, and each defendant rented his or her room separately and paid the rent separately and individually. Mrs. Fernando occupied her room in her own name. The evidence shows that King spent some of his evenings in Mrs. Fernando's room, and that usually the door was left open. On one evening, according to the testimony of a certain witness, this witness saw the defendants lying on her bed, and the circumstances were such as tended to show illicit intercourse. But when officers came to the house a little later the same night, expecting to find the defendants in the same room together, they were found in their separate rooms and beds.

The decisions uniformly and thoroughly establish that mere acts of illicit intercourse do not constitute a living together "in a state of cohabitation and adultery," within the meaning of statutes like that under which these defendants have been prosecuted. The evidence is legally insufficient to support the verdict.

The judgment and the order denying a new trial are, as to both defendants, reversed.

We concur: **JAMES, J.; SHAW, J.**

26 Cal. App. 49

PEOPLE v. GREENING. (Cr. 350.)

(District Court of Appeal, Second District, California. Nov. 30, 1914.)

1. CRIMINAL LAW ⇨1166½ — RULINGS AT TRIAL—DISCRETION—PREJUDICE.

On a separate trial of accused for murder, the court excepted his codefendant from an order excluding witnesses from the trial, save when called to testify, and, the district attorney having waived his right to make an opening statement to the jury, the court denied accused's counsel the privilege of so doing prior to the close of the evidence on behalf of the people. Held, that neither ruling was an abuse of discretion, and, even if so, was not prejudicial to accused's substantial rights.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. ⇨1166½.]

2. WITNESSES ⇨277 — CROSS-EXAMINATION OF ACCUSED.

Where, in a prosecution for homicide, the state claimed that accused killed deceased to rob him, and proved that after the homicide accused was in possession of certain money from which he made several disbursements, to contradict which accused testified that he had the money before deceased was killed, the district attorney was properly permitted to ask him on cross-examination as to where, how, from whom, and when he got the money and the amount and disbursements thereof.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. ⇨277.]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Martin L. Greening was convicted of murder, and he appeals. Affirmed.

Carpenter & Gibbons, of San Luis Obispo, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. By indictment defendant and one Mary Suggs were charged with the murder of Charles Quinn. Upon a separate trial the jury convicted defendant of murder in the first degree, recommending that his punishment be fixed at imprisonment for life. Judgment followed in accordance with this recommendation, from which, and an order denying his motion for a new trial, he appeals. It was admitted upon trial that defendant shot and killed Quinn, and it is conceded the evidence was sufficient to justify the verdict rendered.

The grounds upon which counsel ask for a reversal are: First. That the court abused its discretion in not excepting Mary Suggs from an order excluding witnesses from the trial save when called to testify. Second. The district attorney having waived his right to make an opening statement to the jury before introducing evidence on behalf of the prosecution, the defendant's attorney asked leave to make an opening statement on behalf of defendant before the introduction of such evidence. The court denied him the privilege of so doing, and this ruling is assigned as abuse of discretion on the part of the court. Third. Erroneous rulings of the court in permitting the district attorney to cross-examine defendant. To illuminate these questions we are presented with a transcript of upwards of 1,100 pages.

[1] Consideration of the two assignments of error herein first noted may be dismissed with the statement that our attention is not directed to anything tending in the slightest degree to show an abuse of discretion on the part of the court. Neither, conceding such abuse, is it made to appear that the order and ruling could have affected the substantial rights of defendant. As to the order excluding witness Suggs from the courtroom during the trial, counsel for appellant say: "It is impossible now to determine to what extent the defendant was prejudiced by her absence from the courtroom." And with reference to the refusal of the court to permit defendant's attorney to make an opening statement to the jury, prior to the close of evidence on behalf of the people, it is merely said: "It would have tended to clarify the issue."

[2] The assignment of error based upon the ruling of the court in permitting the cross-examination of the defendant is equally without merit. The theory of the prosecution was that the killing of Quinn by de-

fendant was for the purpose of robbing him of certain money of which he was shown to have been in possession a short time prior to the homicide. In line with this theory it was shown that defendant, after the homicide, was in possession of certain money from which he made several disbursements around town. To contradict the effect of this evidence, defendant in his own behalf testified that he had the money before Quinn was killed. Thereupon, over defendant's objection, the district attorney was permitted to question him as to where, how, from whom, and when he got the money, and the amount and disbursements thereof. In this cross-examination defendant testified that he had won some \$35 or \$40 in a game of coon-can from one Sellers. Further questions on cross-examination were apparently for the purpose of showing the falsity of his statements, defendant being interrogated as to the identity of Sellers, the expenditure of the money so won, and generally as to what he and Sellers did, in the course of which he said that they went to different saloons and clothing stores. Whereupon he was asked if they went anywhere else, to which he replied: "Went to a sporting house." Appellant insists that how, when, where, or from whom defendant obtained the money which he testified to having prior to the homicide was wholly immaterial, and hence his objections should have been sustained. If such contention be true, there can be little purpose in cross-examination, the object of which in this case was to show that defendant had no money immediately prior to the killing of deceased. The extent to which cross-examination may go is largely a matter in the discretion of the trial court. Certainly there was no abuse of discretion in permitting an inquiry the result of which might show the statement of defendant to be untrue, or even improbable. The questions were proper and well calculated to elicit answers affecting the weight to be given the statement made by the witness.

The points presented by counsel in conducting this appeal are so trivial and so wholly without merit that the prosecution thereof, at an expense to the taxpayers of several hundred dollars for a transcript of the proceedings, can only be justified upon the ground that in a criminal case the law gives to the defendant and counsel no opportunity for considering the merits of the case or advisability of an appeal, but compels them to appeal at once or lose the right so to do. The law in this regard should, in my opinion, be amended so as to give a defendant and his counsel time in which to consider whether or not the taking of an appeal be advisable.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 131

DUNLAP v. SUNSET LUMBER CO. et al.
(Civ. 1301.)

(District Court of Appeal, Third District, California. Dec. 3, 1914. Rehearing Denied by Supreme Court Feb. 1, 1915.)

1. HUSBAND AND WIFE — 159—CONTRACTS—CONSIDERATION — SURETYSHIP FOR HUSBAND.

Defendant's general manager, bookkeeper, and sales manager were stockholders in the C. Co., which was indebted to defendant, and they proposed to plaintiff's husband that, if he would assume and become liable to defendant for the payment of such debt, one-third of the stock in the C. Co. would be transferred to him. With plaintiff's consent, he agreed to this, received the stock, and he and plaintiff executed a note to defendant secured by a deed of trust on land which was plaintiff's separate property, for the indebtedness of the C. Co. *Held*, that the transfer to plaintiff's husband of title to a one-third interest in the C. Co. was a good consideration for the note and deed of trust, under Civ. Code, § 1605, providing that any benefit conferred or agreed to be conferred upon the promisor by any other person to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered by such person other than he is at the time lawfully bound to suffer as an inducement to the promisor, is a good consideration for a promise, and the contention that plaintiff merely became a surety to defendant for the antecedent obligations of the C. Co., and that, as no consideration passed between her and defendant, the note and deed of trust were without consideration, was unsound.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 622, 629, 630; Dec. Dig. 159.]

2. EVIDENCE — 471—WEIGHT AND SUFFICIENCY—FACTS OR CONCLUSIONS.

In an action to cancel a note and deed of trust on the ground that they were without consideration, the testimony of a witness, in answer to leading questions, that the note and deed of trust were given to secure the antecedent obligations of a third party to defendant, involved a mere legal conclusion having no evidentiary force.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. 471.]

3. CANCELLATION OF INSTRUMENTS — 45—PRESUMPTIONS AND BURDEN OF PROOF—CONSIDERATION.

In an action to cancel a promissory note on the ground that it was given without consideration, the note itself imported a sufficient consideration, and the burden was upon plaintiff to overcome and destroy that presumption by evidence sufficient in probative force to satisfy the jury or the trial judge.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 100, 101; Dec. Dig. 45.]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Emma M. Dunlap against the Sunset Lumber Company and others. From a judgment in favor of the defendant named, plaintiff appeals. Affirmed.

Sterling Carr, of San Francisco, for appellant. C. L. Colvin, of Oakland, for respondents.

HART, J. The plaintiff brought this action for the purpose of securing a decree can-

celing a certain promissory note and a certain deed of trust, said note having been executed in favor of and delivered to the defendant corporation by her and her husband, and said deed of trust executed by her to secure the payment of said note. The sum and substance of the allegations of the complaint are that the note in suit was and is not, so far as the plaintiff is concerned, supported by a consideration. The defendants answered the complaint, specifically denying each and all of its material averments, and also filed a cross-complaint, setting forth the facts constituting a history of the transaction leading to this action and declaring that the trustees under the deed had, in accordance with the terms of said deed, sold the property which was the subject of said deed at public auction for the sum of \$275, the highest bid offered for the same, and that, after paying the legal expenses of said sale, the said trustees paid the balance of the sum so received, to wit, the sum of \$135, to the defendant corporation, and that said sum was by it applied to the debt, to secure the payment of which the note and the trust deed in controversy were executed. The prayer of the cross-complaint is that judgment be awarded the defendant corporation against the plaintiff, that "she take nothing by this action, and that this defendant may have judgment against the plaintiff Emma M. Dunlap and defendant George T. Dunlap for the sum of \$5,060.60, with interest," etc. Judgment was rendered and entered in favor of the Sunset Company and against the plaintiff and the defendant George T. Dunlap in accordance with the prayer of the cross-complaint. The plaintiff appeals from said judgment, supporting said appeal by a transcript of the testimony prepared in pursuance of the provisions of section 953a of the Code of Civil Procedure.

The principal point made by the plaintiff is that the findings are not supported by the evidence.

[1] The action grows out of a transaction whereby George T. Dunlap, the husband of the plaintiff, became the owner of one-third of the capital stock of the Clayton Advertising Company, a corporation, which was, at the time said transaction took place, engaged in the business of "outdoor" advertising in the city of Oakland. It appears that said Clayton Advertising Company was, prior and down to the date of the note in question (December 9, 1909), indebted to the defendant Sunset Lumber Company on an open account, in the sum of \$4,816.84, for goods, wares, and merchandise sold and money advanced to the first-named company. It further appears that certain persons who were connected in official capacities with the defendant corporation were stockholders and members of the board of directors and officers of the Clayton Company. These per-

sons were E. H. Nash, J. E. Neal, and C. S. Lamb, and were, respectively, the general manager, the bookkeeper, and the sales manager of the Sunset Company. They, with one C. L. Clayton, held all of the issued capital stock of the Clayton Company. Neither the plaintiff nor her husband, George T. Dunlap, was in any way connected with either of said corporations prior to the execution of the promissory note in question, nor was the plaintiff at any time, either prior or subsequent to the 9th day of December, 1909, the date of said note, an officer, a director of or a stockholder in the Clayton Company. While this indebtedness of the Clayton Company to the Sunset Company still existed, negotiations were had between the said George T. Dunlap and the above-named stockholders of the former concern, who, as seen, were also connected with the Sunset Company, which resulted in an agreement whereby one-third of the capital stock of the Clayton Company was to be transferred to said Dunlap in consideration of the payment by Dunlap of the debt due from the Clayton Company to the Sunset Company. Pending these negotiations and before they were consummated, however, Dunlap presented the proposition to his wife (the plaintiff) and requested her to join him in the execution of a promissory note in favor of the Sunset Company for the amount of said debt and at the same time asked her to make and execute the deed of trust in question to secure the payment of said note. Mrs. Dunlap assented to this proposition, and, accordingly, joined her husband in the execution of said note and made the deed of trust, which latter instrument covered a city lot, situated in the city of Oakland, and which lot was at all times her sole and separate property; the same having been purchased by her with money obtained through the estate of her deceased father. After the delivery of said note and the execution and delivery of said deed of trust, certain shares of the stock of the Clayton Company were transferred to George T. Dunlap. The plaintiff, as before stated, did not then, nor at any other time, become a stockholder in said company. The note above mentioned was given directly to the Sunset Company. The defendants E. H. Nash, J. E. Neal, J. R. Pereira, Jr., and George T. Dunlap were, except the last-named defendant, trustees under the deed of trust and as such were proceeded against as necessary parties.

The specific contention of the plaintiff is, stating it in the language of her counsel, that, since, "according to the findings, the note and the trust deed were not made or delivered until long after the obligations of the Clayton Company to the Sunset Company arose and became due and payable," and since "said promissory note formed no part of the original transaction between these two companies, Mrs. Dunlap became but a surety for the antecedent obligations of the Clayton

Company, and that as such surety it was necessary that a valid consideration pass between herself and the Sunset Company to hold her upon the note in suit; that Mrs. Dunlap did not become the surety of her husband, as there was no obligation of any kind due from her husband to the Sunset Company or to the Clayton Company." Hence, it is contended, there was, in the execution of said note by the plaintiff, no consideration moving to her from either of said companies, or from her husband. It follows, so the argument proceeds, that the findings, which accord with the theory of the defendants that the transaction whereby one-third of the capital stock of the Clayton Company was transferred to George T. Dunlap involved a sale of said stock to the latter in consideration of the assumption by him of the payment of the debt due the Sunset Company from the Clayton Company, are not supported by the evidence.

After making findings negating certain averments of the complaint, the court made the following finding, which is reproduced here in full because it involves a statement of all the ultimate facts essential to the support of the judgment:

"That on or about the ——— day of December, 1909, and prior to the execution of said promissory note, the said plaintiff and the said George T. Dunlap entered into an agreement with defendant Sunset Lumber Company, acting by and through its agents, E. H. Nash, C. S. Lamb, and J. E. Neal, under and by which the said George T. Dunlap agreed to assume and pay the indebtedness theretofore existing in favor of the Sunset Lumber Company, and against the Clayton Advertising Company aggregating an amount in the sum of \$4,816.84, in consideration that the Sunset Lumber Company would cause to be transferred to said George T. Dunlap and said plaintiff one-third of the capital stock of the Clayton Advertising Company, and agreed to execute and deliver to the Sunset Lumber Company the promissory note aforesaid, and to secure the payment of the same agreed to execute and deliver to the said Sunset Lumber Company the deed of trust referred to in said amended complaint; that on the 7th day of December, 1909, the said Sunset Lumber Company caused to be transferred to the said George T. Dunlap, upon the order of the said plaintiff, and the said George T. Dunlap, one-third of the capital stock of the Clayton Advertising Company, and in consideration of said transfer the said plaintiff and the said George T. Dunlap executed and delivered to defendant, Sunset Lumber Company, the promissory note and deed of trust referred to in said amended complaint; that said promissory note and said deed of trust were received by the said Sunset Lumber Company in settlement of its claim against the Clayton Advertising Company, and the said Sunset Lumber Company, at the request of the said plaintiff and her said husband, George T. Dunlap, released and reassigned to the Clayton Advertising Company all contracts and other securities it then held for the payment of the indebtedness due and owing to it by the Clayton Advertising Company; that the said plaintiff and the said George T. Dunlap acquired the said stock of the Clayton Advertising Company, as a business investment for the said George T. Dunlap, and for the son of the said plaintiff, Emma M. Dunlap; that said promissory note

and said deed of trust were not given as security for the debt of the Clayton Advertising Company, but were given in payment of the stock in the Clayton Advertising Company, caused to be transferred to them by the Sunset Lumber Company as aforesaid, and were intended to be the original and absolute obligation of said plaintiff and the said George T. Dunlap, and were received and accepted by said defendant Sunset Lumber Company as such absolute obligation."

It can hardly be said that there is a conflict in the evidence itself as to the facts of the transaction from which this case arises. The controversy between the parties seems rather to hinge upon the interpretation of the testimony, or, perhaps it would be the more correct to say, upon the nature, in legal effect, of the transaction as it is explained by the uncontroverted or admitted facts of the same.

George T. Dunlap was the only witness called by the plaintiff. Testifying for her or in support of the claims of her complaint, he admitted that the arrangement was that he was to assume and so become liable to the Sunset Company for the payment of the debt due it from the Clayton Company in consideration of the transfer to him of one-third of the capital stock of said company. He said that, after the proposition had been discussed between him and Mr. Lamb, of the Sunset Company, on several different occasions, and after he had been persuaded that it would be a profitable investment, he submitted the matter to his wife, the plaintiff herein, and explained to her that he could acquire one-third of all the capital stock of the Clayton Company by assuming the payment of the debt due from said company to the Sunset Company, and that the latter company was willing to accept security for its claim against the Clayton Company. He requested the plaintiff to join him in the execution of the note in suit and, as security for the payment thereof, to make and deliver to the Sunset Company a trust deed to the real property described in the complaint, which was, as before shown, her separate estate, and that she consented to do so upon her understanding of the proposition as so explained to her by him. But a clearer understanding of the nature of the transaction may the better be obtained from George T. Dunlap's version of it in his own language. He testified:

"He (Mr. Lamb) proposed to me if some arrangement could be made that security could be given, if I could supply the security for the obligations to the Sunset Lumber Company, that he could arrange that I could have a third interest in this business and be identified with the management of it. That plan was carried out. Question by the Court: You had no interest in the business up to that time? A. No, sir; that was the basis on which I was to acquire some interest. The Court: Then you signed this note? A. Yes, sir. Q. In other words, as a payment for your interest in the business. A. No, sir. Oh, so far as I was concerned? The Court: Yes. Q. Stock was issued to you, was there not, at the time you and your wife signed this (the

note)? A. Stock was issued to me; yes, sir. Q. At that time? A. Yes, sir. Q. A part of that transaction? A. Or immediately afterwards. Q. A part of the transaction? A. Yes, sir; it was a part of the transaction. * * * I requested Mrs. Dunlap to supply some security, explained to her what the proposition was, and I suggested that she give a trust deed, or I thought it could be arranged that if she would consent to give a note and deed of trust for property on Adeline street that it would be satisfactory. * * * Q. At the time this note was given by yourself and Mrs. Dunlap, to whom were the shares of the capital stock of the Sunset or the Clayton Advertising Company delivered? A. Well, it was understood that one-third of the stock to be issued should be issued to myself and son."

After thus relating the circumstances of the transaction, Dunlap, during the course of his testimony, later on went over the matter again as follows:

"I explained the whole proposition to Mrs. Dunlap, and, after having suggested and discussed with Mr. Lamb what security might be provided, I think he reported to me that he believed the security would be satisfactory—in fact, I think he did state that it was satisfactory, and papers were prepared, and, while these papers were being prepared, I explained to Mrs. Dunlap what was to be done, and she consented to sign the papers. * * * Q. Now, getting back to this transaction, Mr. Dunlap, as I understand it, the agreement was that you would secure this indebtedness of the Clayton Advertising Company to the Sunset Company? A. I was to supply security; yes, sir. Q. In consideration of that you were to get one-third of the capital stock of the Clayton Advertising Company? A. Yes, sir. Q. Prior to that time you had not any interest at all in the Clayton Advertising Company? A. No, sir. Q. You did get that stock, did you? A. In the way I have explained, yes. * * * Q. Why did she (the plaintiff) sign this deed of trust? A. Because I requested it. Q. Why did you request it? A. Because I thought there was an opportunity to get hold of an interest in a desirable business for myself and son. Q. You desired to get it, did you? A. Yes, sir. Q. And you got it by her signing this? A. Unfortunately I got it."

Dunlap proceeded to testify that, on the day of the consummation of the deal, he had 500 shares of the stock purchased by him issued to his son, Robert E. Dunlap, and the remainder of the stock issued to him as trustee for the benefit of himself and son. He said that he intended ultimately to transfer all the stock he had secured to his son—

"if he was good to me, and the business was good. Q. Did you state to your wife, when she signed the papers, you intended to give it to him? A. Yes. Q. That was part of it? A. That was the understanding. Q. This stock was to go to you, and you were to invest it or keep it for your son? A. That was understood, that the business might afford an opportunity to him, and that as it might seem wise to me he should receive the interest in the company. Q. And the purpose of executing this note and deed of trust in reality was to purchase an interest in this business as an investment for your son, is that right? A. The purpose was to give an opportunity for myself and son to take hold of this business with the other people interested. * * * The original understanding was that she (Mrs. Dunlap) was to sign the deed of trust to secure the amount of the Sunset Lumber Company, and in return the Sunset Lumber Company was to cause to be transferred to me one-third of the capital

stock. That arrangement was carried out. * * * I represented Mrs. Dunlap through all the transactions, so far as she had anything to do with it."

[2] The foregoing excerpts from the testimony of George T. Dunlap may appear to involve, so far as this opinion is concerned, an unnecessary repetition of his version of the transaction; but they are here thus given for the purpose of showing that, throughout his entire testimony, there was not the slightest variance in the facts and circumstances of the transaction as he understood them and as undoubtedly they occurred. It is true that in one or two instances he was made to say, through leading questions by his attorney, that Mrs. Dunlap executed the note and the trust deed to secure the "antecedent obligations of the Clayton Advertising Company to the Sunset Lumber Company"; but this statement involved a mere legal conclusion which could, of course, have no evidentiary force.

The witnesses Lamb, Neal, and Nash, who, as seen, were officers of the Sunset Company, having authority to transact the usual and ordinary business of said corporation, each gave testimony confirming the conclusion of the trial court that the transaction involved the sale to Dunlap of a one-third interest, or stock amounting to the same thing, in the Clayton Company and that the making of the note and trust deed by Mrs. Dunlap was in consideration of the transfer of such interest or stock to her husband.

It is not deemed necessary to present here a minute statement of the testimony of those witnesses. It is considered enough to say that their testimony corroborates in all essential particulars that of George T. Dunlap concerning the circumstances of the transaction, and that it further shows that, upon the completion of the sale to Dunlap, Nash, the general manager of the Sunset Company, and one of the owners of the stock transferred to Dunlap, prepared and delivered to the Clayton Company a statement showing that its account with the Sunset Company had been canceled and closed as a part of the transaction with Dunlap.

That the important findings of the court are well buttressed by the testimony—indeed, by the testimony of Dunlap alone—there appears to us no possible ground for controversy.

Reduced to a simple and concise statement, the transaction, according to Dunlap's own version of it, involved a purchase by him of a one-third interest in the Clayton Company from Lamb, Neal, and Nash, and that, in the place of paying cash therefor, he agreed to and did assume the payment of an indebtedness due from said Clayton Company to the Sunset Lumber Company, with which the vendors of the stock were connected as officers and agents. And the plaintiff, before signing the note and executing the deed of trust in question, was made fully acquainted

by her husband with the purpose for which she was to give the security. She was told by Dunlap that he desired to purchase a one-third interest in the Clayton Company as an investment for himself and their son.

If the plaintiff had joined her husband in the execution of the note and made the trust deed to secure its payment and upon the faith thereof had secured the money with which to pay the Sunset Company the amount of the Clayton Company's indebtedness to it from a third party, wholly disinterested in either of the companies concerned here, and thus had obtained the one-third interest in the Clayton Company, the transaction, so far as either she or her husband is concerned, would be no different in principle from the one which is disclosed by Dunlap's testimony. And certainly in such case no one would be found to say that the note, so far as the plaintiff was concerned, was not supported by a sufficient consideration.

The entire fabric of the argument of the plaintiff, however, is erected upon the proposition, pressed by her, that the transaction was one with which the Sunset Company had no connection whatsoever, since the negotiations were wholly between George T. Dunlap and the stockholders of the Clayton Company. Thus the theory is deduced that, by signing the note and executing the trust deed, she merely became a surety of the Clayton Company for the extinguishment of its "antecedent obligations" to the Sunset Company. But no such proposition was submitted to the plaintiff by her husband. Besides, neither she nor her husband had any interest in the Clayton Company prior to the consummation of the negotiations whereby he became the owner of a one-third interest therein, and, obviously, there was no sane reason for assuming or guaranteeing the payment of a claim for which neither was in any legal sense or measure liable.

It is true that the stock purchased by Dunlap was owned by Neal, Lamb, and Nash; but these men were not only interested as stockholders and officers in the Clayton Company, but were as well connected with and the agents of the defendant corporation. In the transaction with Dunlap, they not only acted for the Clayton Company as a corporation, but for themselves as stockholders therein, and at the same time they represented the Sunset Company as its agents. And by the consummation of said transaction, they not only released the Clayton Company from its liability for the payment of the debt due from it to the Sunset Company, but also released themselves from their respective proportions of the individual liability resting upon them as owners of stock of the corporation for the payment of said debt. At the same time and by reason of said transaction, they, as agents of the Sunset Company, authorized to represent it in such a transac-

tion, secured ample and satisfactory security for the ultimate extinguishment of a large indebtedness due to it. Thus it is plainly manifest that in said transaction they acted no less for the Sunset Company than for the Clayton Company and for themselves, individually. That they had the legal right to represent these several interests in the transaction is a proposition which will not be disputed.

Acting, then, for the two corporations and themselves as individuals, they, in effect, said to Dunlap:

"We will transfer to you one-third of the issued capital stock of the Clayton Company if you will pay the latter's indebtedness to the Sunset Company."

This was the effect of the proposition to which Dunlap assented and which was in effect ultimately consummated by the execution by him of satisfactory security for the payment of the debt and the transfer to him of the one-third of the capital stock of the Clayton Company. And it was the identical proposition submitted by Dunlap to his wife and upon which she consented to execute the note and the trust deed involved in this controversy.

[3] We can perceive no possible reason for holding that the note, so far as both the plaintiff and her husband are concerned, is not supported by a sufficient consideration. She was, as we have seen, moved to sign the note and to execute the trust deed in consideration of the transfer to her husband of title to a one-third interest in the Clayton Company. This was undoubtedly a good consideration in law. Civ. Code, § 1605. The note itself imported a sufficient consideration, and the burden was upon the plaintiff to overcome and destroy that presumption by evidence sufficient in probative force to satisfy the jury or the trial judge. *Keating v. Morrissey*, 6 Cal. App. 163, 91 Pac. 677; *Thom v. Stewart*, 162 Cal. 413, 421, 422, 122 Pac. 1069; *Adams v. Hopkins*, 144 Cal. 19, 36, 77 Pac. 712; *People v. Milner*, 122 Cal. 171, 179, 54 Pac. 833; *Estes v. Ballard*, 22 Cal. App. 344, 134 Pac. 361. The plaintiff not only failed to dispel that presumption, but by her own proofs seems to have strengthened and sustained it.

Quite obviously the case here is wholly different from the cases of *Chaffee v. Browne*, 109 Cal. 211, 41 Pac. 1028, *Lagomarsino v. Giannini*, 146 Cal. 545, 80 Pac. 698, and *Wright v. Byrne*, 129 Cal. 616, 62 Pac. 176, all cited by the plaintiff. In *Chaffee v. Browne*, it is held that a mortgage given by the wife upon her separate property to secure her husband's antecedent debt, without any new consideration received either by the husband or wife or moving from the creditor, is a nudum pactum, and therefore not of binding force upon the wife. *Lagomarsino v. Giannini* is a case where a third party in-

dorsed a demand note long after its execution, and after the death of the maker, "without any new consideration or the relinquishment of any right by the payee," and the court held that an indorsement of a note under such circumstances imposed no obligation upon the indorser. In *Wright v. Byrne* a note was given by the guardian of the person and estate of a minor to evidence an indebtedness contracted by a former guardian of the same minor. The action was against the later guardian and the ward, who, when the action was brought, had attained her majority. The court held that, since the defendant Byrne (the guardian) did not owe the debt for which the note was executed, so far as she was concerned there was no consideration for the note, and that so far as was concerned the defendant Hinkley (the ward), who did not sign the note, she could not be held liable on the theory that the note was executed by her guardian as guardian, for no authority from the probate court was shown for such execution. That case upon the facts is in no particular analogous to the case at bar.

It perhaps ought to be stated that other findings than the one above quoted are challenged by the plaintiff for want of sufficient evidence to sustain them. But, as above intimated, we regard the quoted finding as involving a disposition of the whole ultimate question in this case. Whether therefore (referring to one of the points thus made) the finding that the Sunset Company, upon the consummation of the sale of the stock to Dunlap, returned and reassigned to the Clayton Company certain contracts between the latter company and its patrons and which contracts were, down to the time of the sale to Dunlap, held by the Sunset Company as security for the debt due it from the Clayton Company, is or is not supported by evidence, is of no material importance, as said finding is not essential to the support of the judgment. Indeed, we view that finding as of a mere probative and not of an ultimate fact. In other words, that fact, if proved, could have the effect only of tending to prove that the obligations of the Clayton Company to the Sunset Company had been extinguished, which fact, in turn, would, under all the circumstances of the transaction, merely tend to prove, if anything at all, that Dunlap bought the stock in the Clayton Company upon the terms and conditions claimed by the defendants.

Our conclusion is that the findings essential to the support of the judgment are sufficiently supported by the proofs.

There are no other points calling for special notice.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

26 Cal. App. 152

FURTADO v. BIRD. (Civ. 1260.)

(District Court of Appeal, Third District, California. Dec. 4, 1914.)

1. HIGHWAYS — 184—INJURIES FROM NEGLIGENCE DRIVING—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for injuries to a person riding a horse, sustained in a collision with an automobile, evidence as to the manner in which the accident occurred held to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. —184.]

2. HIGHWAYS — 172—INJURIES FROM NEGLIGENCE DRIVING—CONTRIBUTORY NEGLIGENCE.

It was not the duty of a person, riding a horse on a highway, to constantly look back though he was hard of hearing, especially where there was ample room for the driver of an automobile to turn out and avoid striking the horse.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 459, 460; Dec. Dig. —172.]

3. HIGHWAYS — 176—INJURIES FROM NEGLIGENCE DRIVING — DUTIES OF AUTOMOBILE DRIVERS.

When the driver of an automobile overtook a person riding a horse and observed that such person apparently did not hear the horn, it was his duty to slow down, and even stop, if necessary to avoid running into the horse.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 465; Dec. Dig. —176.]

4. HIGHWAYS — 184—INJURIES FROM NEGLIGENCE DRIVING—ACTIONS—INSTRUCTIONS.

In an action for injuries to a person riding a horse, sustained in a collision with an automobile, where the complaint alleged that defendant was driving at a high rate of speed and came suddenly upon plaintiff from the rear, without warning, and, in attempting to pass plaintiff, negligently steered his machine or allowed it to run into and strike plaintiff's horse, and plaintiff testified that the automobile was coming at the rate of 25 miles an hour, that he first saw it when it was eight or nine yards from him, and that he reined the horse as near the fence as he could, but that the automobile ran into it, a requested instruction was properly modified so as to submit negligent acts of defendant, other than the running of the automobile at a high rate of speed.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. —184.]

5. HIGHWAYS — 184—INJURIES FROM NEGLIGENCE DRIVING—ACTIONS—INSTRUCTIONS.

In such action, an instruction if plaintiff was riding sidewise, and by reason thereof was unable to properly control the horse, and if the accident would not have occurred had he been riding in the usual manner, to find for defendant, was properly modified by adding "unless defendant knew of the situation of plaintiff, and realized that he might inflict injury upon plaintiff by driving his automobile as he did, but nevertheless recklessly took a chance upon so doing, while having the ability to avoid the accident, if he had such ability," as the instruction, in the form requested, would apparently have excused defendant's negligence because plaintiff was not riding in the usual manner, while the meaning of the modification was not, as claimed, obscure.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. —184.]

6. HIGHWAYS — 184—INJURIES FROM NEGLIGENCE DRIVING—ACTIONS—INSTRUCTIONS.

In an action for injuries to the rider of a horse, sustained in a collision with an automo-

bile, where it was undisputed that plaintiff was partly deaf or hard of hearing, he testified that he heard no warning horn, and defendant testified that plaintiff appeared not to be aware of his approach, an instruction that plaintiff was bound to use ordinary care for his own safety, and to observe and take notice of all such dangers as could have been discovered by the observation of a person using ordinary care and caution, "and possessed of ordinary sight and hearing," and, if thereby informed of danger, to avoid it, was properly modified by adding, after the quoted words, "provided he had ordinary hearing," since while plaintiff was bound to use even greater care than a person of good hearing, in order to exercise that care required of a person having unimpaired faculties, it was not true that he was bound to hear what would have been heard by one possessing normal faculties, nor to act as a person would have been required to act who heard the horn, and the modification could not have led the jury to understand that plaintiff, because of his defective hearing, was not required to use ordinary care.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. —184.]

7. HIGHWAYS — 184—INJURIES FROM NEGLIGENCE DRIVING—ACTIONS—INSTRUCTIONS.

In an action for injuries to a person riding a horse, sustained in a collision with an automobile, where it appeared that plaintiff was partly deaf, but defendant testified that he did not know this, and he also testified that he sounded the horn when 200 or 300 feet from plaintiff, but that plaintiff did nothing to indicate that he knew of his approach, an instruction that if defendant sounded an alarm which would have been heard by a person of ordinary hearing, and if he believed that plaintiff had ordinary hearing, and if, by reason of the condition of the road, he could not turn to the left and pass plaintiff, he had a right to presume that plaintiff would turn to the right and permit him to pass, until it became apparent to him that plaintiff did not hear him, did not, as claimed, place upon defendant the burden of proving that he believed that plaintiff had ordinary hearing, especially as the instruction was favorable to defendant, since by his own testimony it appeared that he discovered, in ample time to avoid the collision, that his warning was not heard and, if heard, was not heeded.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. —184.]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by J. F. Furtado against Isaac Bird. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

F. G. Ostrander, of Merced, for appellant.
F. W. Henderson, of Merced, for respondent.

CHIPMAN, P. J. Action for personal injury. It is alleged in plaintiff's complaint:

"II. That on or about the 24th day of October, 1912, plaintiff was traveling along said county highway in a northerly direction, riding horseback; that at said time he was riding on a walk and traveling from the land rented by him, and lying south and west of said county road, going to the land upon which he was living; that on said day said defendant was traveling on said road in an automobile driven by himself in the same direction as plaintiff; that at said time said defendant overtook plaintiff, who was then riding along the westerly side and close to the west line of said highway; that said defendant was driving at a high rate of speed and came suddenly upon plaintiff from

the rear without giving any warning whatsoever and did attempt to pass plaintiff; that in attempting to pass plaintiff said defendant negligently steered his machine or allowed it to run into and strike the horse upon which plaintiff was riding; that, upon said horse being struck by said machine so operated by defendant, plaintiff was thrown from said horse violently to the ground, suffering a broken arm. * * *

"III. That the road upon which said plaintiff and defendant were traveling on said 24th day of October, 1912, at the place where said injury was inflicted by defendant on plaintiff, so as aforesaid, is at least 50 feet wide, all of which, with the exception of about 5 feet thereof, has been, at all times herein mentioned, traveled and adapted to travel by persons either in horse-driven vehicles, horseback, or motor vehicles."

In his answer defendant "denies that he was driving his automobile at a high rate of speed, and denies the allegations of plaintiff as to his approaching plaintiff without giving any warning, and denies that he attempted to pass plaintiff, or that he negligently steered his machine or allowed it to run into or strike the horse upon which plaintiff was riding, and denies that plaintiff's horse was at any time struck by defendant's automobile, and in this respect alleges that plaintiff negligently caused his horse to collide with defendant's automobile. Defendant further sets up the separate defense of contributory negligence, and alleges that, by the exercise of proper or ordinary or reasonable care on plaintiff's part, plaintiff could have avoided colliding with defendant's automobile, and that each and all of the injuries alleged in plaintiff's complaint were caused by his failure to exercise proper or ordinary or reasonable care at the time said injuries were received."

The cause was tried by a jury, and plaintiff had a verdict for \$1,000. Defendant appeals from the judgment and from the order denying his motion for a new trial.

Appellant attacks the implied findings of the jury on the ground that the evidence is insufficient to establish any negligence of defendant either as the proximate cause of the injury or as contributory thereto, and that the evidence is insufficient "to justify the jury in finding that the plaintiff was not guilty of negligence, which was the proximate cause of his injury," or, in other words, the evidence was sufficient to establish plaintiff's contributory negligence.

[1] It appeared that the highway on which the accident occurred is 50 feet wide and runs south from the city of Merced. It is graded and used in the center, and a roadway is also used on each side of the center grade, and the road is fenced on both sides. A berm or bench of earth, about three feet wide, extends from the fence on each side to the sides of the roads. At the time of the accident plaintiff was riding a horse in a northerly direction along the west side of the highway, between the graded part of the road and the fence. He explained in his testimony that he was riding sidewise, because the

stirrup straps of the saddle were too short, and was going along slowly, no faster than a walk. He was a farmer and stock raiser and, at the time, was cultivating two places, as stated in the complaint, and was going to his home from his rented place. He stated on the witness stand that one of his ears had been injured, which practically destroyed his hearing in that ear, and he said he was "hard of hearing." Plaintiff and defendant were well acquainted with each other, and plaintiff testified that he "knew of no reason why he should run into me." Defendant, driving a seven-passenger 45 horse power automobile, weighing 3,200 pounds, approached plaintiff from the rear, on this road, and overtook him. A collision occurred, and plaintiff was thrown from his horse, causing his arm to be broken. There were no witnesses to the accident in the immediate vicinity, except the parties themselves, and plaintiff's and defendant's account of the circumstances surrounding the collision is irreconcilably conflicting. Recognizing the rule by which we are governed in cases of conflicting evidence, appellant claims that plaintiff's "narrative of the facts, surrounding and incident to the accident, is so highly improbable and so contrary to the laws of nature and of probabilities, in fact, of possibilities, such narrative should be rejected." We have read plaintiff's account very carefully and do not find it of the character described by appellant. The substance of his story may be given in few words. He testified:

"The first I noticed I was riding sideways, and I was just walking my horse along, and I just happened to turn my head, just naturally happened to turn my head kind of westerly over my right shoulder [in several other places describing the accident he said left shoulder], and I happened to notice the automobile up to me, as near as I can make out, 8 yards, or 7 or 8 yards, maybe 9 yards, because I didn't take time, I thought at the time, then I say I noticed it coming at high speed, and I thought my life was in danger, so I thought all the chance I had in the world. I reined my horse as near the west fence as I could. * * * I no more had my horse turning heading to the west and his automobile run into my horse and threw my horse down, and I was thrown off my horse to the front of the automobile, I should judge 6 or 8 feet. * * * I think the braces of the light was sprung around. The light that was broken was on the left side of the machine. The horse that I have referred to up to the time that I was thrown off had not scared at any time that day. It was the horse my little boy Tony rides. * * * The horse is about 14 years old. I was riding sideways because the stirrups was too short for me and I could not ride otherwise. I have been accustomed to riding horseback for 30 years. * * * The horse was not scared by the automobile coming up behind. * * * It has been his habit not to notice automobiles when they go by at all. * * * I don't swear that the automobile was coming at the rate of 25 miles an hour, but it is my judgment it was. My horse was paying no attention to the machine and was walking quietly, and Mr. Bird ran upon me at that rate of speed."

Plaintiff's story was that, upon noticing the automobile as he turned his head west-

erly, looking over his left shoulder, his horse's fore feet were upon the bench of earth next to the fence. In this position the horse's hind feet would be next to the road along which defendant was traveling. His machine was damaged by the breaking and bending of the glass lamp at the left side. Plaintiff's horse was injured "8 or 10 inches above the hock joint" of the left leg. These facts harmonize with and corroborate plaintiff's account of the accident. And these admitted facts are wholly inconsistent with defendant's account.

Defendant testified:

"When I was within 200 or 300 feet of him, I sounded the horn. When he turned to the left, I wheeled the machine suddenly to the right to get out of his way, and, as I got the front wheels up on top of the grade just about where the first track would be, he had wheeled his horse toward the fence, and his horse got his fore feet up on the berm. The berm is a three-foot space which is not plowed from the fence, out to the side of the road. As his horse got his feet up on there he started to come back. Furtado was sitting sideways, and he lost balance on the horse and started to run the horse back, and by that time I shut the gasoline off. I just got the machine on top, got the wheels on top of the grade, and I shut the gasoline off and threw on the emergency brakes, and the horse ran right back and struck the lamp on the left-hand side of the machine. * * * The horse fell back against the machine because it struck the ground just where the grade starts up from the bottom of the ditch, and Mr. Furtado was thrown off in the road. The horse fell on his right side."

According to defendant's testimony his car was almost at right angles with the road and the front wheels well up on the grade when the horse backed up the grade and in front of the car. It hardly seems probable that both horse and rider would be thrown down in this manner.

Plaintiff may have been mistaken about the speed of the car, although it must have been approaching him with considerable force to knock the horse down. Both parties agree that plaintiff endeavored to escape danger by turning his horse to the fence, and, under the circumstances, it was the natural and safest thing for him to do. It is possible that plaintiff's injury may have been brought about in the way defendant describes the accident. But it is not only possible but probable that it came about as plaintiff testified. In any event, there is nothing in the testimony of plaintiff which would warrant our holding that it was so improbable as to be unworthy of belief.

Two witnesses for plaintiff, who were some distance from the scene of the accident, testified to having observed the car as it approached plaintiff and ran against the horse. Much of defendant's evidence was directed to the testimony of these witnesses to show its improbability owing to physical objects intervening between where they stood and the place of the accident. It is not necessary to determine whether or not these witnesses were speaking the truth. The ju-

ry had plaintiff's and defendant's testimony before them, and had a right to accept plaintiff's account without other corroboration than was furnished by the facts and circumstances made to appear.

Defendant testified:

"Q. Did you slow up your machine at all after leaving the Stone House? A. Yes, sir. Q. Why? A. Because I saw a man ahead of me on horseback. * * * Q. How far away from you was he when you commenced to slow up? A. About 300 feet. Q. What else did you do in the operation of your machine? A. I just slowed it down, that is all, shut off the gasoline. * * * I began to honk the horn when I was a good deal further away than 300 feet, but he did not make any effort to turn out. I don't think he knew of my approach until I was pretty close to him. From the time I first noticed him he did not do anything to indicate that he knew of my approach until I got within 20 or 30 feet of him, and then he turned his horse out to the left. At the same time I was turning to the right."

[2, 3] Appellant contends that plaintiff was guilty of contributing to his injury because, being hard of hearing, it was his duty to look back as well as forward, and that, if he had been doing so, this accident would not have occurred. We do not think it was plaintiff's duty to be constantly looking back. Both parties had an equal right to the use of the road, but defendant was in the better position to avoid a collision, and, when he observed that plaintiff appeared not to hear the horn, it was defendant's duty to slow down, and even to stop his car, if necessary to avoid running against plaintiff's horse. Furthermore, he had ample room to turn his car to the right, and could thus have avoided the accident. He says he did this, but that the horse backed up against the car after it was stopped and caused plaintiff to fall off and the horse to go down also. The jury evidently did not believe this, and we cannot say they were unauthorized to reject defendant's story of the accident.

Some objections to the instructions given by the court will be noticed.

[4-6] Instruction 18, requested by defendant, was properly modified so as to include negligent acts of defendant other than running his automobile at such high rate of speed as to cause the accident.

Instruction 19 was that if the jury found from the evidence that plaintiff was riding sidewise, and by reason thereof he was unable to properly control the actions of the horse, and that if he had been riding in the usual manner, the accident would not have occurred, defendant was entitled to the verdict. This instruction would have been error if given as asked, for it ignores defendant's responsibility for alleged negligence in running his car against plaintiff's horse, and would seem rather to excuse it because he was not riding in the usual manner. The court modified the instruction by adding:

"Unless defendant knew of the situation of plaintiff and realized that he might inflict in-

jury upon plaintiff by driving his automobile as he did, but nevertheless recklessly took a chance upon so doing while having the ability to avoid the accident, if he had such ability."

Counsel says:

"We are frank to confess we do not know just what the court intended the jury to understand by the modification."

It seems to us that the intention is not far to seek. If defendant knew how plaintiff was situated, and realized that if he (defendant) kept on his course plaintiff might be injured, the fact that he was riding sidewise would not excuse defendant; or, as the court put it, it was defendant's duty "to avoid the accident, if he had the ability to do so."

Instruction 24, requested by defendant, was given as modified; the italics showing the modification:

"The plaintiff in the case was bound to use ordinary care for his own safety while riding along the highway, and to observe and take notice of all such dangers as could have been discovered by the observation of a person using ordinary care and caution, and possessed of ordinary sight and hearing, *provided he had ordinary hearing*, and if thereby informed of danger to avoid it."

It is insisted that the modification "destroyed the effect of the instruction and told the jury that, if plaintiff did not have ordinary hearing, he was not required to use ordinary care for his safety." The undisputed evidence was that plaintiff was partly deaf or hard of hearing. In view of this admitted fact, it would not have been proper to instruct the jury that he was bound to observe and take notice of all such dangers as could have been discovered by a person possessed of ordinary hearing. He testified that he heard no warning horn, and defendant testified that he appeared not to be aware of his approach. Strictly, he could not be bound to act as a person would have been required to act who heard the warning or was possessed of ordinary hearing. He was, however, bound to use even greater care than a person of good hearing, in order to exercise that care which is required of a person having unimpaired faculties. Still, he would not be bound to hear what would have been heard by any one possessing normal faculties. We do not think the jury could have understood the court to tell them that, because plaintiff had not ordinary hearing he was not required to use ordinary care for his safety. That this was his duty was impressed upon the minds of the jury in other instructions very plainly.

[7] The instruction 25 is subjected to the same criticism and need not be further noticed. Instruction 30 was modified as noted by italics:

"I instruct you that if you believe from the evidence that defendant Bird sounded an alarm while approaching plaintiff, and that such alarm would have been heard by a person of ordinary hearing, and *the defendant Bird believed that plaintiff had ordinary hearing*, and that the defendant could not turn to the left and pass plaintiff by reason of the condition

of the road, then the defendant had the right to presume that plaintiff would turn to the right upon hearing such alarm and permit defendant to pass; and such right so to presume would exist until it became apparent to the defendant that plaintiff did not hear him."

We cannot see that the modification had the effect to cast the burden upon defendant to "prove affirmatively that he believed plaintiff had ordinary hearing." Defendant testified that he "was not aware that he [plaintiff] was deaf"; that he had conversed with him, "but never observed him holding his hand up to his ear to help his hearing. * * * I did not know he had any trouble with his hearing." The instruction was intended, no doubt, to give the defendant the benefit of the law of the road, and we do not think that the modification weakened the instruction in respect of such law. In its entirety it was favorable to defendant. According to defendant's own testimony, he discovered, in ample time to avoid the collision, that his warning was not heard and, if heard, was not heeded. By his own testimony it appeared that he saw plaintiff turn his horse to the left while he (defendant) was some distance behind plaintiff, and he testified that he thereupon turned his car to the right to pass plaintiff. The jury evidently did not accept this latter statement as true.

We discover no prejudicial error in any of the rulings of the court. There was evidence supporting the implied findings of the jury.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

26 Cal. App. 129

VASIK v. SPEESE. (Civ. 1574.)

(District Court of Appeal, Second District, California. Dec. 3, 1914. Rehearing Denied Jan. 2, 1915. Denied by Supreme Court Feb. 1, 1915.)

1. FRAUDS, STATUTE OF ~~125~~—VERBAL AGREEMENT TO LEASE.

Under the statute of frauds (Civ. Code, §§ 1624, 2309), providing that an agent must be appointed by writing to contract for his principal, where such contract must be in writing, and section 2310 providing that a ratification of an agent's authority can be made only in the manner required to confer original authority, the breach of a verbal agreement to lease for a term of five years cannot serve as a basis of an action for damages.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 275-277½; Dec. Dig. ~~125~~.]

2. LANDLORD AND TENANT ~~48~~—RECOVERY OF MONEY PAID AS A DEPOSIT ON VOID AGREEMENT TO LEASE.

Where defendant, by an unenforceable verbal agreement, contracted to lease certain premises for five years, and the plaintiff paid a sum of money as a deposit on making the agreement, such sum cannot be recovered, in an action on the agreement.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 114-116; Dec. Dig. ~~48~~.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Tony Vasik against J. M. Speese. Judgment for defendant, and plaintiff appeals. Affirmed.

Harriman, Ryckman & Tuttle, of Los Angeles, for appellant. G. F. McCulloch, of Los Angeles, for respondent.

CONREY, P. J. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

In this action the plaintiff seeks to recover damages for the breach of an alleged agreement of the respondent to lease to plaintiff certain real property for a period of five years. The damages are alleged to consist in the sum of \$100 paid by the plaintiff at the time of making the agreement, and in certain other sums expended and time lost by the plaintiff in preparing for performance of the contract by him.

[1] The evidence shows that there was no written agreement or lease made or signed by the defendant, or by any person authorized in writing by the defendant to act for him. Under the rules declared in sections 1624, 2309, and 2310 of the Civil Code, the alleged contract is invalid and not binding upon the defendant. There being no valid contract, it follows, of course, that there can be no damages for breach thereof.

[2] It is true that the plaintiff, having paid the sum of \$100 to H. L. Suydam on account of the proposed lease, would be entitled, in an action properly brought for that purpose, to recover the money so paid, and this recovery could be had from Suydam, or from the defendant, upon showing that the money was received on behalf of the defendant or applied to his use. But that is not the case presented upon this record. The complaint does not purport to demand anything, except damages for the breach of an agreement, which damages, for the reasons above stated, cannot be obtained in this action.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

26 Cal. App. 45

Ex parte POTTER. (Cr. 351.)

(District Court of Appeal, Second District, California. Nov. 27, 1914.)

POISONS — STATUTORY PROVISIONS — SALES BY OTHER THAN REGISTERED PHARMACISTS.

Under Poison Act (St. 1907, p. 125) § 7, as amended by St. 1913, p. 694, by adding to the schedule of poisons which may not be dispensed except by a duly registered pharmacist or assistant pharmacist, ant poison containing any of the poisons enumerated in the schedule, such ant poisons may not be sold by grocers and dealers generally notwithstanding St. 1911, p. 1248, § 14a, as added by St. 1913, p. 363, which includes ant poison in the list of insecticides and fungicides which may be sold by grocers and dealers generally, as the Legislature evidently recognizes the existence of two classes

of ant poisons, some of which do and others of which do not contain the poisons enumerated in section 7.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 1; Dec. Dig. —2.]

Original habeas corpus proceeding by E. S. Potter. Writ discharged, and petitioner remanded to custody.

Parker & Moote, of Los Angeles, for petitioner. John D. Fredericks and George L. McKeeby, both of Los Angeles, John F. Davis, of San Francisco, and Edward E. Leighton, of Los Angeles, for respondent.

CONREY, P. J. On writ of habeas corpus directed to the chief of police of the city of Los Angeles.

Petitioner is held under arrest by virtue of a criminal complaint charging him with a violation of the provisions of "an act to regulate the sale of poisons in the state of California and providing a penalty for the violation thereof," commonly known as the "Poison Act." This petitioner is the same person who was the petitioner in the case of In re Potter, 164 Cal. 735, 130 Pac. 721. The facts in that case are similar to those here presented, and the statutes affecting the case are the same now as then, with the exceptions hereinafter noted. A certain act, referred to in the briefs in this case as the insecticide or fungicide act, approved May 1, 1911, was amended by an act approved June 2, 1913, by adding thereto a section numbered 14a (Stats. 1911, p. 1248; Stats. 1913, p. 363). In that new section "ant poison" was included in a list of articles permitted to be sold by grocers and dealers generally without restriction. Section 7 of the so-called "poison act" was amended June 11, 1913 (Stats. 1913, p. 694). Prior to this amendment, said section 7, in schedule A referred to therein, included "arsenic, its compounds and preparations," in a list of articles which might not lawfully be sold by persons situated as the petitioner; he not being a licensed pharmacist. Nevertheless, it was held by the decision above mentioned that, under the permissive language contained in the so-called "Pharmacy Act," the petitioner had a right to sell Kellogg's Ant Paste, an ant poison containing arsenic. It was declared that the pharmacy act and the poison act are statutes in *pari materia*, and that construing them together grocers such as the defendant were empowered to sell ant poisons "when prepared and sold only in original and unbroken packages and labeled with the official poison labels," even though they contained arsenic.

Subsequent to that decision, by the amendment approved June 11, 1913, to section 7 of the Poison Act, the Legislature added to schedule A the following words: "Ant poison containing any of the poisons enumerated in this schedule." Petitioner claims that the addition of these words does not extend the meaning of the section, which already con-

tained in the same list the words, "arsenic, its compounds and preparations." If this contention be sustained, the decision in the former case is fully applicable here.

We are of the opinion, however, that this latest and very specific expression of the will of the Legislature recognizes the existence of two classes of ant poisons, some of which may contain poisons enumerated in the schedule A and others may be prepared without any of those poisons. The first-named class is thereby excluded from the ant poisons which may be sold by grocers and dealers generally, and on the facts here presented may not lawfully be sold by the petitioner.

The writ is discharged, and the petitioner is remanded to the custody of the chief of police of the city of Los Angeles.

We concur: JAMES, J.; SHAW, J.

25 Cal. App. 735

PEOPLE v. WEST. (Cr. 536.)

(District Court of Appeal, First District, California. Nov. 12, 1914.)

CRIMINAL LAW ⚡1159—APPEAL—VERDICT—EVIDENCE.

Merely that the situation shown by the evidence is unusual is not ground for setting aside a conviction, where the evidence as a whole is not inherently incredible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. ⚡1159.]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Robert West was convicted of rape, and appeals. Affirmed.

A. L. Frick and B. J. Wyman, both of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal by the defendant from a judgment and order denying a new trial, the conviction being for the crime of rape. In support of the appeal it is urged that the evidence is insufficient to sustain the verdict, this contention being based upon the alleged inherent improbability of the evidence.

We have read the record and considered it carefully, and are satisfied that, while an argument might be made against the truthfulness of the testimony, it fails when made against its inherent probability. The mere fact that it is unusual and out of the ordinary to encounter the situation described in the record does not make it absolutely and inherently improbable. We do not see, upon the whole case, that the evidence is inherently incredible and improbable; on the contrary, the story in its entirety may well be true. In parts, perhaps, it is doubtful, and might be made the foundation of a strong argument to the jury that the complaining witness was not to be believed.

That argument doubtless was made to the jury and considered by it, but such an argument cannot be considered by this court.

The judgment and order are affirmed.

26 Cal. App. 148

PEOPLE v. JAN YOU. (Cr. 347.)

(District Court of Appeal, Second District, California. Dec. 4, 1914.)

1. CRIMINAL LAW ⚡1134—REVIEW—CREDIBILITY OF WITNESSES—CHARACTER.

On appeal from a conviction for crime on the ground that the evidence was insufficient, the appellate court cannot consider the bad character of the prosecuting witnesses nor the good reputation of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. ⚡1134.]

2. PROSTITUTION ⚡1—OFFENSES—"INMATE OF A HOUSE OF PROSTITUTION."

A woman who visited a rooming house kept by defendant in which prostitution was encouraged and allowed by him, on three occasions, and each time had intercourse with men, dividing the proceeds with defendant, was an "inmate of a house of prostitution" within St. 1911, p. 9, imposing a penalty on one who procures a person to become an inmate of such house.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. ⚡1.]

3. PROSTITUTION ⚡1—OFFENSES—ELEMENTS.

Under St. 1911, p. 9, making punishable one who procures a person to become the inmate of a house of prostitution or to enter any place in which prostitution is encouraged or allowed, it is not necessary to the offense that a woman become an inmate of the house, if she was procured or encouraged by defendant to enter it.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. ⚡1.]

4. CRIMINAL LAW ⚡518—EVIDENCE—CONFESSION—CAUTION.

Where an immigration inspector visited defendant in jail, advised him of the charge against him, and told him he did not have to answer any of the questions, and then repeated the statements made by the prosecuting witness and asked if they were true, again stating that if defendant did not wish to answer he need not do so, the confession was voluntary and admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1157-1162; Dec. Dig. ⚡518.]

5. CRIMINAL LAW ⚡1141—APPEAL—QUESTIONS PRESENTED FOR REVIEW—INSTRUCTIONS.

The accused cannot complain of error in instructions given by the court without affirmatively showing that they were not given at his request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3014, 3015, 3020, 3022, 3023; Dec. Dig. ⚡1141.]

6. CRIMINAL LAW ⚡829—TRIAL—REQUESTED INSTRUCTIONS—REPETITION.

In a criminal trial, the court need not give requested instructions which state correct propositions of law but which were already fully and affirmatively covered by the court's instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⚡829.]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Jan You was convicted of crime, and he appeals. Affirmed.

Frank A. McDonald, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted upon an information charging him with the crime of pandering, as defined by an act of the Legislature approved February 8, 1911 (Stats. 1911, p. 9). He appeals from the judgment and an order of court denying his motion for a new trial.

[1] The first ground upon which appellant bases his claim for a reversal is that the evidence did not justify the verdict rendered, in that it failed to show that defendant did by promise, threats, device, or scheme cause, induce, persuade, or encourage the prosecuting witness, whom we shall call A. B., to become an inmate of a house of prostitution, or an inmate of any place in which prostitution was encouraged or allowed, or to enter any place wherein prostitution was encouraged or allowed. The evidence was ample as tending to prove that defendant conducted a rooming house, and under the pretense of showing A. B., the prosecuting witness, and her two female companions some curios, as well as by other means, encouraged and induced them to go to this rooming house, which they visited at night on three occasions, and while there, at his suggestion, occupied rooms with Chinese habitues of the place, with whom they had sexual intercourse and from whom in consideration of such intercourse they received money, and in each case defendant exacted a division of the money so received. That he not only allowed but encouraged A. B. to visit the house for such purpose admits of no doubt.

[2,3] The fact that the character of the witnesses so testifying was, as claimed by defendant, bad and their evidence false and unworthy of belief, or that defendant's reputation, as shown by two of his Chinese friends, was good, are not questions affecting the judgment to be considered by the court upon appeal. Neither is there any merit in the contention that the prosecuting witness was not an inmate of the house. In our opinion, it would place a too narrow construction upon the term "inmate of a house of prostitution," as it is used in the statute, to say A. B.'s visits there under the circumstances shown did not constitute her an inmate. It is unnecessary, however, to determine the question, since under the statute the offense is complete where one procures a female person "to enter any place in which prostitution is encouraged or allowed"; and it clearly appears that the practice of prostitution was encouraged and allowed by defendant in this rooming house

of which he was proprietor. There could be no stronger evidence that it was a house of prostitution.

[4] It is next contended that the court erred in permitting to be introduced in evidence a confession of defendant made to one Joseph C. Nardini, a United States immigration inspector, whose official duty it was, under the circumstances, to make inquiry into the offense charged against defendant for the purpose of ascertaining whether or not he had violated the provisions of the laws of Congress. The record shows that the inspector called upon defendant at the county jail, presented to him the warrant issued by the United States authorities, advised him of the nature of the proceedings, told him that he need not answer any incriminating questions, and asked, "Didn't they (the police) charge you with receiving money from the girls that were caught practicing prostitution by them in your house on that evening?" to which the defendant answered, "Yes." He was then asked, "Is that charge true or not?" which question was accompanied by the statement: "You don't have to answer that if you don't wish to. Do you wish to answer it?" To which defendant answered:

"Yes. Q. Each one of these girls stated that they paid you 75 cents every time they had sexual intercourse with a Chinaman; is that true or not? A. Yes. Q. Those girls said they had practiced prostitution, and they said they paid you 75 cents for the use of the room; is that true? A. Yes."

There is absolutely nothing in the record tending to show that these answers were made under duress or by reason of any inducement or promise held out to defendant as a consideration for making them. They were freely and voluntarily made, and the objection here urged to the admission of the statement finds no support in the record. *People v. Eslabe*, 127 Cal. 243, 59 Pac. 577.

[5] Appellant insists the court erred in giving to the jury certain instructions requested by the prosecution. In reply to this contention it is sufficient to say that the record discloses no instructions given at the request of the prosecution. For aught that appears from the record, the instructions as to the giving of which appellant complains may have been given at his own request. Where a defendant urges error predicated upon the giving of erroneous instructions, it devolves upon him to show affirmatively that such instructions were not given at his request. In the absence of such affirmative showing, the court cannot indulge the presumption that the trial court erred. *People v. Casselman*, 10 Cal. App. 234, 101 Pac. 693.

[6] Defendant requested the court to give instructions which, as stated in the record, covered 26 pages, and now urges that the court erred in refusing to give a number of these instructions. An examination of the instructions given shows that the jury was fully and fairly instructed upon every phase

of the case, and, while some of the instructions requested by defendant embody proper and correct statements of the law applicable to the case, the subjects thereof appear to have been fully and fairly covered by the instructions given; hence defendant's substantial rights could not have been prejudiced by the refusal of the court to give the same.

Appellant cites a great many authorities in support of the alleged error that the court abused its discretion in limiting the argument to the jury made by defendant's counsel to 30 minutes, and refusing defendant's request for additional time in which to present such argument. There is absolutely nothing in the record which discloses such action on the part of the court, and without a showing of such error the question becomes a mere abstract proposition which will not be considered by this court.

Other errors are predicated upon rulings of the court upon the admission of testimony. Conceding that the court might properly have ruled otherwise, the matters are trivial and the rights of defendant in no event could have been prejudiced thereby.

The record discloses no merit in the appeal, and the judgment and order are therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 47

PEOPLE v. WALKER. (Cr. 343.)

(District Court of Appeal, Second District, California. Nov. 30, 1914.)

CRIMINAL LAW — 1169 — APPEAL — HARMLESS ERROR — ADMISSION OF EVIDENCE.

In a prosecution for murder, the admission of a confession claimed to have been extorted by fear, intimidation, and improper influence in which defendant admitted that he shot deceased, but claimed to have acted in self-defense, if erroneous, was harmless, where he testified substantially to the same effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. — 1169.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

John Walker was convicted of murder, and he appeals. Affirmed.

Paul M. Nash and L. D. Barnett, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

CONREY, P. J. Defendant, having been convicted of murder and sentenced to imprisonment for life, appeals from the judgment and from an order denying his motion for a new trial.

The first proposition urged on behalf of the defendant is that the court erred in admitting in evidence, over the objections of the defendant, the testimony of the witness Coulter, a shorthand reporter, relative to a

so-called confession made by the defendant in the presence of a deputy district attorney and certain police officers and other persons. The ground of the objection is that, under the circumstances shown in the record, the alleged confession was not free and voluntary, but was extorted by fear, intimidation, and improper influence.

If it be admitted for the purposes of the argument that the facts affecting the admissibility of the confession are within the rule as stated in *People v. Quan Gim Gow*, 23 Cal. App. 507, 138 Pac. 918, and cases there cited, and that the court in the case at bar erred in receiving the evidence, the record further shows that the error is without prejudice to the substantial rights of the defendant. The substance of the confession is that the defendant, in the presence of said persons, admitted that he fired the shots which caused the death of Maurice W. Halloran, but in the same statement claimed that he was acting in self-defense, because at the moment of the shooting, Halloran "was reaching for something," and defendant thought that Halloran was going to shoot right away. At the trial of this action the defendant became a witness in his own behalf, and his testimony there given is substantially to the same effect as that above noted. He makes the admission in his testimony as follows:

"When I turned around I saw this man Halloran going for his pocket just like that (showing). Q. Then what did you do? A. I took my gun and began shooting, because I thought he was going to shoot me."

The so-called confession did not tend to prove anything more than that which the defendant admits to be true; namely, that it was he who killed the deceased. Unfortunately for him, the jury did not believe that the circumstances as shown by the other evidence were such as to constitute a justification for the killing.

We have examined the several instructions which defendant requested and which were refused by the court. So far as these instructions were legally correct and appropriate to the case, they were contained in other instructions given by the court to the jury.

The judgment and the order denying the motion for a new trial are affirmed.

I concur: JAMES, J. I concur in the judgment: SHAW, J.

26 Cal. App. 100

PEOPLE v. RONSSE. (Cr. 349.)

(District Court of Appeal, Second District, California. Dec. 1, 1914. Rehearing Denied Dec. 31, 1914.)

1. CRIMINAL LAW — 274 — PLEA — WITHDRAWAL — RIGHT.

A refusal to permit defendant to withdraw a plea of guilty in order that he might object to the want of a preliminary examination before a qualified magistrate was not an abuse of dis-

cretion, where he showed no reasonable excuse for his failure to present such objection before the plea.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 632, 633; Dec. Dig. ⚡274.]

2. CRIMINAL LAW ⚡1032 — JURISDICTION — OBJECTION—TIME—PRELIMINARY EXAMINATION.

An objection that the committing magistrate was only a pretended incumbent of a pretended office will not be considered when made at the time of trial and after verdict, where the information is regular in form.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2627, 2628, 2642; Dec. Dig. ⚡1032.]

3. CRIMINAL LAW ⚡1144—PRELIMINARY EXAMINATION—PRESUMPTION—INFORMATION.

The presence on the files of the superior court of an information regular in form presupposed a valid prior examination and commitment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. ⚡1144.]

4. CRIMINAL LAW ⚡245 — JURISDICTION — OBJECTION—WAIVER—PRELIMINARY EXAMINATION.

Under Pen. Code, § 996, providing that if a motion to set aside an information is not duly made the defendant is precluded from afterwards raising any of the statutory grounds therefor, defendant's failure to move to set aside the information on the ground that he did not have a preliminary examination before a competent magistrate precluded him from subsequently objecting to the court's jurisdiction on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 515-517; Dec. Dig. ⚡245.]

5. CRIMINAL LAW ⚡1170½—HARMLESS ERROR—EXAMINATION OF WITNESSES.

The exclusion of general questions to the complaining witness on cross-examination as to her testimony at the preliminary examination was harmless, where questions calling for a statement of the particular matters to which the witness testified or failed to testify at the preliminary examination were allowed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. ⚡1170½.]

6. WITNESSES ⚡388—CROSS-EXAMINATION—QUESTIONS—PARTICULARITY.

A question to the complaining witness on cross-examination, asking whether she had ever talked with any one about the case, was properly excluded as too general.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242, 1246; Dec. Dig. ⚡388.]

7. WITNESSES ⚡388—CROSS-EXAMINATION—IMPEACHMENT—FOUNDATION.

Where general questions inquiring merely whether the witness has had a conversation with a third person are asked by defendant to lay a foundation for impeachment, and objections thereto are sustained, defendant should either offer to show what he expects to prove, or indicate by a more specific question wherein the matter expected to be elicited is material.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242, 1246; Dec. Dig. ⚡388.]

8. CRIMINAL LAW ⚡1170—HARMLESS ERROR—CROSS-EXAMINATION—EXCLUSION OF QUESTION.

In a prosecution for assault with intent to commit rape, wherein defendant was convicted

of simple assault, the exclusion of questions propounded to the prosecutrix to elicit testimony, showing that she instituted the prosecution to force defendant into a marriage, was harmless, where the jury must have understood from the other testimony that defendant would not have been prosecuted if he had been willing to marry prosecutrix.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. ⚡1170.]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

A. J. Ronse was convicted of assault, and appeals. Affirmed.

Davis & McCoy, of San Diego, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Appellant was charged by an information with the crime of assault with intent to commit rape. He was convicted of having committed a simple assault, which charge was included within that upon which he was tried. This appeal is from the judgment and from an order denying his motion for a new trial.

It was alleged in the information that appellant assaulted one Dorothy Zeigler and used force and violence in the attempt to accomplish an act of sexual intercourse with the prosecutrix. The complainant's testimony was to the effect that prior to the time of the alleged assault she had made an engagement of marriage with appellant, who was a veterinary surgeon; that upon the night of the 27th of December, 1913, after attending a theater with the accused, she accompanied him, at his request, to his office, which was in a building then being used as a veterinary hospital. She testified that appellant first showed her through the office and drugroom at the hospital, and that he then took her into his bedroom, which was adjoining the office, for the purpose, as he stated, of showing her some photographs; that she sat upon his bed and that he sat beside her while the photographs were being shown; that he then turned out the light and reclined with her upon the bed; that he first "coaxed" her to accede to his wishes, which she refused to do; that thereupon he endeavored to remove a large part of her clothing, in which attempt he partially succeeded; that she did not cry out, but fought and scratched him and prevented him from accomplishing his purpose; that finally he abandoned the attempt; and that she dressed herself and rode with him to her sister's house in the city of San Diego, where she remained that night, as her home was in a suburban town. The occurrence at the hospital happened between the hours of 11 and 12 o'clock at night. The complainant admitted that the accused had caressed her earlier in the evening, and that while he was showing her the rooms he had his arm about her shoulders a portion of the time,

to all of which proceedings she made no objection for the reason, as she stated, that they were engaged to be married. Immediately after this occurrence, it appears from the testimony that the accused evidenced some disinclination to enter into a marriage with the complainant, and it fairly appears by every reasonable inference to be drawn from the evidence that the prosecutrix gave the accused the option of either leaving town, marrying her, or being prosecuted. There was a meeting held at the office of the district attorney when the issuance of a complaint was under consideration, and at that time appellant agreed to marry the girl. He accompanied her to the office of the county clerk and secured a marriage license, and that evening prosecutrix rode with him in his automobile and accompanied him to a restaurant and later to her home. However, after further considering the matter, the accused declined to enter into the marriage at that time, and the filing of the complaint and his arrest on the charge made in the information immediately followed. Upon this state of the evidence, which is narrated as strongly in favor of the case made by the prosecution as can be drawn from the record, the jury convicted of a simple assault, and appellant was sentenced to serve six months in the county jail.

The statement made by appellant's counsel in their brief to the effect that the chief object sought to be accomplished by the prosecutrix in lodging the complaint against appellant was to force him into a marriage with her is entirely justified by the facts as we gather them from the transcript of the evidence. And it may be here mentioned that the accused denied in positive terms that he had used any force upon the person of the prosecutrix. He admitted that, while the two were lying upon his bed at a late hour of the night, he had suggested to her that she submit to his wishes, which she refused to do, adding that, even though she were so inclined, her then condition was such as to make the act impossible of commission. However, as to the matter of what the facts were with reference to the alleged assault having been made, the jury had the right to conclude, as they must have concluded, that the testimony of the prosecutrix was more entitled to be believed than that of the accused; and, unless some error or irregularity appears to have been committed which resulted to prejudice the case of the accused in the eyes of the jury, the judgment and order must stand affirmed. We have examined closely all of the points made by appellant and have kept in mind the consideration that the case was such, as presented by the prosecutrix, as might well have suggested a suspicion that the prosecution was lacking in good faith.

[1] Appellant first contends that it was error for the trial court to refuse to allow him to withdraw his plea of not guilty so

that he might move to set aside the information. After the plea was entered, the application to withdraw it was filed in written form, and at the same time there was filed a motion to set aside the information. The motion to withdraw the plea was promptly denied, but it does not appear that any ruling was made upon the motion to set aside. The ground assigned in support of the motion to set aside the information was that the defendant had never been legally held to answer by a committing magistrate. It was set forth in the notice of motion that the board of supervisors were without authority to appoint the justice of the peace before whom appellant appeared, because there was in fact no such office existent and that the said board was without power to create it.

In order to entitle a motion to set aside the information to a hearing, it must be made at the time fixed for pleading and should be made before plea is entered. Section 990 of the Penal Code provides that the defendant may, "in answer to the arraignment, move to set aside, demur, or plead to the indictment or information." The record shows that on February 16, 1914, defendant was before the court with his counsel and was duly arraigned; time for pleading was set for February 20, 1914; that on February 20th he appeared with counsel and pleaded not guilty. On April 14, 1914, he appeared again with counsel, and the date of his trial was then fixed for May 6, 1914. Next, on April 30, 1914, more than two months after the plea of not guilty was entered, he filed his motion for leave to withdraw that plea, and also his motion to set aside the information.

A defendant in a criminal case is not entitled as a matter of right to withdraw a plea duly made to an indictment or information, in order that he may interpose objections to the proceedings which should have been presented before the plea; and when he appeals to the discretion of the court to allow him so to do there should be some showing of reasonable excuse for his neglect, such as: that he was without the advice of counsel theretofore as to his rights. Other facts might exist which, when presented to the trial judge, would be persuasive in determining such an application in favor of a defendant. No such facts were here presented, and, instead of there appearing to have been an abuse of discretion shown, had a contrary ruling been made the court's action would more properly have been subject to that criticism.

[2-4] Conceding that defendant was able to show, as his contention is, that the person who acted as a justice of the peace and committed him for trial was not invested with the powers of a magistrate, but was only a pretended incumbent of a pretended office, nevertheless this objection made at the time of trial, and also after verdict, by

which appellant sought to question the jurisdiction of the court, came too late. It was the same objection that was made the ground of the offered motion to set aside the information. The information was regular in form, and its presence on the files of the superior court presupposed a valid prior examination and commitment. In *Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119, where, on habeas corpus, after conviction, a defendant raised the question that he had never been examined and held to answer before the filing of an information, the Supreme Court, by the late Chief Justice Beatty, pointed out that this question should have been seasonably raised by a motion to set aside the information under section 995 of the Penal Code. In the opinion it is said:

"The filing of the information gave the court jurisdiction to proceed in the case, and the section of the Code cited provides the exclusive method of trying the question whether the information was founded on the necessary preliminary examination and commitment."

And it may be added that section 996 of the Penal Code, immediately following the section which specifies the grounds upon which a motion to set aside an indictment or information may be made, provides that if the motion is not so made the defendant is precluded from afterwards raising any of the specified objections. See, also, *People v. Bawden*, 90 Cal. 195, 27 Pac. 204. The decision in *People v. Webber*, 133 Cal. 623, 66 Pac. 38, is not authority for the position taken by appellant, that he was entitled to raise the question as to the regularity of the preliminary examination by objection to the jurisdiction of the court. The decision referred to only declares what the Code in plain terms provides, to wit, that a motion in arrest of judgment will reach any defect in the information which would have been good ground for demurrer. Pen. Code, §§ 1004, 1185. It has been before noted herein that the information was regular on its face; it sufficiently charged a public offense and one within the jurisdiction of the superior court.

[5] The complaining witness was asked on cross-examination several general questions as to whether she had testified to the facts of the case at the preliminary examination. Objections were made to the questions and sustained by the trial judge. While it would have been proper to have allowed the questions to be answered (*People v. Hart*, 153 Cal. 261, 94 Pac. 1042), still no prejudice could have resulted to the defendant's case, for the court did allow answer to be made to questions calling for a statement as to particular matters as to which the witness had testified or failed to testify at the preliminary examination.

[6, 7] On further cross-examination, the prosecutrix was asked whether she ever had a conversation with a Mrs. Hendee in regard to the complaint lodged against the appel-

lant, or in regard to her relations with appellant, or whether she ever talked with Mrs. Hendee about the case. She was then asked whether she had ever talked with any one about the case. Objections were made to the several questions and in each instance sustained. The objection to the last question was properly sustained. The question was too general in its scope and pointed to no particular conversation which might furnish a basis for proof affecting the credibility of the witness. The remaining questions asked might well have been allowed as preliminary to further interrogation; but, while such rulings were improper to be made, it cannot be said that the defendant was prejudiced thereby. We conceive the correct rule to be this: Where in the endeavor to lay a foundation for impeaching the credibility of a witness general questions are asked going merely to an inquiry as to whether a witness has had conversations with a third person, and objections are sustained thereto, the party against whom the adverse rulings are made should, either by an offer to show what he expects to prove or by a more comprehensive question, indicate wherein the matter expected to be elicited will be material. This, unless it is shown that the court declined to allow the statement of the expected evidence to be made or such further questions to be asked. Such was not the condition at the trial of appellant, as shown by this record. This view is applicable to all of the objections to later rulings presented on page 4 of appellant's brief.

[8] Before the complaint charging the crime for which appellant was prosecuted had been filed, the prosecutrix, her mother, and a Mrs. Praul, visited the appellant and held conversations with him. Appellant while testifying on his own behalf stated that he and the prosecutrix had retired to another part of the building and there had some conversation. He stated that reference was made by the young woman to the subject of his marrying her. He was then asked to tell what she said on the subject, and the question was objected to. The court inquired what the purpose of it was, and counsel replied:

"Simply to show, your honor, that the whole thing in the mind of Dorothy Zeigler and her mother and Mrs. Praul was forcing the defendant into a marriage; that their visit there was for that purpose, and failing in that object they lodged this criminal complaint."

The court responded:

"If it is admissible at all, it goes to the question of the credibility of the witness, and for no other purpose."

The objection was then sustained. Appellant had the right to show all of the words, actions and conduct of the prosecutrix which in any way would furnish the jury with evidence as to her motive in instituting the prosecution. But we find it stated by appellant immediately following in his testimony that he was taken to the prose-

cuting attorney's office and there agreed, as a condition that he would not be prosecuted, to marry the prosecutrix. The jury could have been under no misapprehension as to the fact that had the accused been willing to enter into a marriage with the prosecutrix the charge never would have been lodged against him. Notwithstanding all this, the jury chose to believe the complainant in her narrative as to the attempted rape.

We find no error in the record which may properly be said to have resulted in depriving defendant of his right to a fair trial. While this case belongs to a class where, as has been often said by appellate courts, trial judges should be extremely liberal in permitting an accused the privilege of a very broad and unhindered cross-examination of the prosecutrix, still, before this court is authorized to disturb the judgment, it must be made apparent that the rulings complained of have been prejudicial.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

23 Cal. App. 52

MAGNESON v. PACIFIC MFG. CO.
(Civ. 1298.)

(District Court of Appeal, Third District, California. Nov. 30, 1914.)

1. HOMESTEAD ⇨203—LEVY ON AND SALE THEREOF—EFFECT.

Under Civ. Code, §§ 1237, 1238, a homestead, selected by the plaintiff, a married woman, from the separate property of her husband and in accordance with the statute, impressed its character upon the land in controversy, and the defendant's judgment, not falling within Civ. Code, §§ 1240, 1241, establishing exceptions to the homestead exemption from execution, such defendant acquired no title to the land by levy thereon and sale thereof.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 381, 382, 384-386; Dec. Dig. ⇨203.]

2. QUIETING TITLE ⇨7—LEVY ON AND SALE OF HOMESTEAD—ACTION TO QUIET TITLE.

An action to quiet title is a proper mode to afford the court opportunity to remove an apparent cloud on a homestead title, although it is in point of law unaffected by a levy on, and sale of, the premises.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14-33; Dec. Dig. ⇨7.]

3. HOMESTEAD ⇨200 — APPRAISAL—EFFECT OF FAILURE TO APPLY FOR WITHIN STATUTORY PERIOD.

Under Civ. Code, §§ 1245-1254, providing that a judgment creditor, within 60 days after levy, may make application for an appraisal of homestead property to determine what excess in value over \$5,000 exists to be applied on his judgment, if such application is not made within the statutory period, the judgment creditor's lien by virtue of his levy, if any exists, ceases.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 372-377; Dec. Dig. ⇨200.]

4. HOMESTEAD ⇨21 — VALIDITY — MARRIED WOMAN.

Where the action is to quiet title, the plaintiff pleading a homestead exemption as against a creditor of her husband, to give judg-

ment for her the court need not find that the property is her separate estate.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 29, 30; Dec. Dig. ⇨21.]

5. QUIETING TITLE ⇨47 — FINDINGS — PLEADINGS—FACTS IN ISSUE.

In an action to quiet title, the trial court in its findings cannot go outside the issues raised by the pleadings.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 95-97; Dec. Dig. ⇨47.]

6. QUIETING TITLE ⇨10—BASIS OF JUDGMENT.

In an action to quiet title, the plaintiff must secure judgment on the strength of his own title, not the weakness of the defendant's.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36-42; Dec. Dig. ⇨10.]

7. HOMESTEAD ⇨213 — PLEADING — EXISTENCE OF HOMESTEAD.

Where the complaint, in an action to quiet title, set out a cause of action, alleging that the fee of the premises was in the plaintiff, and an answer and cross-complaint to traverse such allegation set up that the fee was in plaintiff's husband, while in her answer to such cross-complaint plaintiff traversed the allegation of title in the husband and set out a right of homestead in herself, the existence of such right of homestead is properly in issue, and may be found.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 394-396; Dec. Dig. ⇨213.]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action to quiet title by Chrestina Magnuson against the Pacific Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. B. Rinehart, of Oakland, for appellant.
Jas. H. Boyer, of San Francisco, for respondent.

BURNETT, J. The action was to quiet title, the complaint being in the usual form, plaintiff alleging absolute ownership in herself. Defendant filed an answer and a cross-complaint denying the title of plaintiff and setting up that O. M. Magnuson, the husband of plaintiff, was, on the 6th day of February, 1911, and ever since has been, the owner of said premises, subject to defendant's claim as follows: That said property was attached by defendant in an action brought by it against said O. M. Magnuson and, upon recovery of judgment, said property was sold by the sheriff under execution and purchased by defendant herein and a certificate of sale issued to it. Defendant prayed that it be decreed that it holds a valid lien upon said property by virtue of said sale and for general relief. Plaintiff answered said cross-complaint, denying the material allegations thereof and setting up the occupancy of said premises as a dwelling by plaintiff and her husband during all the time mentioned in said cross-complaint and also the due execution and recordation of a declaration of homestead by herself on said premises prior to the levy of said attachment. The court found that, on the 20th

day of February, 1911, said O. M. Magnuson was the owner in fee and he and his wife, plaintiff herein, were then in the possession and entitled to the possession of, the property in controversy; that on said date, while so residing with her husband and occupying the dwelling house on said premises, said Chrestina Magnuson "duly selected and claimed said premises as a homestead for the joint benefit of herself and her said husband" and properly executed and filed for record a declaration of homestead in due form; that, at no time prior to the recording of said declaration of homestead by plaintiff had she or her husband "made, executed, or recorded, any declaration of homestead on said or any other property; that said homestead has never been released or abandoned and remains in full force and effect." The findings also set out the statements contained in said declaration of homestead, showing a full compliance with the requirements of the law. The court further found that, on and prior to February 6, 1911, O. M. Magnuson was indebted to defendant in the sum of \$2,567.59, and that, on March 22, 1911, suit was brought for its recovery and a writ of attachment was levied on said homestead; that judgment was recovered, on April 29, 1912, for said amount, and a writ of execution was issued and levied on said property, and the same was duly sold by the sheriff to the defendant on June 7, 1912; that said defendant, Pacific Manufacturing Company, did not, prior to said sale or at any time, apply to the superior court for the appointment of persons to appraise the value of said homestead and no persons were ever appointed by said court in said action to appraise the value of said homestead; that said sale was illegal and void and conveyed no title to said Pacific Manufacturing Company. From the foregoing the court deduced the conclusion that:

"Said plaintiff, Chrestina Magnuson, now and at all the times since the 20th day of February, 1911, has been the owner of a homestead interest and title in and to the real property hereinbefore and in the complaint herein described, and said defendant Pacific Manufacturing Company has not any right, title, or interest in or lien upon said land or premises, or any part thereof. Plaintiff, Chrestina Magnuson, is entitled to a judgment of this court against said defendant, quieting her homestead title and interest in and to said property."

Accordingly, a decree was entered quieting her title to said homestead interest.

[1] No other conclusion could have been legally drawn from the facts found by the court. This is made apparent by the plain terms of the statute.

The homestead was selected as provided by the law, and therefore its character became impressed upon the dwelling house in which plaintiff resided and upon the land on which said dwelling house was situated. Section 1237, Civ. Code. The claimant, being married, had the right to select the homestead from the separate property of her hus-

band. Section 1238, Id. The effect of said selection, as far as important here, is provided and declared in sections 1240 and 1241 of said Code as follows:

"The homestead is exempt from execution or forced sale, except as in this title provided."

"The homestead is subject to execution or forced sale in satisfaction of judgments obtained: (1) Before the declaration of homestead was filed for record, and which constitute liens upon the premises. (2) On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendor's liens upon the premises. (3) On debts secured by mortgages on the premises, executed and acknowledged by husband and wife or by an unmarried claimant. (4) On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record."

It is clear that the said judgment against said O. M. Magnuson does not fall within any of said exceptions to the general rule as to exemption of the homestead.

[2] As clear as language can make it, therefore, the homestead of plaintiff was not subject to execution to satisfy said judgment. The purported levy and sale were and each of them was, consequently, of no legal effect. Said homestead was not thereby destroyed nor subjected to any lien or incumbrance. At most, the effect of said levy and sale was to create an apparent cloud upon the homestead title, and it was proper for the court in this action to adjudicate its invalidity and determine that said homestead was unimpaired and unaffected by said abortive proceeding to subject it to a sale to satisfy a judgment against the husband rendered long subsequent to the selection of the homestead.

It seems hardly necessary to comment upon the terminology of said sections of the Code. The language is so plain and its meaning so well settled that additional definition or description is not called for. Assuredly, the expression, "exempt from execution," can create in the mind of appellant's counsel no doubt as to the intention of the Legislature. Of course, if it is exempt from execution, the homestead is not liable to execution. If not liable, it cannot be impaired or affected by an attempted levy of execution. In legal effect, therefore, plaintiff's title to and interest in the homestead was just the same after said purported levy and sale as before.

But, while the homestead is thus exempt, the statute contemplates that one selected as this was may not exceed the value of \$5,000, and a method is provided whereby said exemption may be limited to said amount. The course to be pursued thus to limit it is prescribed by the sections of the Civil Code from 1245 to 1254, inclusive. It is necessary to quote only said section 1245 as amended in 1911 (Stats. of 1911, p. 888):

"When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section 1241 is levied upon the homestead, the judgment creditor may at any time within sixty days thereafter apply to the superior court of the county in

which the homestead is situated for the appointment of persons to appraise the value thereof, and if such application shall not be made within sixty days after the levy of such execution the lien of the execution shall cease at the expiration of said period, and no execution based upon the same judgment shall thereafter be levied upon the homestead."

[3] The execution here was levied on said homestead April 30, 1912, and the action was commenced July 16, 1912, more than 60 days thereafter, and it was tried November 6, 1912, nearly 6 months after said levy, and no application was ever made for the appointment of appraisers. The lien of said execution, therefore, if any existed, ceased by virtue of said statutory provision, and for all purposes of this case said homestead must be considered as one not to exceed \$5,000 in value and entirely exempt from said execution.

If any authority be needed in support of conclusions that are so obvious, we may refer to *Lubbock v. McMann*, 82 Cal. 230, 22 Pac. 1145, 16 Am. St. Rep. 108; *Sanders v. Russell*, 86 Cal. 120, 24 Pac. 852, 21 Am. St. Rep. 26; and *Roth v. Insley*, 86 Cal. 141, 24 Pac. 853. In the first of these it is said:

"When the attributes of residence and selection according to law exist so as to express its essence, the homestead becomes an estate in the premises selected, exempted by law from forced sale. They may be of greater or less value than the interest in them exempted by law. The excess, if there be one, in value, though it may be homestead in fact, is subject to the *jus disponendi* of the owner and the claims of his creditors. *Ham v. Santa Rosa Bank*, 62 Cal. 139 [45 Am. Rep. 654]. But it does not follow that the excess in value is subject to seizure and sale at the instance of an execution creditor. If the property so impressed with the character of homestead is worth more than the homestead exemption, and the creditor desires to avail himself of that excess, the proceedings provided by the Code (Civ. Code, §§ 1245-1259) must be taken for the admeasurement and application of such excess. *Waggle v. Worthy*, 74 Cal. 268 [15 Pac. 831, 5 Am. St. Rep. 440]. A judgment creates no lien upon property thus affected, and a levy gives no right, except to inaugurate the proceedings for the admeasurement of such excess. *Barrett v. Simms*, 62 Cal. 440. It follows that a sale, unless made under order of court, and for purposes of segregation of the excess as provided in the sections referred to, would convey no title. But though the sale of a homestead under execution conveys no title, it may create a cloud and involve the homestead claimant in litigation, and will therefore be enjoined. *Oliver v. Rogers*, 28 Cal. 520; *Eby v. Foster*, 61 Cal. 287."

Appellant contends that the judgment is erroneous for the reason that respondent based her right of action, not on a homestead claim, but upon absolute ownership, and the court found that she had in the property a homestead interest, and that O. M. Magneson was the owner in fee, and that therefore the judgment was not within the issues and opposed to and inconsistent with the material allegations of the complaint. We can find no merit in this position. The situation seems to be as follows: In her complaint plaintiff claimed title in herself. This was

denied in the answer, and in the cross-complaint defendant alleged that the title to the property was in O. M. Magneson subject to defendant's lien as aforesaid and a certain mortgage specifically referred to. In her answer to this cross-complaint plaintiff "denies that said O. M. Magneson ever since the 6th day of February, 1911, or at any time since said date, has been, or is now, or at any time mentioned in said cross-complaint was, the owner in fee or otherwise or at all of said or any portion of said described premises, or the holder thereof; and denies that said defendant and cross-complainant has or ever had any lien thereon"; and, "for a further and separate answer and defense" to said cross-complaint, plaintiff fully set forth her claim as to the homestead. The issues were thus clearly presented as to the title of plaintiff and of O. M. Magneson to said property, the validity and effect of the homestead declaration of plaintiff, and the interest, if any, acquired by defendant through said levy and sheriff's sale.

It was the duty of the court to determine the issues raised by the cross-complaint and answer, as well as those presented by the complaint, and therefore the court did find that the title to the property was vested, on February 20, 1911, in O. M. Magneson, but that by reason of said declaration of homestead plaintiff became the owner of a homestead interest and title therein, and that defendant's attempted sale of said premises was illegal and void, and therefore defendant was without any title or interest in or to said property or any part thereof.

[4] Manifestly, to uphold the judgment it was not essential that the court should find that the property was the separate estate of plaintiff. As far as the homestead interest and the rights growing therefrom affect the controversy here, it is of no consequence whether the legal title to the property was in plaintiff or her husband or the community. If any of these conditions existed by reason of the said declaration of homestead, the property would become exempt from the execution and sale attempted by defendant. Nor is there any inconsistency in the finding that, "on the 20th day of February, 1911, said O. M. Magneson was the owner in fee" of said premises, and that said plaintiff, Christina Magneson, "is now and at all times since the 20th day of February, 1911, has been the owner of a homestead interest and title in and to" said property. It is to be noticed that the court does not find that said O. M. Magneson has been the owner in fee since said February 20th, as seems to be assumed by appellant. We are not therefore called upon to consider whether such finding would be inconsistent with the determination of the homestead interest to be in plaintiff, nor does it seem necessary or advisable to attempt any technical disquisition as to the exact nature of the homestead title or claim. It is sufficient to

ascertain that there was and is a valid homestead interest vested in plaintiff, and that, under the conditions shown to exist, it was unaffected by said proceedings of defendant.

In none of the cases cited is there anything held to lead us to doubt the integrity of the judgment herein.

[5, 6] It is elementary, as held in *Reilly v. Wright*, 117 Cal. 77, 48 Pac. 970, and *Schroder v. Aden Gold Mining Co.*, 144 Cal. 628, 78 Pac. 20, that the court in its findings cannot go outside of the issues raised by the pleadings, and that the plaintiff must recover, if at all, upon the strength of his own title, and not the weakness of that of his adversary.

In *Tappendorff v. Moranda*, 134 Cal. 421, 66 Pac. 491, it was stated:

"It was essential to the plaintiff's cause of action that her complaint should show that the land sued for was covered by a valid declaration of homestead. Otherwise she could not sue alone, but the right of action would have been in her husband. Code Civ. Proc. § 370."

[7] The foregoing case might afford appellant some comfort if there had been here no allegation as to the homestead, but that issue, as we have seen, was presented by the answer to the cross-complaint. In other words, if the complaint had been the only pleading on the part of plaintiff, no claim not included therein could have been maintained by her. But, having stated a cause of action and other issues having been made by other pleadings, it was proper to find the facts included therein as they were disclosed by the evidence.

In *MacLeod v. Moran*, 11 Cal. App. 622, 105 Pac. 932, the property involved appeared to be community property, and therefore it was necessary for the wife to allege that the land was covered by a valid declaration of homestead in order to justify the action by herself alone.

We are satisfied that the appeal, being on the judgment roll alone, is without substantial merit, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

26 Cal. App. 41

MILLER v. SUPERIOR COURT IN AND
FOR RIVERSIDE COUNTY et al.
(Civ. 1631.)

(District Court of Appeal, Second District,
California. Nov. 25, 1914.)

PARTIES ☞95—DESCRIPTION—COMPLAINT—
AMENDMENT.

Where plaintiff filed a complaint entitled "San Jacinto Packing House, Plaintiff, v. I. N. Miller, Defendant," and alleged that H. was transacting business in R. county under the fictitious name of "San Jacinto Packing House," and had duly filed with the county clerk a certificate authorizing him to so conduct his business, the complaint was not fatally defective as designating as plaintiff a

thing having no legal entity, but the court was authorized to permit an amendment so that the title should properly read "Arthur S. Holden, Doing Business under the Name and Style of San Jacinto Packing House, Plaintiff, v. I. N. Miller, Defendant."

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 160-166; Dec. Dig. ☞95.]

Petition for certiorari by I. N. Miller against the Superior Court of California for Riverside County and F. E. Densmore, Judge thereof, to review an order allowing an amendment of the complaint in the suit of the San Jacinto Packing House v. I. N. Miller. Application denied.

Barstow, Beach & Rohe, of Los Angeles, for petitioner. H. L. Carnahan and C. W. Benshoof, both of Riverside, for respondents.

PER CURIAM. Certiorari to secure a review of the action of the superior court in allowing a certain amendment to be made in a complaint filed in the justice's court and brought to the superior court on appeal. The justice court action was entitled "San Jacinto Packing House, Plaintiff, v. I. N. Miller, Defendant," and the suit was to recover a sum of money alleged to have been earned by plaintiff for labor performed. The first paragraph of the complaint contained the following allegation:

"That Arthur S. Holden is transacting business in the county of Riverside, state of California, under the fictitious name of San Jacinto Packing House, and that the said Arthur S. Holden has duly filed with the clerk of the county, in which the principal place of business of said San Jacinto Packing House is situated, a certificate, duly acknowledged, stating the name in full and the place of residence of the person transacting business under said fictitious name, and that he has caused said certificate to be published in a newspaper in said county for a period of four successive weeks."

Defendant, after demurring, filed an answer to the complaint and the action proceeding to trial, and judgment followed in favor of the plaintiff. An appeal was then taken, and at the trial had in the superior court, and upon application made therefor and against the objection of the defendant, plaintiff was allowed to amend the title of his suit making it read as follows:

"Arthur S. Holden, Doing Business under the Name and Style of San Jacinto Packing House, Plaintiff, v. I. N. Miller, Defendant."

Defendant offered no testimony, and judgment was again entered in favor of the plaintiff.

Petitioner here insists that it was not within the power of the superior court to allow the amendment to be made in the title of the suit for the reason that the title, as originally made, designated as plaintiff a thing which had no legal entity, and that therefore the suit should have been viewed as though there was no party designated as plaintiff, in which view, it is contended, no amendment could be permitted to be made

which would cure the defect. Extensive quotations are made from a number of decisions, notably that in the case of *Western, etc., Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978. In that case a summons was issued in the name of Dalton Marble Works, and at the trial an amendment was allowed by which the words "H. P. Colvard, Proprietor," were added to the designation of plaintiff. The Georgia court held that the amendment was improperly allowed, and that the motion to dismiss should have been granted "on the ground that it was not alleged that the 'Dalton Marble Works' was a corporation, nor, if it was a partnership, did it appear who were the partners composing the firm, nor was it the name of an individual." In another case where the same ruling was made, it was said:

"Pembina & Owners" is not alleged to be a corporation or partnership, and is not a party, within the meaning of this section." *Steamboat Pembina and Owner v. Wilson*, 11 Iowa, 479.

It will be noted that, in support of the objections made in the cases referred to, it appeared that the complaints were lacking in allegations showing that the plaintiffs were in fact persons or other legal entities of which the law would take cognizance.

In this case it did appear, by an affirmative allegation in the complaint, that the plaintiff designated as San Jacinto Packing House was represented in the person of Arthur S. Holden, as the owner of the business transacted under that name. The complaint disclosed fully the exact character of the plaintiff. If the title and style of the plaintiff as "San Jacinto Packing House" had stood alone, then it might properly be said, as is urged by petitioner, that the name imported no legal entity, and it would follow in such case that no amendment could be made in the title to make good that which was fatally deficient in the first instance. We think that, in determining whether the amendment should have been allowed, the court was entitled to take into consideration the allegations of the complaint; and, if it appeared upon such consideration that the bare title was defective in not describing the plaintiff sufficiently, an order might properly be made permitting the additional words of description to be inserted. Here the defendant could not have been misled as to the true character of the party suing, for he was plainly told by the allegations of the complaint that that party was Arthur S. Holden, who was doing business under the name of the San Jacinto Packing House. We have no criticism to make of the law as stated by petitioner, to wit, that a party to a suit designated in an authorized way under a fictitious style, where the complaint does not disclose his true character, cannot afterwards correct his pleading by amendment. We do hold, however, that, in determining

the identity of a party plaintiff, the allegations of the complaint may be looked to as well as the title. Petitioner suggests that had the cause proceeded to judgment under the title in which it was brought, and that judgment had been in his favor, such a judgment would be of no value as against the plaintiff designated under the fictitious name. The answer to this contention is that, as the complaint disclosed the identity of the real party in whose favor the action was being prosecuted, the petitioner might have asked the court to require an amendment to be made which would clearly describe the name of the real party in interest. If the order for amendment was not complied with, the action might have been dismissed.

From these conclusions it follows that the application for the writ should be denied; and it is so ordered.

26 Cal. App. 67

MORRIS v. HARTLEY et al.

(Civ. 1116, 1271.)

(District Court of Appeal, Third District, California. Nov. 30, 1914. On Petition for Rehearing, Dec. 31, 1914.)

1. PLEADING $\S$ 254—AMENDED COMPLAINT—DEMURRER.

Where a complaint was amended at the trial to conform to the proof, a special demurrer theretofore filed against the original complaint cannot be treated as applying to the amended complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 752-760; Dec. Dig. $\S$ 254.]

2. SUBROGATION $\S$ 35—JUNIOR MORTGAGEES—INTEREST IN PROPERTY.

Plaintiff and his wife owned a lot covered by a mortgage securing a note executed by plaintiff, and sold the property to H., who assumed the mortgage, paid a portion of the purchase price, and gave a mortgage for the balance. The deed to H. was executed only by plaintiff. H. thereafter conveyed the lot to T. to secure the payment of a loan to him. At T.'s request, plaintiff and his wife executed a new deed for the purpose of correcting the first one. Thereafter defendant paid to T. the balance of H.'s debt, and T. conveyed the lot to him; defendant having knowledge of the facts and taking the conveyance subject to the mortgages. At the maturity of the original mortgage debt, plaintiff paid it and had it released of record, and now seeks to foreclose his mortgage and also to be subrogated to the rights of the first mortgagee. Defendant contended that the deed of plaintiff and his wife extinguished the purchase-money mortgage given by H., and plaintiff was therefore a mere volunteer not entitled to be subrogated to the rights of the original mortgagee, under Civ. Code, §§ 2903, 2904, giving to a person having an interest in property subject to lien the right to redeem the property from the superior lien in the same manner that the owner might, and to be subrogated to all benefits of the superior lien. *Held*, that the deed having been intended solely to correct the former deed, and defendant having notice of that fact, plaintiff did not thereby lose his interest in the property or his right to subrogation.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 107, 108; Dec. Dig. $\S$ 35.]

3. MORTGAGES 494—FORECLOSURE—JUDGMENT.

A judgment, in foreclosure proceedings, which describes the property and directs the sale of it or so much thereof as may be sufficient to raise the amount due to plaintiff with costs of suit, appoints a commissioner to make the sale, gives specific directions for the application of the proceeds, and forecloses the rights of the defendants in the property, sufficiently complies with the requirements of Code Civ. Proc. § 726, that the judgment shall direct the sale of the incumbered property or so much thereof as may be necessary, and the application of the proceeds to the costs and expenses and the payment of the amount due to plaintiff, though such judgment stated that the land was declared to be a valid lien, not that the mortgages constituted such lien.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1441-1445; Dec. Dig. 494.]

On Petition for Rehearing.

4. PLEADING 420—AMENDMENT AT TRIAL—OBJECTIONS—WAIVER.

Where a complaint is amended at the trial to conform to the proofs, the defendant cannot sit by without objection and then contend that by the entry of the judgment he was deprived of his right to demur or answer within ten days, but he must seasonably make any objection that he has to the amended complaint or is deemed to have waived such objection.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1408-1412; Dec. Dig. 420.]

5. PLEADING 254—AMENDMENT AT TRIAL—DEMURRER—TRIVIAL AMENDMENT.

Amendments to a complaint for the foreclosure of a purchase-money mortgage, which showed that the property was originally owned by the plaintiff and his wife, not the plaintiff alone, and that a deed executed by them, which defendant contended extinguished the mortgage, was intended merely to correct the omission of the wife's execution in the first deed, were not trivial amendments which did not require the filing of a new special demurrer to the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 752-760; Dec. Dig. 254.]

6. APPEAL AND ERROR 247—QUESTIONS PRESENTED—THEORY IN LOWER COURT.

Where defendant moved to strike an amended complaint filed to conform to the proofs on the ground that it radically changed plaintiff's cause of action, he cannot contend on appeal that the amendment was so trivial that his special demurrer to the original complaint would apply to the amended complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1426-1431; Dec. Dig. 247.]

7. APPEAL AND ERROR 1040—HARMLESS ERROR—RULINGS ON SPECIAL DEMURRER.

Where all the questions raised by special demurrer were considered at the trial and none of the defects in the complaint misled the defendant, he was not prejudiced by the overruling of his special demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. 1040.]

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Action by Isidor F. Morris against A. F. Hartley, F. J. Bethel, and others, to foreclose a mortgage on real estate. Judgment for the plaintiff, and defendant Bethel ap-

peals. Affirmed, and petition for rehearing denied.

P. H. Johnson and Jas. D. Meredith, both of Sacramento, for appellant. M. S. Wahrhaftig, of Sacramento, for respondent.

CHIPMAN, P. J. This is an action for the foreclosure of certain mortgages upon real property situated in the city of Sacramento. Judgment went against defendant Hartley for the several sums mentioned in plaintiff's amended complaint as secured by said mortgages, and foreclosure was ordered. It was found by the court that defendant Brooke Realty Company had no interest in the subject-matter of the action. Defendant Hartley made default. Defendants Trainor and Bethel answered. Defendant Bethel alone appeals; his appeal being from the judgment and from the order denying his motion for a new trial.

There are two separate transcripts, the present one, No. 1116, an appeal from the judgment, and No. 1271, an appeal from the order. By stipulation both appeals are presented together in the same brief.

The land involved consists of two separate parcels; one parcel being the north one-half of the south one-half of lot numbered 1 in the block bounded by T and U and Twenty-Fifth and Twenty-Sixth streets (hereinafter designated as parcel "A"), and the other parcel being the south one-quarter of said lot (hereinafter designated as parcel "B"), the two parcels constituting the south one-half of said lot.

It appears that, on and prior to September 30, 1910, plaintiff and his wife, Belle Morris, were the owners of the said property. On November 16, 1909, they executed their promissory note to Susie Harlow for the sum of \$2,000, due one year after date, at 10 per cent. interest, payable monthly, and, if not so paid, an option was given to treat the principal as due. It also provided that if not paid at maturity the note "is hereby renewed from year to year, at the option of the holder." Plaintiff and his wife, on the same day, executed their mortgage to said Susie Harlow to secure the payment of said note on what we designate as parcel "A." On November 16, 1909, plaintiff and his wife executed to B. P. McIntyre and Lulu Speer their promissory note for \$2,000 secured by mortgage on parcel "B." Neither of these last-named persons was made party to the action, and, of course, they are not concerned with the decree. The court, however, in ordering the sale of parcel "B," directed that it be sold subject to the mortgage of McIntyre and Speer.

It appears from the amended complaint: That on September 30, 1910, plaintiff sold all of said land to defendant Hartley for the sum of \$6,100, payable as follows: \$500 at the execution of the deed; \$2,000 when due

on the Susie Harlow promissory note; \$2,000 when due on the McIntyre and Speer promissory note; \$750 to be paid plaintiff in seven years with 10 per cent. interest per annum, "to be secured by promissory note and mortgage upon" parcel "A"; and \$850 to be paid in eight years with 10 per cent. interest per annum, to be secured by promissory note and mortgage upon parcel "B," pursuant to which said agreement said notes and mortgages were duly executed and delivered by Hartley to plaintiff and said mortgages were duly recorded. That, on October 5, 1910, defendant Hartley conveyed the land by deed to defendant Trainor, duly recorded on that day, and, at defendant Hartley's request, plaintiff and his wife, on October 10, 1910, executed and delivered to Hartley their deed to said land, which was duly recorded October 20, 1910, but that said deed "was executed as a mere correction of the former deed dated September 30, 1910, in which the name of Belle Morris, his wife, was inadvertently omitted," and it appeared at the trial that this second deed to Hartley was without further consideration and was given because the title, on said last-named date, was in plaintiff and his wife. That, on January 16, 1911, defendant Trainor executed and delivered to defendant Bethel his deed to said land which was on that date duly recorded. It appeared that in each of the promissory notes given by Hartley to plaintiff there was a provision that the "principal is due and payable each month in installments of \$10.00 (ten dollars) or more." There was also a provision that, should Hartley fail to make payment as provided in said notes, either of principal or interest, plaintiff had the option to treat the notes as due. It is alleged that, except the sum of \$500 paid by Hartley to plaintiff at the time of the execution of said deed to him, said Hartley has failed and neglected to pay any part of either of said two promissory notes, and the same are now due, "and plaintiff now exercises his said option to collect the same in full." It is further alleged that the Susie Harlow incumbrance on said property of \$2,000, "which defendant Hartley agreed to pay when due as part of the consideration for the sale to him of the said land, became due on the 16th day of November, 1910, and neither defendant Hartley nor any of the aforesaid subsequent purchasers of the said land paid the same; that plaintiff was thereupon obliged to discharge such obligation, and on or about the 5th day of December, 1910, paid to said Susie Harlow the said sum of \$2,000," with interest, and on said 5th day of December, 1910, she duly satisfied said mortgage by indorsement on the margin of the book of mortgages in the said county; that "the said incumbrance for the sum of \$2,000 to B. P. McIntyre and Lulu Speer which defendant Hartley agreed to pay * * * became due on the 1st day of November, 1910, * * *

and is still a subsisting incumbrance in the sum of \$2,000 and interest thereon upon said land"; that neither defendant Hartley nor either of said subsequent purchasers of said land has paid the said sums of \$750 and \$850 secured by the said mortgage to Susie Harlow and the whole thereof, to wit, the sum of \$3,600, is due and owing plaintiff from said defendant Hartley; that, by reason of plaintiff's having paid to said Susie Harlow the amount called for in her said mortgage, plaintiff is subrogated to her rights.

The amended complaint then proceeds to state what purport to be second, third, fourth, and fifth causes of action. In each of them the averments of the first cause of action are re-averred and made part thereof except, in the fifth cause of action, certain two paragraphs, not important to notice, are omitted. The second cause of action simply repeats Hartley's liability to pay the Susie Harlow mortgage. The third cause of action alleges that neither Hartley nor "either of the aforesaid subsequent purchasers has paid" the \$850 note and mortgage of Hartley to plaintiff. The fourth cause of action alleges that neither Hartley nor either of said subsequent purchasers has paid said \$750 note and mortgage executed by Hartley to plaintiff. The fifth cause of action alleges that neither Hartley nor either of said subsequent purchasers has paid, except the sum of \$500, the purchase price for which the said land was sold to Hartley by plaintiff.

The prayer of the complaint is for judgment against Hartley for the sum of \$5,600 with interest at 10 per cent. per annum from September 30, 1910, and the sum of \$200 attorney's fees and costs and for the usual order of sale of the premises; the proceeds to be applied in payment of the McIntyre and Speer note and mortgage and interest and "in payment of the amount of \$3,600 and interest thereon as aforesaid to plaintiff and the further sum of \$200 with which to pay attorneys and counsel fees, and that the defendants and all persons claiming under them or either of them, either as purchasers or incumbrancers, or otherwise, may be barred and foreclosed of all right, claim, or equity of redemption in the said premises," and for judgment and execution against defendant Hartley, and also for deficiency judgment should any deficiency remain after applying the proceeds of the sale of said premises; that the plaintiff or any party to the suit may become a purchaser at said sale to whom a deed shall be executed and the purchaser let into possession; and for "such further relief in the premises as to the court may seem proper."

Defendant Trainor answered that the deed of October 5, 1910, from Hartley to him was as security for the payment to him by Hartley of a certain sum which has been fully paid, and that he was ready and willing to reconvey the property to Hartley, but that

the latter requested him to make and execute a deed of said land to defendant Bethel, which Trainor did, on January 16, 1911.

Defendant Bethel filed a general and special demurrer to the original complaint, which was overruled, and he answered the original complaint, admitting many of its averments. He denied that plaintiff was obliged to discharge the Harlow mortgage and alleged that the Harlow note and mortgage were fully satisfied and discharged, on December 5, 1910; admitted the execution of the deed by Morris and his wife, on October 10, 1910, but denied that it was for the purposes of correction only; denied that by paying the Harlow mortgage plaintiff became subrogated; and alleged that the two Hartley notes of \$750 and \$850 were fully discharged, on October 10, 1910.

The court found that all the allegations of the first cause of action set forth in the amended complaint are true; also, all the allegations of the third and fourth causes of action; also, that all the allegations of the answer of defendant Trainor are true. The court also found that defendant Bethel did not purchase the land for a good and valuable consideration; that the deed made by Trainor to him, January 16, 1911, was so executed by him at Hartley's request as security for the sum of \$150 "then and there paid by defendant F. J. Bethel to extinguish a debt then due from defendant A. F. Hartley to defendant W. E. Trainor; that defendant F. J. Bethel took said deed from defendant W. E. Trainor with notice of all incumbrances subsisting upon the land in controversy at the time defendant A. F. Hartley executed his deed to the said land to said W. E. Trainor on the 5th day of October, 1910."

In defendant Bethel's answer it was alleged that neither the note nor the mortgage executed by plaintiff and his wife to Susie Harlow for \$2,000, on November 16, 1910, is "owing or unpaid from defendant F. J. Bethel"; on the contrary, that both said note and mortgage were fully paid, satisfied, and discharged, on December 5, 1910. The court found that these averments of Bethel's answer were not true, "except that the mortgage therein mentioned was satisfied of record by plaintiff as an inferior lienor." The court further found: That there is due and owing plaintiff from defendant Hartley the sum of \$2,000 and interest, upon the promissory note of plaintiff and his wife to Susie Harlow, on November 16, 1909, secured by mortgage upon parcel "A" of said land; also, the sum of \$750 upon said note of defendant Hartley executed to plaintiff September 30, 1910, secured by mortgage executed by said Hartley on parcel "A" of said land; also, the sum of \$850 and interest upon said note of defendant Hartley executed to plaintiff on September 30, 1910, secured by mortgage on parcel "B" of said land. That it is necessary to appoint a commissioner for the

sale of said premises, and that said commissioner be directed to sell parcel "B" subject to the mortgage lien of B. P. McIntyre and Lulu Speer, and from the moneys realized at such sale to pay to plaintiff the sum of \$1,072.25, with costs and interest. That such commissioner also sell parcel "A", and out of the moneys realized from such sale, after deducting expenses thereof, to pay to plaintiff the sum of \$3,245.20, and, if the amount realized from said sale shall be insufficient to pay said sums, then plaintiff may have judgment for any deficiency remaining. As conclusion of law the court found that plaintiff is entitled to judgment for the sum of \$4,317.35.

The original complaint was filed January 18, 1911, to which defendant Bethel filed a general and special demurrer, on February 4, 1911. The court overruled the demurrer, on April 10, 1911, and on October 27, 1911, defendant Bethel filed an answer to plaintiff's original complaint. The cause came on for trial February 23, 1912, "and the same was continued to the 27th day of February, 1912, and upon completion thereof, upon motion of plaintiff's counsel, the court allowed the complaint herein to be amended to conform to proofs adduced at the trial." On March 8, 1912, plaintiff served and filed his amended complaint, and on March 14, 1912, the court made its findings and filed its judgment, and on March 15, 1912, said judgment was duly entered. On March 28, 1912, defendant Bethel served and filed a motion to strike the amended complaint from the files, which purports to have been "based upon the pleadings and records in the action and the affidavit of James D. Meredith, attorney for Bethel, and upon oral testimony to be adduced at the hearing of said motion." The record contains no affidavit or testimony in support of the motion. On May 13, 1912, this motion and the settlement of the bill of exceptions came on to be heard. The motion was denied and appellant given on May 20, 1912, "to prepare and serve a statement on motion for a new trial and the settlement of bill of exceptions." No answer to the amended complaint was filed, although it was served and filed six days before findings and judgment, and no stipulation appears that the answer to the original complaint should be deemed an answer to the amended complaint. The case, however, seems to have been tried upon the theory that the facts presented by the amended complaint, except as admitted, were denied substantially as appeared in appellant's answer to the original complaint, and we shall so treat the record.

[1] We cannot, however, so treat the demurrer. It is well settled that an amended complaint supersedes the original complaint and furnishes the sole basis of plaintiff's cause of action. If defendant Bethel had desired to avail himself of objections, other

than to the sufficiency of the amended complaint to state a cause of action, he should have renewed his special demurrer. We are satisfied that a cause of action is stated in both complaints.

[2] Upon the merits, appellant's position is: First, that the deed of plaintiff and his wife to Hartley, on October 10, 1910, "absolutely released and discharged the two mortgages of Hartley to Morris (one for \$750 and one for \$850) and merged them in Hartley and had the operative effect of absolutely releasing and discharging said two mortgages of A. F. Hartley to Isidor F. Morris," and that appellant took the title freed from these mortgages; second, that Morris was a mere volunteer or intermeddler when he paid the Susie Harlow mortgage debt and caused the mortgage to be satisfied, on December 5, 1910, and that when Trainor, January 16, 1911, conveyed the land to appellant, the latter took the title with no incumbrance upon the premises except the McIntyre and Speer mortgage. On the face alone of the records of deeds and mortgages this contention finds support. And appellant's claim at the trial was and is here that he made the purchase upon such notice only as these records imparted. There was testimony, however, which the court accepted and which tended to show that Trainor took his deed to secure \$250 loaned by him to Hartley, \$100 of which Hartley paid him and \$150 was paid him for Hartley by appellant, and that Trainor conveyed to appellant to secure the latter in paying Trainor this amount, and that there was no other consideration for Trainor's deed to appellant. There was evidence that when Morris and wife made their deed to Hartley, five days after Morris had deeded the land to Hartley, it was for the sole purpose of conveying the wife's interest, and that it was well understood by Hartley that the premises remained subject to the mortgages given by him and the two mortgages of \$2,000 each given by Morris and wife; that the consideration was \$6,100, of which Hartley paid \$500 at the time of his purchase, the balance being made up of these four mortgages. There was evidence that when Morris paid the Harlow mortgage it was to protect the mortgages given him by Hartley, and there was evidence from which the court was justified in finding that appellant had notice of these transactions, and that when he received his deed from Trainor he knew in what capacity Trainor held the title, and also knew that Hartley and Morris treated all these mortgages as subsisting liens and that appellant in fact took the land subject to these liens. Appellant's contention is that Morris ceased to be a lienor because of the conveyance of himself and wife to Hartley, October 10, 1910, and therefore had no right to be subrogated under the Harlow mortgage and had no such relation to the land as would authorize him to pay off the Harlow mort-

gage under sections 2903 and 2904 of the Civil Code. These sections confer upon a person having an interest in property, subject to a lien, the right to redeem from the lien, and by such redemption he becomes subrogated to all the benefits of the lien; and further provides that one who has a lien inferior to another, upon the same property has a right to redeem the property, in the same manner as its owner might, from the superior lien; and "to be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby." See, also, section 2876, Civ. Code. The evidence showed that plaintiff was endowed with these rights. Appellant's various points in challenging the findings rest upon the assumption that he had no notice of any transaction other than shown by the records of deeds and mortgages and that he purchased the property outright and unconditionally with such notice only. But there was evidence sufficient to show that this, as the court found, was not true, and that he in fact took his conveyance from Trainor to secure the \$150 paid Trainor for Hartley's benefit, and that he then knew all the facts upon which plaintiff bases his rights in the action as herein above set forth. We think there were sufficient averments in the amended complaint on which to base the findings. We are of the opinion that the learned trial judge was fully warranted by the evidence in making his findings of fact and conclusions of law.

[3] Some criticism is made of the form of the judgment, and it must be admitted that in some respects it is open to appellant's criticism. For example, it adjudges that the land "be and hereby is declared a valid lien for the payment to plaintiff," etc. And it is claimed that:

"Nowhere is it decreed and adjudged that any of the mortgages set forth in the complaint are a lien upon the premises involved, or that the plaintiff is entitled to the foreclosure of such a lien on the premises involved."

Section 2931 of the Civil Code provides that:

"A mortgagee may foreclose the right of redemption of the mortgagor in the manner prescribed by the Code of Civil Procedure."

Section 726 of the latter Code prescribes no form for the judgment. The principal object of the proceeding is to cause a sale of the incumbered property and the application of the proceeds of sale to the payment of the debt secured thereby as in the section directed. The judgment describes the property and directs its sale, "or so much thereof as may be sufficient to raise the amount due to the plaintiff with costs of suit," etc.; appoints a commissioner to conduct the sale; and gives specific directions as to the application of the proceeds to pay the amounts due, which are specifically given; and declares that all the defendants and all persons claiming under them or having liens subse-

quent to plaintiff's liens, and who have acquired any estate or interest in said premises subsequent to the filing of the motion of the pendency of the action, "be forever barred and foreclosed of and from all equity of redemption," etc. The judgment seems to be a sufficient compliance with the statute to effectuate its object.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

On Petition for Rehearing.

PER CURIAM. Appellant petitions for a rehearing. The point especially urged is that the court erroneously held that the demurrer to the original complaint could not be considered as a demurrer to the amended complaint.

[4] As shown in the opinion, heretofore filed, the judgment was entered six days after the amended complaint was filed. Appellant contends that he was entitled to 10 days in which to demur or answer. It frequently happens that amendments are made by leave of court to conform to the evidence adduced at the trial. We do not understand that in such cases the opposing party can stand by without answering or demurring and, after the court has made its findings and entered its judgment, claim that he was deprived of his right to answer or demur. If he has objection to the amended complaint as allowed by the court, he should seasonably make such objection known, or he must be deemed to have waived such objection. In the present case he was duly served with a copy of the amended complaint, which recites that it was filed "by leave of court first had and obtained."

[5] It is further contended that the amendments to the complaint were trivial and did not require a new demurrer, citing *Flood v. Templeton*, 148 Cal. 374, 376, 83 Pac. 148. The amendment was, we think, something more than trivial and was to meet a very important issue in the case as to which there was evidence and a finding of the court. There was an amendment showing that the property was owned by Morris and his wife, whereas the original complaint alleged that Morris was the owner. There was also an amendment that, on October 10 1910, Morris and his wife conveyed the premises to Hartley merely by way of correcting the deed made by Morris alone and with no intention that it should affect the mortgages given by Hartley. One of appellant's contentions at the trial—strongly urged—was that this deed "absolutely released and discharged the two mortgages of Hartley to Morris (one for \$750 and one for \$850) and

merged them in Hartley and had the operative effect of absolutely releasing and discharging said two mortgages of A. F. Hartley to Isidor F. Morris," and that appellant took the title freed from these mortgages. This issue was fully exploited at the trial, and evidence admitted tending to show that the purpose of this deed of October 10th was well known to all the parties.

[6] In his motion to strike the amended complaint from the files, appellant states, among other grounds, that it "radically changes and alters the alleged causes set forth in plaintiff's original complaint on file herein"; and that it "set forth matters and issues entirely new, wholly distinct, and completely different from those embraced in the original complaint." Appellant would hardly seem justified in now claiming that the amendments were trivial and such as were referred to in the case above cited. Besides, in the case cited the demurrer was general and the court stated that the objections to the complaint could be made at any time. We still think that he should have renewed his demurrer if he intended to rely upon it.

[7] Furthermore, we are of the opinion, if we are in error upon this point, that the matters called to the attention of the court by the special demurrer (it is not contended that there was any merit in the general demurrer) were gone into at the trial. Appellant was not misled by any of the defects in the pleading pointed out in the special demurrer, for the case seems to have been fairly tried on the merits. He was not prejudiced by the overruling of his demurrer. *Stein v. United Railroads*, 159 Cal. 368, 113 Pac. 663.

The petition is denied.

26 Cal. App. 804

MORRIS v. HARTLEY et al. (Civ. 1271.)
(District Court of Appeal, Third District, California. Nov. 30, 1914.)

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Action by Isidor F. Morris against A. F. Hartley, F. J. Bethel, and others, to foreclose a real estate mortgage. From an order overruling defendant Bethel's motion for a new trial, after judgment had been rendered for plaintiff, defendant Bethel appeals. Affirmed.

James D. Meredith and P. H. Johnson, both of Sacramento, for appellant. M. S. Wahrhaftig, of Sacramento, for respondent.

CHIPMAN, P. J. This is an appeal from the order denying defendant Bethel's motion for a new trial and, by stipulation, was presented in the briefs filed in the appeal from the judgment (No. 1116, 146 Pac. 73), this day decided. For the reasons therein presented, the order is affirmed.

We concur: HART, J.; BURNETT, J.

26 Cal. App. 108

BERNARDO v. RUE. (Civ. 1547.)

(District Court of Appeal, First District, California. Dec. 1, 1914.)

1. ELECTIONS ⇨303 — CONTEST—SUBMISSION OF CASE—FINDINGS—FILING—TIME—JURISDICTION.

Code Civ. Proc. § 1118a, relating to election contests, provides that, within five days from the end of the time allowed for filing statements required, the county clerk must notify the superior court of the county or city and county of all statements filed, and the court shall continue in special session to hear and determine issues arising, and within ten days after submission thereof shall file its findings of fact and conclusions of law, and immediately thereafter judgment shall be entered. *Held*, that such provision as to time was directory only, and that the court, by failing to file its findings and enter judgment within ten days after submission of the case, did not lose jurisdiction thereof.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 315; Dec. Dig. ⇨303.]

2. ELECTIONS ⇨300—CONTEST—NONSUIT.

Where, in a high school election contest, the judges of the election not only did not proceed to count and dispose of the ballots as required by law, but changed their returns after they were filed at an illegal and secret meeting in the rear of a saloon, so as to change the result of the election, and, had they followed the statute, the result at which they arrived would have been impossible without a fraudulent purpose, the court erred in directing a nonsuit.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 308-313; Dec. Dig. ⇨300.]

3. ELECTIONS ⇨241 — CANVASS — BALLOTS FOLDED TOGETHER.

At the close of the polls, Pol. Code, § 1253, requires the board to compare their count with the list of voters kept by the clerk and to lay aside sets of votes folded together until the count is completed, when a comparison of the count with the number of names of electors on the lists will show whether the ballots folded together were cast by one elector, in which event they should be rejected.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 218; Dec. Dig. ⇨241.]

4. ELECTIONS ⇨243—COUNT—MODE.

Pol. Code, § 1252, provides that, on the close of the polls, judges must immediately canvass the votes in public and in the presence of bystanders, which must be continued without adjournment until completed and the result declared. *Held*, that the election board is required to commence their count at once on the close of a school election, and publicly, and in the presence of bystanders, conduct the same without adjournment until the count is completed, and after the result is declared and recorded and the ballots, together with their official returns, have been deposited with the clerk, the jurisdiction of the board over any matter concerned in the election ceases.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 220; Dec. Dig. ⇨243.]

5. ELECTIONS ⇨245—RETURN—CORRECTION—CONTEST.

After the result of a school election has been declared and recorded, and the ballots and the returns deposited with the clerk of the district, any review or correction of the returns must be under direction of the board of trustees of the school district or other canvassing board, as required by Pol. Code, § 1281a; there being no authority in law for the withdrawal by the board, on the day following the election, of their

official returns from the custody of the clerk for any purpose.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 222; Dec. Dig. ⇨245.]

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Election contest by Frank J. Bernardo against Joseph Rue. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Ross & Ross, of San Mateo, for appellant. Barrett & Thomas and Fabian D. Brown, all of San Francisco, for respondent.

RICHARDS, J. This was a proceeding instituted to contest the election of the defendant to the office of high school trustee at Half Moon Bay, Union high school district, held within said district on April 3, 1914. The action was commenced on April 21, 1914, and came on for trial on the 8th day of May, 1914. The plaintiff's case was presented on that day; and, at the conclusion of the evidence offered in his behalf, a motion for nonsuit was on the same day made by the defendant and granted by the court. On the 28th day of May, 1914, the court filed its findings and caused its judgment to be entered in defendant's favor; and from the order granting said motion for nonsuit, and from the judgment affirming the election of the defendant to the office in question, the plaintiff prosecutes this appeal.

[1] The first point urged by the appellant is that the case having been submitted and the motion for nonsuit granted on May 8, 1914, it was the duty of the court under section 1118a of the Code of Civil Procedure to file its findings and enter its judgment within ten days after the submission of the case; and that the court, having failed to do so within said time, lost jurisdiction to render its decision or enter a judgment after the expiration of the ten-day period within which it was permitted by the statute to act; and hence that the judgment rendered and entered in this proceeding is a nullity and must be reversed. We incline to the opinion that the sections of the act governing the court's action upon the trial of proceedings of this character are directory, in the absence of an express provision of the statute declaring them to be mandatory, and that, while the recent amendment to the Code of Civil Procedure, by which section 1118a was added, was evidently intended to hasten the work of the courts in passing upon election contests, it was not intended thereby to provide the parties to an election contest should lose valuable rights because of the delay of the judge in making or filing his findings and judgment. We think therefore that this point of the appellant is not well taken.

[2] The appellant further contends that the court erred in granting the motion for nonsuit at the close of the plaintiff's case.

The practically undisputed facts before the court, upon which such motion for nonsuit was made and granted, are these: On the 3d day of April, 1914, two elections were held in the town of Half Moon Bay, one for the election of a grammar school trustee and one for the election of a high school trustee; the polls of each of these elections being in different places. During the progress of the high school election a voter was noticed to have inadvertently dropped a grammar school ballot into the box at the time of the deposit of his high school ballot. When the polls closed, the ballots cast were dumped out of the ballot box on a table and, with the exception of this particular grammar school ballot, were counted, when it was found that 287 ballots had been cast. The election board did not compare this count of the ballots with the poll list of voters, as required by section 1253 of the Political Code, but proceeded to open the ballots and announce the count of the names written thereon. In so doing, it was found that there were four additional grammar school ballots, which were cast aside. During the progress of the count two high school ballots, folded together as one, were found, which the inspector declared "a stuffed ballot," and which was laid aside without being unfolded or counted at the time. Presently two other ballots folded together as one were found, which were similarly laid aside without unfolding or counting. When the count was completed, it was found that the plaintiff Bernardo had received 164 votes and the defendant Rue 117, and that there were four grammar school votes not counted for either. After the completion of the count, as above set forth, and while the judges of the election were in the act of writing down on their official tally list how many votes had been cast for the respective candidates, the inspector took up one of the two sets of double ballots and opened it and separated the ballots and showed them to the defendant Rue, and then asked:

"What are we going to do with these two ballots? They could have slipped together very easily when they were thrown in together. I think it is right to give them to Mr. Rue."

The board so decided, over the protest of the plaintiff Bernardo, and credited Mr. Rue with the two extra votes, making his total number 119 votes, and also making the total number of votes counted tally with the initial count of the ballots before the canvass began, but leaving the other of the two double sets of votes unopened and uncounted and out of question for the time being. The board then proceeded to fill out the official sheet showing the returns of the election, and, after doing so, they gathered up all of the ballots, including the four grammar school ballots, and also the remaining unopened and uncounted double set of ballots, and threw them into the ballot box, which they then delivered, together with their offi-

cial returns of the election, to the clerk of the high school district, who was not a resident of this precinct nor a member of this election board, and thereupon the election board and the bystanders dispersed.

In the meantime the election had also proceeded in the seven other polling places of the high school district, with the result that the plaintiff Bernardo received in these 131 votes and the defendant Rue 176 votes; these, added to the votes of each in the polling place in question, would give to each of the candidates a total of 295 votes and create a tie election.

It is fairly inferable that this result was known to the members of the election board of the precinct in question at least by the following day; but, however this may be, the undisputed evidence shows that on the following night, at least 24 hours after the election of the previous day was closed, and the vote canvassed, and the result announced and recorded, and the ballot box and official returns deposited with the clerk of the district, the members of this election board re-assembled in the back room of the saloon of one of their number, and which was a different place from that where the election had been held, and there, about 9 o'clock in the nighttime, and in the absence both of the public and of the contestants in the election, the members of the board proceeded to alter their formal official returns, which, in some way not revealed by the record, they had recovered from the clerk of the district, so as to add to the already recorded vote of the defendant Rue two additional votes, presumably those contained in the set of double ballots which, so far as the record discloses, they had never opened nor examined nor counted. The effect of this alteration was to give to the defendant Rue, upon the face of the altered returns, a majority of two votes in the election.

The foregoing undisputed facts were before the court in this proceeding at the time the motion for nonsuit was made. They show upon their face such a state of facts and such a repeated and willful disregard of the plain letter of the law regarding elections as would seem to render it perfectly plain that a motion for nonsuit ought not to have been granted in this case. Conceding the respondent's contention that the provisions of sections 1252-1260 of the Political Code are directory, and that, in the absence of insignia of fraud, election boards will not be held to a strict compliance with the statute, it would seem clear that, if this election board had followed the direction of the sections of the act above quoted, the result at which they arrived would have been impossible without a fraudulent purpose.

[3] It was the duty of the board, under section 1253 of the Political Code, to compare their count of the number of votes cast with the list of voters kept by the clerk.

Had they done this, they would have found that the count of the votes cast either did or did not correspond with the poll list, and this knowledge would have guided that board in determining whether the two sets of votes folded together were each to be counted as one vote or as two; but, having disregarded this requirement of section 1253, the board also proceeded to disregard the succeeding section of the Code, which reads:

"If two or more separate ballots are found so folded together as to present the appearance of a single ballot, they must be laid aside until the count of the ballots is completed; then, if upon comparison of the count with the number of names of electors on the lists which have been kept by the clerks, it appears that the two ballots thus folded together were cast by one elector, they must be rejected."

If the foregoing two sections of the Code had been followed and if the board were then still in doubt as to whether the two sets of double ballots should be counted each as one or as two votes, the succeeding section of the Code supplies the procedure by providing that, if the number of ballots is in excess of the names on the list, the ballots must be replaced in the box, and a number of ballots equaling such excess must be publicly drawn therefrom by one of the judges and destroyed unopened. It is evident that the election board were in some doubt as to whether these two sets of double ballots were illegal, and whether, if divided, they would cause the number of votes to exceed the number of voters, for they laid both of them aside during the regular count and did not in fact open or count one of these double sets of ballots at all. These repeated divergences from the plain letter of the statute, conceding it to be directory, nevertheless indicate the drift of this election board toward the precipice of a positive violation of the election laws, which of itself should suffice to invalidate this election.

[4] Section 1252 of the Political Code provides as follows:

"As soon as the polls are finally closed the judges must immediately proceed to canvass the votes given at such election. The canvass must be public, in the presence of bystanders, and must be continued without adjournment until completed and the result thereof is declared."

It is the plain intentment of this section of the act that the election board shall commence their count of the votes at once upon the close of the election, and that they shall publicly and in the presence of the bystanders conduct the same without adjournment until such count is completed and the result declared and recorded. When this is done, and the ballots, together with their official returns, have been deposited with the clerk of the school district as other sections of the act require, the powers and duties of the election board are at an end; and their jurisdiction over any matter concerned in the election ceases.

[5] Thenceforth any review or correction of their returns must be done under the di-

rection of the board of trustees of the school district, or other canvassing board, under the provisions of section 1281a of the Political Code. There was therefore no authority in law for the withdrawal by this board, on the day following the election, of their official returns from the custody of the clerk of the district for any purpose whatever; and, conceding their action in this regard to have been inspired by an honest motive, it was clearly beyond their lawful power. It is difficult, however, to make even this concession, in view of the circumstances under which this election board effected the alteration of their official returns. The conduct of the members of the board in reassembling in the night of the following day, 26 hours after the election, privately and in the back room of a saloon, and in there attempting to so alter their official returns as to change the result of an election, made up a series of improprieties which of themselves, and even in the absence of any other lapses in the course of the election, should have led the trial court to deny a motion for nonsuit and require affirmative proof justifying such a course of action and clearly establishing an integrity of motive as well as a rightfulness of result on the part of this board.

Whether or not a motion for nonsuit is the proper proceeding in an election contest may be open to question, in view of the language of section 1221 et seq. of the Code of Civil Procedure, requiring the court to hear and determine the proofs and allegations of the parties, and to file its findings of fact and pronounce its judgment either confirming or annulling such election, and also in view of the fact that an election contest is not an ordinary adversary proceeding between private parties, but is a proceeding in which the public is vitally interested and concerned. However this may be, it appears that in the case at bar the court, in addition to granting the motion for nonsuit, made and filed its findings of fact and conclusions of law at the time of entering its judgment in the case. The findings of fact of the court are as follows:

"I. That all of the allegations of plaintiff's and contestant's complaint and petition are untrue, except the allegations contained in paragraphs I, II, III, and IV thereof, which are hereby found to be true, and except the allegations thereof admitted to be true by defendant's answer, which are hereby found to be true.

"II. That all of the allegations contained in the answer of defendant and respondent on file herein are true."

In order to test the correctness of the foregoing findings, it is necessary to examine the answer of the defendant. It is found to consist of several pages of specific denials of the averments of plaintiff's pleading and also of several more pages of affirmative matter set forth as a separate answer and defense to plaintiff's action. The defendant, having made a successful motion for nonsuit at the close of plaintiff's case, was not required to

offer and in fact did not offer any evidence in support of the averments of his answer. One of the averments of defendant's answer was the affirmative allegation that the election officers "did publicly, correctly, and rightfully announce and declare that 164 votes had been cast in said school district for plaintiff and contestant and that 121 votes had been cast for said defendant and respondent herein." This affirmative averment of the defendant's answer was not only unsupported by any evidence in the case, but was positively negated by the affirmative and undisputed evidence above set forth, showing that the only time and manner in which the election board ever declared that the defendant Rue had received 121 votes in the election was upon the occasion referred to, when, 26 hours after the election was over and after the functions and power of the board had ceased, they privately, illegally, and wrongfully, and in a place where they had no business to conduct any part of the official proceedings of the election, changed the official returns so as to show a different result from that recorded upon the day of the election, and so as to change the result of the election itself. This is but one of a number of affirmative allegations of the defendant's answer, which were not only not supported by the evidence, but were directly negated by the undisputed proofs in the case. There are other alleged errors in the record; but the foregoing considerations render unnecessary their determination upon this appeal.

The order granting a nonsuit and the judgment confirming the respondent's election are reversed, and the cause remanded for a new trial.

We concur: LENNON, P. J.; KERRIGAN, J.

26 Cal. App. 116

Ex parte SMITH. (Cr. No. 282.)

(District Court of Appeal, Third District, California. Dec. 2, 1914.)

1. MUNICIPAL CORPORATIONS ⚡661—STREETS—RIGHT TO CONTROL.

The state has the original right to control streets in cities and towns, except that, under the Constitution, any city operating under a freeholder's charter has the exclusive right to pass ordinances as to "municipal affairs."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1432, 1434-1436; Dec. Dig. ⚡661.]

2. MUNICIPAL CORPORATIONS ⚡592—CITIES OF THE SIXTH CLASS—CONSTITUTIONAL POWERS.

Under Const. art. 11, § 11, the authority of a city of the sixth class is only to make local, police, and sanitary regulations, and such other regulations as are not in conflict with general laws.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. ⚡592.]

3. MUNICIPAL CORPORATIONS ⚡592—POLICE POWER—CONFLICT OF ORDINANCE WITH STATUTE.

A statute will override a conflicting city ordinance, other things equal, whether it precedes or follows it in point of time.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. ⚡592.]

4. MUNICIPAL CORPORATIONS ⚡703—POLICE POWER OF STATE—REGULATION OF SPEED OF MOTOR VEHICLES.

In the exercise of the police power, the state may make any reasonable regulation of the speed of motor vehicles on streets and highways that the Legislature deems necessary to protect life and property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. ⚡703.]

5. MUNICIPAL CORPORATIONS ⚡703—POLICE POWER—REGULATION OF SPEED OF MOTOR VEHICLES—CONFLICT OF ORDINANCE WITH STATUTE.

An ordinance of a city of the sixth class, limiting the speed of motor vehicles to 12 miles an hour within the city, conflicts with and is superseded by motor vehicle act (St. 1913, p. 639), which sets speed limits from 30 to 10 miles an hour, according to the character of the place through which the vehicle is passing.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. ⚡703.]

6. MUNICIPAL CORPORATIONS ⚡703—USE OF STREETS—STATUTES—CONSTRUCTION.

Motor vehicle act was intended to make uniform regulations concerning the operation of motor vehicles in incorporated cities and towns, since it expressly repealed all former acts on the same subject, whether or not consistent with it, and contains numerous specific provisions concerning the operation of motor vehicles and the duties of local municipal authorities in respect thereto.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. ⚡703.]

7. HIGHWAYS ⚡166—REGULATION OF USE—MOTOR VEHICLE ACT.

Motor vehicle act was intended to establish uniform regulations for the operation of such vehicles over all public ways in the state, whether within an incorporated municipality or not.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 457; Dec. Dig. ⚡166.]

8. MUNICIPAL CORPORATIONS ⚡703—USE OF STREETS—ORDINANCES.

Under motor vehicle act, directing local municipal authorities to post notices reading, "Slow down to ——— miles," the blank space is not for the insertion of the speed limit set by municipal ordinance, and therefore the provision does not impliedly recognize the validity of such ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. ⚡703.]

9. MUNICIPAL CORPORATIONS ⚡703—ORDINANCES—USE OF STREETS—CONSTRUCTION.

Motor vehicle act is a revenue measure, and overrides all municipal regulations of the same matter, to avoid the impairment of its efficacy as such measure, that must arise under any recognition of the power of municipalities in the premises.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. ⚡703.*]

J. C. Smith was convicted of violating the speed ordinance of Merced City, and applies for writ of habeas corpus. Writ ordered to issue.

L. J. Schino, of Merced, for petitioner. F. W. Henderson, of Merced, for respondent.

CHIPMAN, P. J. Petitioner was convicted of the offense of misdemeanor for violating the speed limit prescribed by ordinance of the city of Merced for automobiles, and was sentenced to pay a fine of \$20, and, if not paid, that he be imprisoned in the county jail until said "fine be duly satisfied, in proportion to one day's imprisonment for every \$2 of the fine." Failing to pay his fine, the petitioner was committed to the sheriff of the county, and it is from such commitment he seeks to be discharged.

It was charged in the complaint:

"That said J. C. Smith, on or about the 4th day of September, A. D. 1914, at Merced city, in the county of Merced, state of California, did willfully and unlawfully drive an automobile over the streets of Merced city at a greater rate of speed than 12 miles an hour."

Merced is a city of the sixth class, with a population of about 3,000 persons. For the purposes of the case, it was conceded at the hearing that at the time of his arrest petitioner was not exceeding the speed limit prescribed by the state law in the section of Merced where he was then traveling, but it does not appear upon what part of the street or in what part of the city he was traveling.

Ordinance No. 151 of the city of Merced, by section 14, provides as follows:

"No vehicle shall be allowed to be driven or run over the streets in the city of Merced at a greater rate of speed than twelve miles an hour."

And section 22 makes it a misdemeanor to violate any of the provisions of the ordinance, punishable by fine not exceeding \$100, or by imprisonment not exceeding 30 days, or both, and, in case the fine be not paid, "by imprisonment at the rate of one day for every two dollars of the fine so imposed." This ordinance was passed on January 2, 1911.

The motor vehicle act of 1913 (Stats. 1913, p. 639) is declared by its title to be:

"An act to regulate the use and operation of vehicles upon the public highways and elsewhere [enumerates many other purposes, such as payment of registration fees, licensing person operating motor vehicles, providing penalties for violating the provisions of the act, and the disposition of registration and license fees, fines and forfeitures]; * * * and to repeal all other acts or parts of acts either in conformity or in conflict with this act."

Some of the provisions of the act are as follows:

"Sec. 22. * * * (b) Every person operating or driving a motor or other vehicle on the public highways of this state shall operate or drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive a motor or other vehicle on

a public highway at such rate of speed as to endanger the life or limb of any person or the safety of any property: Provided, that it shall be unlawful to drive at a rate of speed in excess of thirty miles an hour: And provided, further, that in any event no person shall operate or drive a motor or other vehicle on any public highway where the territory contiguous thereto is closely built up, at a greater rate of speed than one mile in three minutes, or in the business district of any incorporated city and county, city or town, at a greater rate than one mile in four minutes, or at a greater rate of speed than one mile in six minutes where the operator's or chauffeur's view of the road traffic is obstructed either upon approaching an intersecting way, or in traversing a crossing or intersection of ways, or in approaching or traversing a bridge, dam, trestle, causeway or viaduct, or in going around corners or a curve in a street or highway."

Section 1 reads, in part, as follows:

"* * * (4) 'Public highways' shall include any highway, county road, state highway or state road, public street, avenue, alley, park, parkway, driveway, or public place in any county or incorporated city and county, city or town; (5) 'business district' shall mean the territory of any county or incorporated city and county, city or town, contiguous to public highway, which is at that point mainly built up with structures devoted to business; (6) 'closely built up' shall mean the territory of any county or incorporated city and county, city or town, contiguous to a public highway not devoted to business where for not less than a quarter of a mile, the dwelling houses on such highway average less than one hundred feet apart: Provided, that the local authorities having charge of such highway shall have placed conspicuously thereon at both ends of such closely built up section signs of sufficient size to be easily readable by a person using the highway, bearing the words 'Slow down to ——— miles' (inserting in the blank space preceding the word 'miles' the rate of speed prescribed by law and also an arrow pointing in the direction of the territory where the speed is to be reduced); (7) 'local authorities' shall include all boards of supervisors, trustees or councils, committees, and other public officials of counties, incorporated cities and counties, cities or towns; * * * (15) 'intersecting highway' shall mean any highway which joins another at an angle, whether or not it crosses the other. * * *

"Sec. 32. Excepting as in this act otherwise expressly provided, any person violating any of its provisions shall be deemed guilty of a misdemeanor, and upon conviction thereof unless in this act otherwise expressly provided, shall be punishable by a fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days, or both, for the first offense; and punishable by fine of not less than fifty dollars nor more than one hundred dollars, or imprisonment not exceeding thirty days, or both, for a second offense; and punishable by a fine of not less than one hundred dollars nor more than two hundred and fifty dollars, or imprisonment not exceeding thirty days, or both, for a third or a subsequent offense."

Section 36 provides for the payment of all fines and forfeitures to the treasurer of the county where collected, who shall—

"at intervals of not greater than once a month place such moneys in a fund to be called the 'county good road fund' or 'city and county good road fund,' as the case may be, which shall be used by the highway commission of the county or city and county, as the case may be, or by the board of supervisors * * * for the construction, improvement, maintenance and repair of such roads as shall be designated

* * * with regard to the proper and just distribution of the benefits of this act throughout the county or city and county."

"Sec. 40. This act shall be known and cited as the 'Motor Vehicle Act.' An act entitled 'An act to regulate the operation of motor vehicles upon public highways, and making an appropriation for the purpose of carrying out the objects of this act,' approved March 22, 1905, and all acts or parts of acts amendatory thereof are hereby expressly repealed, and all other acts and parts of acts inconsistent herewith, are hereby repealed."

Briefly stated, the motor vehicle act provides: First, that no motor shall be operated at "such rate of speed as to endanger the life or limb of any person or the safety of any property." This provision is independent of the provision fixing certain maximum speeds. The act then fixes the maximum rate of speed generally—I. e., in sparsely settled portions of the country, at 30 miles an hour; next, where "the contiguous territory is closely built up," the rate of speed is limited to 20 miles an hour; next, in the business districts of any incorporated city and county, city, or town, the limit is 15 miles per hour; and, finally, where "the operator's view of the road traffic is obstructed either upon approaching an intersecting way, or in traversing a crossing or intersection of ways, or in approaching or traversing a bridge, dam, trestle, causeway or viaduct, or in going around corners or a curve in a street or highway," the limit is 10 miles per hour.

The Merced ordinance fixes the limit of speed in all parts of the city at 12 miles per hour, regardless of crossings or intersecting streets or of obstructions to the view of the operator in approaching an intersecting way.

The authority of the city of Merced to pass ordinances is found in section 11, art. 11, of the Constitution:

"Sec. 11. Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

In the municipal corporation act relating to cities of the sixth class, it is provided, by section 862, that the board of trustees of said city shall have power:

"(1) To pass ordinances not in conflict with the Constitution and laws of this state, or of the United States." Stats. 1883, pp. 93, 269.

It is contended, on behalf of petitioner, that the Merced ordinance is void because in conflict with the motor vehicle act of 1905 (Stats. 1905, p. 816), as amended in 1907 (Stats. 1907, p. 915). This alleged conflict, it is claimed, consists in the fact that the ordinance fixes a rate of speed greater than that prescribed by the state law, and the further fact that, in violation of the principle enunciated in the case *In re Sic*, 73 Cal. 142, 14 Pac. 405, the ordinance punishes the same offense as that covered by the state law.

It is also contended that the ordinance, if not in conflict with the motor vehicle act of 1913, is unreasonable and not in exercise of

the police power. It is unreasonable in that it fixes one rate of speed for all parts of the city, in disregard of the requirements common to all similar ordinances regulating the speed of vehicles for the protection of persons and property at street crossings and in the business districts of the city where traffic is often congested. It is said not to be an exercise of the police power, because the main purpose of the ordinance is to secure to the municipal treasury the fines collected for violations which it is the design of the motor vehicle act should go to the road fund of the county.

Petitioner raises the still further question, namely, that the motor vehicle act, by its repealing provisions, was intended to repeal all acts and part of acts theretofore passed either by the Legislature or by municipal ordinances; that, if it did not have the effect of directly repealing local ordinances, it was intended as a "uniform law for the whole state in regard to the regulation of all motor vehicles, and thus do away with the great many automobile ordinances which had so vexed and annoyed the motorists of the state for so long. The circumstances under which the law was passed, and the notorious evils it was meant to remedy, certainly strengthen this view of the meaning of the act and the intention of the Legislature."

Upon this question, the Attorney General of the state, appearing *amicus curiæ*, contends that the only law now in force upon the subject is the act of 1913; that the effect of that act is to render inoperative ordinances of incorporated cities, towns, and of counties which attempt to regulate the speed of motor vehicles and to impose and collect fines for the violation of such ordinances.

[1] Except as to "municipal affairs" concerning which cities having freehold charters (Merced is not among them) are, by the Constitution, given exclusive authority to pass ordinances, and except where the state has relinquished control to municipalities, "the state in its sovereign capacity has the original right to control all public streets and highways" (*Western Union Tel. Co. v. Hopkins*, 160 Cal. 116, 116 Pac. 557); and this carries with it the power to make regulations for the use of streets in incorporated cities and towns. Section 36, art. 4, of the Constitution, provides that:

"The Legislature shall have power to establish a system of state highways or to declare any road a state highway. * * *"

This control of the use of public streets has not, so far as we are aware, been relinquished by the state.

[2, 3] Merced is a city of the sixth class, and, as we have seen, its authority goes no further than to "make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Section 11, art. 11, Const. If, therefore, the Merced ordinance may be

said to conflict with the motor vehicle act, or if this act can reasonably be held to have been intended to supplant all other legislation, state and local, with regard to the subject-matter of the act, clearly the Merced ordinance must stand aside. There may be a conflict where the act of the Legislature follows as well as where it precedes the local ordinance. It is immaterial how or when the conflict arises, if at the time of the alleged violation the ordinance is in conflict with existing general law.

[4] The motor vehicle act very properly provides for different speeds at different places and under different conditions in incorporated cities and towns for the obvious reason that where "the view of the road traffic is obstructed upon approaching an intersecting way," also when "traversing a crossing or intersection of ways," also "in approaching a bridge, dam, trestle, or viaduct," also in "going around corners or a curve in a street or highway," the danger to life and property is increased in direct proportion as the speed is increased. It follows that any reasonable rate of speed, deemed necessary for the protection of life and property, may be prescribed by the state as within its police power.

The Merced ordinance fixes one uniform rate of speed of 12 miles an hour for all parts of the city, whereas the state law limits the speed to 10 miles an hour where the conditions are as last above pointed out, and allows 15 miles an hour in other sections of the city. The Merced ordinance is in unmistakable conflict with the state law in allowing a speed of 12 miles per hour where the state law limits it to 10 miles. The right of the city to regulate the rate of speed is claimed upon the reasoning in the case *In re Hoffman*, 155 Cal. 114, 99 Pac. 517, 132 Am. St. Rep. 75. In that case the state law was a general regulation for the sale of milk. It did not purport to make regulations for incorporated cities, nor did it purport to limit the power of municipalities to legislate upon that subject. In the present case the motor vehicle act deals specifically with the speed of motor vehicles within incorporated cities and towns, and the regulations differ materially from those applicable to such vehicles operated outside of incorporated municipalities.

[5] In passing through the city of Merced with a motor vehicle the operator might, while endeavoring in good faith to obey the law, find himself driving within his rights under the state law and at the same time be violating the local ordinance, or he might be driving no faster than the ordinance allows, and yet be in violation of the state law. It seems to us that the Merced ordinance in its present form is in irreconcilable conflict with the state law.

[6] But, aside from these considerations, we are of the opinion that the motor vehicle act was intended to provide uniform regula-

tions to govern all persons in operating motor vehicles in incorporated cities and towns, unless it may be where some exceptional conditions in such cities and towns demand a lower rate of speed in some parts thereof than is prescribed by the state law and such conditions clearly appear.

We have given the provisions of the motor vehicle act at some length for the purpose of showing its scope and, if possible, to disclose the intention of the Legislature in enacting it. Its title declares its intention to be to repeal all acts "consistent" as well as "in conflict" with it; in the body of the act public highways are declared to "include any public street, avenue, alley, park, parkway, or public place in any county or incorporated city and county, city or town"; it fixes different rates of speed for vehicles to meet the requirements for safety in traversing the streets of such cities and towns; it directs the local authorities having charge of the streets to assist in the execution of the law by placing "conspicuously thereon at both ends of such closely built up section signs of sufficient size to be easily readable to a person using the highway, bearing the words 'Slow down to ——— miles' (inserting in the blank space preceding the word 'miles' the rate of speed prescribed by law and also an arrow pointing in the direction of the territory where the speed is to be reduced)"; and it defines who are meant by "local authorities"; it punishes a violation of the act by fine and directs that all fines shall be used for road purposes; it appropriates quite a large sum of money to be used by the engineer department and otherwise in carrying out the provisions of the law; it provides for the issuing of licenses to dealers in motor vehicles and to persons operating motor vehicles with which they become entitled to use the highways of the state subject to the regulations prescribed by the act for such use, and all revenue received from the original registration of these vehicles is to be used in the construction and improvement of the state and county highways, divided equally between the state and the county from which the registration comes; and finally it expressly repeals the act of 1905 and its amendatory acts "and all other acts and parts of acts inconsistent herewith."

The motor vehicle act, as is plainly manifest, has for its object the regulation of licensing and operating motor vehicles and the raising of revenue for the improvement of the state highways. Its importance as a means of raising revenue for this purpose can at once be seen from the amount derived for the six months ending June 30, 1914. The official reports show that the motor vehicle license amounted for that period to \$1,218,466. There were 106,181 auto registrations and 21,701 motorcycle registrations. Besides these, licenses were issued to 635 auto dealers, 184 motorcycle dealers, and 12,316 chauffeurs, all of whom paid license

fees which are to be devoted to the same uses. It will be recalled that the Legislature submitted to the people of the state (Stats. 1909, p. 647) a general highway scheme involving a bonded indebtedness of \$18,000,000. The act was approved by popular vote at the election in 1910. It was provided, by section 4 of the act, that the moneys derived from the sale of these bonds "shall be used exclusively for the acquisition of the rights of way for and the acquisition and construction of a system of state highways," and the act contemplated a highway system "to constitute a continuous and connected highway system" traversing the Sacramento and San Joaquin valleys and along the Pacific Coast, "connecting the county seats of the several counties through which it passes and joining the centers of population, together with such branch roads as may be necessary to connect therewith the several county seats east and west of such state highway." Section 8 provides:

"All public highways within the state lying within the right of way of said state highway as determined and adopted by the department of engineering shall be and the same shall become a part of the right of way of said state highway, without compensation being paid therefor."

Section 9 (Stats. 1907, p. 218) places the department of engineering in "full possession and control of all roads * * * or other state highways which may hereafter be constructed."

[7] Under this contemplated system, now in course of execution, one or more streets in Merced, as in other county seats, will become a part of the state highway and the right to regulate the speed of vehicles over such streets should be in the state. We think it safe to say that the motor vehicle act is intended in no small degree to supplement the highway act of 1909, for it deals with and regulates the speed of all vehicles over all the highways and all the streets in the state, whether within or without incorporated cities and towns. It is inconceivable that the Legislature, in requiring the "local authorities" to post notices of the speed permitted under state law, contemplated that the local authorities might allow a different speed over the same street and punish the person who exceeded it.

[8] It is suggested by respondent that the direction given in the act to these "local authorities" to post notices requiring persons using the street "to slow down ——— miles," means that the blank space was intended by the Legislature to authorize the municipality to insert therein the speed prescribed by the municipality. Obviously this interpretation is unwarranted.

[9] The motor vehicle act is essentially a revenue law as well as a regulatory measure. To allow incorporated cities and towns unrestricted authority to impose and collect fines for municipal purposes would tend to

defeat one of the objects of the act, for it is common knowledge that most of the prosecutions for infractions of speed regulations arise within incorporated cities and towns. The view contended for by respondent would justify every municipality in the state in passing and enforcing ordinances different from the state law and different from each other, thus placing a most vexatious burden upon the users of our streets and highways in compelling them to become familiar with all these statutes. It seems to us that the Legislature intended by the motor vehicle act to avoid this possible confusion in the law governing the speed of motor vehicles.

The writ is granted, and the petitioner is discharged.

We concur: HART, J.; BURNETT, J.

26 Cal. App. 166

SEBREE et al. v. THOMPSON et al.

(Civ. 1401.)

(District Court of Appeal, First District, California. Dec. 10, 1914. Rehearing Denied by Supreme Court Feb. 8, 1915.)

PRINCIPAL AND AGENT Ⓒ166—ATTORNEY IN FACT—DEEDS—RATIFICATION.

Where an attorney in fact executed a deed to certain real property for his clients, with their knowledge, consent, and approval, in consideration of the settlement of certain litigation which he was managing for them by virtue of his power of attorney, the deed was binding on them and vested title in the grantee and her subsequent successors in interest, though the power did not confer express authority to execute the deed as made.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 627-633; Dec. Dig. Ⓒ166.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Dudley Sebree and others

against C. L. Thompson and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

A. H. Carpenter, of Stockton, for appellants. Everts & Ewing and Geo. Cosgrave, all of Fresno, for respondents.

PER CURIAM. This is an appeal by plaintiffs from a judgment in favor of defendants in an action to quiet title.

Joseph McKinney, who was a resident of San Joaquin county, state of California, died there on April 8, 1893, leaving a will, by the terms of which he left his real and personal property to Olive Jennings. He was of negro blood, born in slavery, and was a half-brother of the plaintiffs in this action. They had scarcely remembered him and had lost trace of him. The defendant, J. H. Kyle, who was an attorney practicing in Missouri, having become aware of the terms of McKinney's will and of the conditions of the estate, looked up his half-brothers; and, after having imparted to them the information he possessed concerning the estate, they and he entered into a contract, by the terms of which he was to contest the probate of the will, and to receive for his services a certain specified amount, provided he was successful. At the same time they executed to him a power of attorney, which vested him with certain authority concerning sales and conveyances of property, and the commencement and settlement of lawsuits. The will of McKinney had in the meantime been admitted to probate, and Kyle, who had come to California immediately upon the execution of the contract and power of attorney, after a fruitless effort to effect a compromise with Olive Jennings, filed a petition for the revocation of the probate of the will. This proceeding resulted in a judgment revoking such probate. In due time an appeal was perfected to the Supreme Court by the proponent of the will, and the contestants, apparently fearing the result of the appeal, effected a compromise with Olive Jennings in 1896, under the terms of which the appeal was dismissed, and she received under the compromise a conveyance of certain lands belonging to the estate. As a part of the same transaction, a certain other portion of the estate was conveyed to Kyle in settlement for the legal services he had rendered to plaintiffs. The conveyances thus made were made by Kyle as the attorney in fact for the plaintiffs. Kyle's codefendants claim through him. It is the validity of the deed by Kyle that is questioned in this proceeding.

It has been held in two cases springing out of this transaction that Kyle was not authorized, under the express terms of the power of attorney, to make a conveyance of any of the lands of the estate. *Alcorn v. Buschke*, 133 Cal. 655, 66 Pac. 15; *Alcorn v. Gieseke*, 158 Cal. 397, 111 Pac. 98. But it was held in the latter case—as we hold in this

(the facts being substantially the same)—that the deed in question was executed by Kyle with the knowledge and consent of the plaintiffs, and hence was ratified by them. True, according to the plaintiffs' testimony, there was no ratification of the acts of Kyle, but, on the other hand, the evidence shows that they accepted their share of the property and exercised acts of ownership over it, and acquiesced in the division made for 11 years. One of the brothers was here on the ground looking after their interests during the negotiations of settlement and actively participated in effecting the compromise and division of the estate. Kyle also testified that the plaintiffs residing in the East were kept informed by letters of each of the steps taken in the whole matter, and in particular concerning the negotiations for a compromise of the litigation and of the settlement thereof; and that they by letters approved of what he had done in this regard. True, these last-mentioned letters were lost in a fire which destroyed Kyle's office, and therefore could not be introduced in evidence; but this only affected the weight of the evidence. Any further discussion of the evidence is unnecessary, especially as a very complete review of the same is to be found in the case of *Alcorn v. Gieseke*, supra. From these considerations it appears that the finding upholding the validity of the deed in controversy is supported by the evidence.

Other points in the case, challenging the sufficiency of the pleadings on behalf of the defendants, have less merit than the one just discussed, and accordingly no comment need be made upon them.

Judgment affirmed.

26 Cal. App. 133

WOLVERINE BRASS WORKS, Inc., v. PACIFIC COAST CASUALTY CO. OF SAN FRANCISCO. (Civ. 1399.)

(District Court of Appeal, First District, California. Dec. 11, 1914. Rehearing Denied by Supreme Court Feb. 8, 1915.)

INSURANCE ⚡256—**FIDELITY INSURANCE**—**AVOIDANCE FOR BREACH OF WARRANTY.**

Insured's false answers or statements in his letter or application for an indemnity bond against loss through his cashier, that the cashier had never been in arrears, that he knew no reason why the bond should not be issued, and that he was not indebted to him, declared by the policy to be warranties and part of the contract, were warranties broken in their inception, and, under Civ. Code, § 2612, the policy never attached to the risk; and the fact that insured made such statements in good faith and without negligence in the examination of its books, which would have disclosed the cashier's prior embezzlement, was immaterial.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 540, 549; Dec. Dig. ⚡256.]

Appeal from Superior Court, City and County of San Francisco; Stanley A. Smith, Judge.

Action by the Wolverine Brass Works, Incorporated, against the Pacific Coast Casualty Company of San Francisco. Judgment

for plaintiff, and defendant appeals. Reversed.

Myrick & Deering, of San Francisco (James Walter Scott, of San Francisco, of counsel), for appellant. Oliver Ellsworth, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial in an action upon a policy of insurance, issued by defendant, insuring the plaintiff against loss through the dishonesty of one Edwin J. Pope, its employé.

Some time prior to the 15th day of July, 1910, Edwin J. Pope, who at that time was employed by plaintiff as cashier, applied to the defendant for an indemnity bond in a certain sum. Thereupon defendant addressed a letter to plaintiff containing certain questions to be answered by it. Among these were:

"Has he [referring to Pope] ever been in arrears with you, or do you know of any reason why this bond should not be issued?" and "Is he now in debt to you?"

To both questions the plaintiff, through one of its officers, answered, "No." The document containing the questions with their answers was returned to the defendant about the 18th day of July, and about a month later the indemnity bond upon which the present suit is brought was issued, relating back to June 15, 1910, as the date on which the risk was to take effect. Within the life of the bond Pope embezzled \$1,255.79 from the plaintiff. At the trial it was also established that there had been a prior embezzlement by Pope, while in the employ of the plaintiff, concerning which, however, the testimony shows that plaintiff was ignorant at the time of the negotiations for the present bond.

According to one of the stipulations of the policy, the statements or answers made in the letter of July 15th for the purpose of procuring the bond were declared to be warranties and part of the contract of insurance.

At the conclusion of plaintiff's case, which showed the facts above detailed, defendant moved for a nonsuit, which was denied; whereupon, and without any testimony being introduced by the defendant, the case was submitted to the jury, with the result already indicated.

We think that the defendant's contention must be sustained that under the proof the court should have directed a verdict in its favor. The above-mentioned warranties being false, the policy issued in reliance upon them was, in our opinion, void ab initio. When a warranty is broken in its inception, the policy never attaches to the risk which it purports to cover. Civ. Code, § 2612; Wenzel v. Commercial Ins. Co., 67 Cal. 438, 7 Pac. 817.

"As a warranty is in the nature of a condition precedent to the validity of the policy, and must be literally true, if the fact warranted is not true, there is a breach of the warranty. It follows as a matter of course that a breach of warranty will avoid the policy." Cooley's Briefs on Insurance, vol. 3, p. 1950.

Plaintiff does not deny this as a sound proposition of law, nor is it denied, nor could it well be, that, so far as the phraseology of the bond and application therefor is concerned, the truth of the answers to the questions propounded in the application is warranted by the plaintiff. It claims, however, that inasmuch as the evidence showed that those answers were made in good faith, and without any negligence in the examination of the books—which might have led, but did not, to a knowledge of the prior embezzlement—the bond is valid, and the judgment should consequently stand. But the answers quoted, relating as they do to the existence of arrears by Pope in his then employment, had a direct and vital bearing upon the contract of insurance (Frost on Guaranty Insurance, 69), and they being, as we have seen, warranties, it is not important, according to the great weight of authority, that the party making them really believed them to be true. Being false in fact, the contract was thereby rendered void. In American Credit Indemnity Co. v. Carrollton, etc., Co., 36 C. C. A. 671, 95 Fed. 111, it is said:

"When there is a distinct agreement that an application for insurance is a part of the contract, and the statements in the application are expressly declared to be warranties, they are to be treated as such, and not merely as representations, and must be strictly true, or the policy will not take effect."

So in *Ætna Life Ins. Co. v. France*, 91 U. S. 510, 23 L. Ed. 401, the same rule is declared:

"It is only necessary to reiterate that all the statements contained in the proposal must be true; that the materiality of such statements is removed from the consideration of a court or jury by the agreement of the parties that such statements are absolutely true; and that, if untrue in any respect, the policy shall be void."

In that case, as in this, the application was made the basis of the policy.

In *Clemans v. Supreme Assembly R. S. of G. F.*, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33, the court says:

"The answer was a warranty, and upon this evidence there was a breach thereof. * * * It is not important that the party making the warranty really believed in its entire truth. If it be false, it avoids the contract."

See, also, *Cobb v. Covenant Mut. Benefit Ass'n*, 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. Rep. 619; *Model Mill Co. v. Fidelity & Deposit Co.*, 1 Tenn. Ch. App. 365.

It follows that the judgment and order should be reversed, and it is so ordered.

We concur: LENNON, P. J.; RICHARDS, J.

26 Cal. App. 198

GROM v. CENTER et al. (Civ. 1248.)

(District Court of Appeal, Third District, California. Dec. 14, 1914.)

MECHANICS' LIENS § 33—STATUTORY PROVISIONS—"IMPROVEMENT."

Under Code Civ. Proc. § 1191, providing that any person who, at the request of the owner of any lot in any city or town, grades, fills in, or "otherwise improves the same," or makes any improvements in connection therewith, has a lien for the work done and materials furnished, one planting a vineyard has a lien therefor, though he did not furnish the materials, since the planting of a vineyard is the making of an "improvement," which refers generally to those things which are permanent, and since there is no distinction between one furnishing materials and the one performing labor in effectuating an improvement.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 32, 33, 38; Dec. Dig. § 33.

For other definitions, see *Words and Phrases*, First and Second Series, *Improvement*.]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Joseph Grom against Mary Center and another. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

James A. Nowland, of St. Helena, and Clarence N. Riggins, of Napa, for appellants. E. S. Bell, of Napa, for respondents.

BURNETT, J. The action was to foreclose a lien for planting a vineyard on the property of said Mary Center, situated within the incorporated limits of the town of St. Helena.

The particular allegation of the complaint important here is as follows:

"That in the months of March and April, 1912, said Mary Center and one Richard W. Fealy, a defendant herein, caused a vineyard to be planted upon said land, and that during the setting out of the same, and at their request, the plaintiff furnished and performed the labor actually used in planting said vineyard, and that they and the plaintiff mutually agreed on or about the 22d of March, 1912, that the said plaintiff should plant said vineyard on said land; that he should commence said planting immediately and do said work in a satisfactory manner; and that upon completion thereof he should be paid by said defendants therefor at the rate of two cents a vine, which was and is the reasonable value of said work at said time and place."

This is followed by allegations of the faithful performance of the work by plaintiff and of the amount still due and unpaid. A demurrer to the complaint was sustained; it being the opinion of the lower court that it was not a proper case for a lien.

The statutory provision upon which appellant relies is the portion we have italicized of section 1191 of the Code of Civil Procedure, as follows:

"Any person who, at the request of the reputed owner of any lot in any incorporated city or town, grades, fills in, or *otherwise improves the same*, or the street or sidewalk in front of or adjoining the same, or constructs any areas, or vaults, or cellars, or rooms, under said

sidewalks, or makes any improvements in connection therewith, has a lien upon said lot for his work done and materials furnished."

While no case entirely like this has been found, appellant believes that the situation is covered by the principles announced in 22 Cyc. 5; *California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 118 Pac. 103, 113; *Donehoo v. Johnson*, 113 Ala. 126, 21 South. 70; *Thompson v. Buckner* (Ky.) 40 S. W. 915; *Gibson v. Fields*, 79 Kan. 38, 98 Pac. 1112, 20 L. R. A. (N. S.) 378, 131 Am. St. Rep. 278, 17 Ann. Cas. 405.

In Cyc., supra, it is declared that an "improvement is more extensive than ordinary repairs and enhances, in a substantial degree, the value of the property"; and, "when the term 'improvements' is used, reference is generally had to those only which are permanent or beneficial."

In *California P. C. Co. v. Wentworth*, supra, it was held by the District Court of Appeal for the Second District that a lien was properly allowed for the furnishing of trees, shrubs, plants, flowers, seeds, bulbs, etc., for a hotel lot in the city of Pasadena; the court saying that:

"The furnishing and planting of seeds, trees, and shrubs, and the caring for the same for such a period of time as would insure that the seeds had become well started and that the plants and trees were thoroughly settled in the ground, would seem to be an improvement to the real estate, which was among those intended to be included in the provisions of section 1191, Code of Civil Procedure. It is probably not true that under the terms of this section a gardener or tiller of the soil could claim a lien by reason of labor expended in the general care of trees or crops, but under the contract made by Chisholm it appears that he was only to plant the seeds, trees, flowers, shrubs, etc., and to see that they were well started after being placed in the ground."

In the Alabama case, supra, the question was as to whether an apple orchard constituted "a permanent improvement," and the court said:

"The evidence discloses that the value of the land itself was enhanced by the orchard, and that such improvements are permanent we do not think can admit of controversy. 10 Am. & Eng. Ency. of Law, 243, and notes."

In *Thompson v. Buckner*, supra, the Court of Appeals of Kentucky held that a good stand of clover and orchard grass must be regarded as an improvement, since it materially enhanced the salable value of the land.

In the Kansas case, supra, it was declared that:

"While it is recognized as the general rule that the plowing and cultivation of land therefore under cultivation does not constitute a 'permanent improvement,' the breaking and reducing of wild lands to cultivation does constitute such improvement."

In the note to said case, as reported in 20 L. R. A. (N. S.) 378, are collated many decisions as to what comes within the purview of "improvements," to which reference may be had for further instances.

We can see no ground for holding that the

planting of a vineyard is any less an improvement to the land than "the planting of lawns and shrubbery" or "of an apple orchard" or "of clover and meadow grass" or "the breaking and reducing of wild lands to cultivation." The planting of a vineyard is generally supposed to be, not only an important and valuable improvement to the land, but one of a lasting and somewhat permanent nature. It is assuredly supposed to enhance the value of the land, and the vines become a vital part of the realty. It is true that appellant did not furnish the vines, but the statute makes no distinction between the one who furnishes the material and him who performs the labor in effectuating the improvement. The lien is granted for the "work done and materials furnished." If the plaintiff had furnished the vines as well as planted them, it seems that no question could be raised that he had improved the land and would clearly be entitled to the lien. Since, however, the work of improving the land, as well as the contribution of material *for such purpose*, is made by the statute a basis for the claim of lien, the present case could be no different in principle from the contingency suggested. In other words, the plain meaning of the statute is that whoever contributes to the substantial improvement of the lot, either by furnishing work or material, is entitled to the privilege of so enforcing his claim.

Respondents claim:

"That the meaning and the purpose for which the said statute was enacted was to create a lien for all work performed by a contractor or a person in grading a street, or placing a sidewalk in front of one's property, or for filling a lot within the incorporated limits of a city, and not for work performed by one in the cultivation or tilling of another's land."

But this view ignores the significance of the expression "or otherwise improves the same," and loses sight of the said decision of the appellate court and cases from the Supreme Court there cited. It may be said, also, that the planting of a vineyard stands on an entirely different footing from the ordinary cultivation of the soil. It may be doubted whether, for the latter, said section affords a lien, since that is probably not such improvement as the statute exacts.

It may be suggested that what we understand to be the plain and natural construction of said statute does not seem to involve any injustice, and it is in harmony with the manifest policy of the law to protect those who furnish labor or material to the advantage of the owners of property. In the nature of things, there seems no stronger reason for allowing a lien to one who grades or fills in the lot than to him who effects or contributes to the improvement herein considered.

The only case cited by respondents in support of their position is *Nanz v. Cumberland Gap Park Co.*, 103 Tenn. 306, 52 S. W. 999, 47

L. R. A. 273, 76 Am. St. Rep. 650. In that case the court reaffirmed the well-established rule that a liberal construction should be given to what is known as the mechanics' lien law, but it is declared that this applies only in favor of parties who are clearly entitled to such lien under the statute. Attention is called to the fact that the mechanics' lien law is purely a creation of and regulated by the statute, and therefore but little aid can be derived by the courts of one state from decisions in other states, unless the statutes are identical, "which is probably not the case in any two states in the Union." Many of the decisions are reviewed, and the court proceeds:

"These holdings are largely based, if not altogether, upon the special wording and phraseology of the statutes under which they are made; and, while they are instructive, they are not controlling under our statute. In the present case, the contention is that the lien rests upon a proper construction of the terms used in the statute, 'improvements made'; but we think it evident, from a reading of the statute, that the improvements therein referred to are such as buildings and structures. The latter part of the section uses the expression 'building contemplated in this section'; and this construction of these terms is strengthened by the use and the connection in which they are used * * * in other sections. * * * In the case at bar, the complainants 'improved' the property by putting on it flowers, shrubs, trees, and by grading and probably graveling the grounds and walks, but they made no erections, structures, buildings, fixtures, or machinery."

And therefore it was held that no lien would attach for such "improvements." The particular statute therein construed provides:

"There shall be a lien upon any lot of ground or tract of land upon which a house has been constructed, built or repaired or fixtures or machinery furnished or erected or improvements made, by special contract with the owner or his agent, in favor of the mechanic or undertaker, founder or machinist, who does the work, or any part of the work, or furnishes the materials or any part of the materials or puts thereon any fixtures, machinery or material, either of wood or metal, and in favor of all persons who do any portion of the work or furnish any portion of the material *for the building* contemplated in this section."

The difference between that section and the one herein involved is quite manifest. In fact, said section 1191, Code of Civil Procedure, does not contemplate a building at all, but provides for improvements to the lot or to the street or sidewalk in front of or adjoining the same.

As we conceive it, the only ground upon which could be excluded the improvement herein made would be to hold that the principle of *ejusdem generis* is applicable to the provision "grades, fills in, or otherwise improves the same," but this would be an arbitrary construction of the terms employed.

The judgment is therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

26 Cal. App. 177

ASBESTOS MFG. & SUPPLY CO. v. LENNIG-RAPPLE ENGINEERING CO. et al. (Civ. 1263.)

(District Court of Appeal, Third District, California. Dec. 11, 1914.)

1. PARTNERSHIP ⇨284—DISSOLUTION—LIABILITIES—EXISTING CONTRACT.

Where plaintiff agreed to furnish to a copartnership certain materials for a gross sum, and the partnership was dissolved before all the materials were furnished, but plaintiff did not release the retiring partner, or accept the surviving partner's liability on the contract, plaintiff can recover from the partnership for the material furnished after the dissolution.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 629; Dec. Dig. ⇨284.]

2. PARTNERSHIP ⇨284—DISSOLUTION—LIABILITIES—EXISTING CONTRACT.

The partnership is also liable for extras furnished after the dissolution which were necessary to complete the work it had contracted for.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 629; Dec. Dig. ⇨284.]

3. PARTNERSHIP ⇨191—ACTIONS AGAINST—STATUTE.

Under Code Civ. Proc. § 388, providing that, when two or more persons are associated in business under a common name, they may be sued by such common name, a partnership is a legal entity for the purpose of such suit, and judgment may properly be entered against it.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 349-353; Dec. Dig. ⇨191.]

Appeal from Superior Court, City and County of San Francisco; W. D. Dehy, Judge.

Action by the Asbestos Manufacturing & Supply Company against the Lennig-Rapple Engineering Company, a copartnership, and others. Judgment for the plaintiff against the Lennig-Rapple Engineering Company, and that defendant appeals. Affirmed.

C. F. Kimball, of San Francisco, for appellant. Edwin H. Williams, of San Francisco, for respondent.

CHIPMAN, P. J. Plaintiff brings the action to recover for material and labor which it is alleged defendants, about July 1, 1910, contracted with plaintiff to furnish, and that defendants agreed to pay therefor the sum of \$1,300; alleged full performance on plaintiff's part and the completion and acceptance of the work, about February 15, 1912; that at all the times mentioned in the complaint the defendant Lennig Engineering Company, and plaintiff, Asbestos Manufacturing & Supply Company, were corporations, and that defendants E. B. Lennig and J. W. Rapple constituted the copartnership of Lennig-Rapple Engineering Company. In a second count the sum of \$34.83 is claimed for extra materials furnished. Said materials were furnished and labor performed upon the Hall of Justice, in San Francisco.

The court granted a nonsuit as to defendants Lennig Engineering Company, a corporation, and E. B. Lennig, as an individual,

and J. W. Rapple, as an individual, on the authority of *Redwood City Salt Co. v. Whitney*, 153 Cal. 421, 423, 95 Pac. 885. Judgment passed only against Lennig-Rapple Engineering Company, a copartnership composed of E. B. Lennig and J. W. Rapple. We need, therefore, concern ourselves only with the answer of this defendant and its defense to the action, although the answer is jointly made by the copartnership and the said members thereof. They deny the making of the alleged or any contract with plaintiff; admit the alleged copartnership, and that it existed until the 30th day of December, 1910, when it was dissolved, and plaintiff had notice thereof soon thereafter; that, upon the dissolution of said copartnership, defendant E. B. Lennig agreed in writing to assume all liabilities of said copartnership, "and continued to carry on the business formerly conducted by the said copartnership until the incorporation of the defendant Lennig Engineering Company," which, it is alleged, was not organized or incorporated until on or about the 5th day of August, 1911; admit that "certain work was completed by plaintiff on said structure on or about February 15, 1912," but deny that the said work was accepted by defendants; allege that at the time of the dissolution of said copartnership as aforesaid "there was nothing due or owing to plaintiff, * * * and that subsequent to said dissolution of said copartnership and long prior to the commencement of this action the said plaintiff accepted the said corporation defendant, Lennig Engineering Company, as its debtor for all of its claims, * * * and released these defendants and each of them from all liability thereon, and thereafter billed all of its said claims to said corporation defendant." Similar answer is made to the second count of the complaint.

The cause was tried by the court without a jury, and judgment went for plaintiff against the Lennig-Rapple Engineering Company, a copartnership composed of E. B. Lennig and J. W. Rapple, defendants, for the sum of \$919.83, with interest from April 13, 1912, the date of the commencement of this action. From a judgment and from the order denying its motion for a new trial this defendant appeals.

The court found as facts:

"That, on or about July 1, 1910, said defendant employed plaintiff to perform certain labor and furnish certain materials for the purpose alleged in the complaint, and agreed to pay therefor the sum of \$1,300, in payments as alleged; that plaintiff duly performed all the conditions of the agreement, which was fully completed February 15, 1912; that said defendant has paid to plaintiff, on account of said agreement, the sum of \$375, and plaintiff has allowed the sum of \$40 as a credit thereon, and no more, leaving a balance due of \$885; that plaintiff furnished to said defendant extra material of the value of \$34.85, at its request, for which it promised to pay said sum; that at no time

prior or subsequent to December 30, 1910, did plaintiff accept said Lennig Engineering Company, or any other person, for any of said materials or labor, as its debtor, and plaintiff did not at any time release said Lennig-Rapple Engineering Company, and that plaintiff did not bill said claims or any of them to said Lennig Engineering Company."

As its conclusion of law, the court found that plaintiff was entitled to judgment for \$919.83, with interest from April 13, 1912, the date of the commencement of the action.

It was stipulated at the trial that plaintiff actually performed the labor and furnished the materials to the extent claimed in the complaint. It was also stipulated that defendant copartnership was dissolved December 30, 1910, defendant E. B. Lennig having withdrawn therefrom, and that plaintiff had notice of this fact shortly thereafter. It was also stipulated that the Lennig Engineering Company was incorporated August 15, 1911, all of which plaintiff had notice soon thereafter, and that, from December 30, 1910, until the incorporation of said company, E. B. Lennig carried on business, with plaintiff's knowledge, under the name of Lennig Engineering Company.

The alleged contract was in writing and consisted of a letter written by plaintiff to defendant Lennig-Rapple Engineering Company, of date July 1, 1910, followed by another letter dated July 7, 1910, containing specifications of the labor and materials to be furnished in performing the contract. Defendant copartnership replied, of date August 1, 1910.

"We are pleased to accept your proposition under date of July 1st, 1910. All the work to be performed in strict accordance with plans and specifications of the city architect and to be done to his entire satisfaction. Payments to be made as stipulated in your letter under date of July 7th, 1910."

It appeared that some of the labor was performed and some of the materials furnished after December 30, 1910. The job was not completed, in fact, until in February, 1912.

The only questions presented by appellant we give in the language of its brief:

"(1) Upon receiving notice of the dissolution of the partnership, plaintiff could not by furnishing labor and materials to the continuing partner alone thereby impose a liability therefor upon the retiring partner; and (2) in no event could a judgment be rendered against the partnership which almost two years before the trial had been dissolved, and at the time of the judgment had no existence either in fact or in law. If the retiring partner can be held for the price of labor and materials furnished after the dissolution, the only proper judgment could be against E. B. Lennig and J. W. Rapple, formerly doing business as copartners under the name of Lennig-Rapple Engineering Company. The judgment against a partnership which did not exist was improper."

Appellant concedes that there was no "novation or substitution of the continuing partner, Lennig, in the place of the partnership as plaintiff's debtor." Appellant concedes also that whatever was due at the time of

the dissolution (which it appeared was about \$125) is justly chargeable against the retiring partner.

The contention simply is this: That under the facts plaintiff could not impose a liability upon the retiring partner which the court did by its judgment against the copartnership; and, this, because the judgment is collectible not only out of partnership assets, but also out of the assets of the retiring partner, who in this instance was served with process and appeared in the case.

Respondent's contention is "that where a partnership enters into a written contract, and promises to pay a certain price for work which it orders done, it is absolutely bound by its promise the same as an individual or corporation would be," and that upon the dissolution of the partnership with or without notice to the other party its liability as a partnership continues, unless terminated in some recognized legal manner—citing *Gilmore on Partnership*, § 80, where it is said:

"The liability on all partnership obligations which have been properly created during the continuance of the relationship can be terminated only in one of the methods recognized by law for the termination of joint contracts in general, viz., payment, release, merger, novation."

[1] The general rule is stated in *Cyc.* as follows:

"The dissolution of a firm does not deprive a partner of the power to perform on behalf of the firm existing contracts, nor does it relieve him of the duty of having them performed. On the other hand, such dissolution does not ordinarily absolve third persons from their contractual obligations to the firm." 30 *Cyc.* 661.

There was evidence sufficient to support the findings. If the labor and material had been furnished upon separate orders given as required from time to time for different purposes, the liability thus arising would take the date of the order and defendant's contention, and the cases cited by it might have some application. Defendant copartnership contracted to pay to plaintiff a certain gross sum (\$1,300) for certain specific materials and certain labor necessary to the completion of a certain specific job. The obligation to perform on plaintiff's part was to perform an entire and indivisible piece of work, and reciprocally, defendant's obligation was to pay a specified sum for such work. This obligation was a continuing obligation of the partnership as constituted when the obligation was entered into. The dissolution of a partnership by the withdrawal of a member will not affect its liability upon contracts made while he was a member, unless such member is relieved from liability by some act of the person dealing with the firm. In the case here plaintiff did no act that worked the release of the withdrawing member. The court found that neither prior nor subsequent to the dissolution of the firm did plaintiff accept any person as its debtor other than the partnership, nor did it at any time release

the partnership. The fact that partners among themselves agree, upon a dissolution, that a remaining partner shall assume all partnership liabilities, cannot affect the rights of persons who before dissolution had contracted with the firm, unless such person does some act which the law will say manifests an intention to release the partnership.

[2] As to the small sum for extras, we see no reason why it should not be recovered, inasmuch as the materials were necessary to complete the work contracted for.

[3] The copartnership was a legal entity, and as such, could be sued, and judgment was properly entered against it. Code Civ. Proc. § 388; *John Bollman Co. v. S. Bachman & Co.*, 16 Cal. App. 589, 117 Pac. 690, 122 Pac. 835; *Goodlet v. St. Elmo Investment Co.*, 94 Cal. 297, 29 Pac. 505.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

it provided for such payment, and therefore unenforceable, though it also provided that it should not be construed as granting an exclusive franchise.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 273; Dec. Dig. ☞198.]

2. MUNICIPAL CORPORATIONS ☞682 — PUBLIC WATER SUPPLY—FRANCHISE—POWER TO GRANT.

Under Const. art. 11, § 19, providing that any person or corporation shall have the right to use the streets of a city for conduits for a public water supply, neither the municipality nor the Legislature could grant an exclusive franchise for that purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1467-1470; Dec. Dig. ☞682.]

3. WATERS AND WATER COURSES ☞198 — USE OF STREETS—WATERWORKS—CONTRACTS—FRANCHISE TAX.

Where a city was prohibited by Const. art. 11, § 19, from imposing a gross earnings tax on a water company for the use of its streets for the distribution of water to its citizens in the exercise of its legislative power, a franchise requiring payment of such a tax could not be sustained under the city's power to contract.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 273; Dec. Dig. ☞198.]

4. WATERS AND WATER COURSES ☞198 — PUBLIC WATER SUPPLY—FRANCHISE—GROSS EARNINGS TAX.

Where the grantee of a city water franchise was required to bid $7\frac{7}{8}$ per cent. of his gross earnings in order to obtain a franchise to maintain a public waterworks company in the city, the city having no legislative power to require such payment, it could not be supported on the ground that the grantee and his successor voluntarily entered into the agreement.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 273; Dec. Dig. ☞198.]

5. WATERS AND WATER COURSES ☞198 — PUBLIC WATER SUPPLY—FRANCHISE TAX—ESTOPPEL.

Where a city without authority imposed a gross earnings tax as a condition to the granting of a public water franchise, neither the grantee nor his assignee was estopped to deny the city's right to recover the same.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 273; Dec. Dig. ☞198.]

26 Cal. App. 191

TOWN OF ST. HELENA v. EWER et al.
(Civ. 1292.)

(District Court of Appeal, Third District, California. Dec. 12, 1914.)

1. WATERS AND WATER COURSES ☞198 — PUBLIC WATER SUPPLY—FRANCHISE.

Under Const. art. 11, § 19, providing that in any city having no public works to supply water any individual or company shall have the privilege of using the streets for laying conduits as necessary to supply the city and its inhabitants with water for domestic and all other purposes, on condition that the city shall have the right to regulate the charges thereof, a franchise, granting the right to an individual who was the highest bidder to use the streets of a city for the distribution of water to its inhabitants on condition that he and his assigns pay to the city $7\frac{7}{8}$ per cent. of the gross earnings arising therefrom, as authorized by St. 1897, p. 135, was unconstitutional in so far as

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by the Town of St. Helena against Fred S. Ewer and the St. Helena Water Company. Judgment for defendants, and plaintiff appeals. Affirmed.

James A. Nowland, of St. Helena, for appellant. T. C. Coogan, of San Francisco, and Percy S. King, of Napa, for respondents.

CHIPMAN, P. J. Plaintiff brings the action to recover from defendants $7\frac{7}{8}$ per cent. of the gross annual receipts collected by defendants for water supplied to the plaintiff and its inhabitants for the five years commencing 1907 and ending 1911, stated in seven separate counts. The amended com-

plaint was filed August 5, 1912. It does not appear when the original complaint was filed. A general and special demurrer to the amended complaint was sustained, without leave to amend, and judgment passed for defendants that plaintiff take nothing by its action and that the action be dismissed.

It appears, from the amended complaint that on September 19, 1899, plaintiff passed a resolution directing the town clerk to advertise for bids for the sale of a franchise for supplying said town and its inhabitants with water, for domestic and general purposes, for a term of 50 years. The form of ordinance to be used in granting the franchise was adopted, and it was ordered:

"That no bids, proposals, or tenders will be received for a single amount stated, but that all bids, tenders, or proposals must be for the payment in lawful money of the United States of a stated per centum of the gross annual receipts of the grantee, arising from its use, operation, or possession, and further stating that no percentage will be paid for the first five years succeeding the publication of such franchise, but that thereafter such percentage will be payable annually, and shall in no case be less than three per centum per annum upon the said gross annual receipts."

The clerk, on September 22, 1899, gave notice, pursuant to said resolution and orders, inviting sealed proposals and, among other things, stated:

"That the character of such franchise or privilege proposed to be granted, the conditions, limitations, and provisos under which the same will be granted, and the term of its continuance is more fully set out and will appear by reference to the said resolution, hereinabove referred to, to which said resolution reference is hereby expressly made for further and fuller particulars.

"No bid or tender will be received of a single sum or amount stated, but all bids must be for the payment, in lawful money of the United States, of a stated per cent. of the gross annual receipts of the person, partnership, or corporation or other authority to whom the franchise or privilege is awarded, arising from its use, operation, or possession.

"That no percentage shall be paid for the first five years succeeding the date of the franchise, but thereafter such percentage shall be paid annually, and shall be in no case less than three per cent. per annum upon such gross annual receipts, the franchise to be forfeited by failure to make the payments stated, in the bid upon which the award is made.

"Bidders must file with each bid, tender, or proposal, a bond to the town of St. Helena, with at least two good and sufficient sureties, to be approved by the board of trustees of the said town, in a penal amount of \$5,000, conditioned that such bidder shall well and truly observe, fulfill, and perform each and all of the terms, conditions and obligations of such franchise, in case the same be awarded to him."

Pursuant to this notice, which was duly advertised in a newspaper, defendant Ewer submitted the following to the board of trustees:

"The undersigned hereby bids and tenders seven and seven-eighths ($7\frac{7}{8}$) per cent. of the gross annual receipts arising from the use, operation, or possession of the franchise offered for sale by your honorable board in accordance with the inclosed and attached advertisement 'Inviting Bids or Tenders for Sale of a Franchise,' dated September 22, 1899, which is hereby referred to for fuller particulars and which advertisement is made a part hereof.

"[Signed] F. S. Ewer."

On December 12, 1899, the board of trustees duly passed ordinance No. 129, granting said franchise, and on December 21, 1899, defendant Ewer notified the trustees, in writing, as follows:

"I hereby accept the franchise granted to me by your honorable board under Ordinance No. 129, and published in the St. Helena Sentinel, under date of December 21st, 1899.

"Yours truly, [Signed] Fred S. Ewer."

Ordinance 129 grants "to Fred S. Ewer, his heirs and assigns, the right, privilege and franchise to construct, establish, maintain and operate a system of waterworks for the purpose of supplying to the town of St. Helena and its inhabitants," etc. Then follow provisions granting right of way over streets, alleys, etc.; the right to lay pipes, maintain reservoirs, and the like. The term of the franchise is 50 years. Rates to be charged and the manner of laying down pipes, etc., are subject at all times to be regulated by the town. Other provisions follow which need not be given. It was provided, also, that "nothing herein contained shall be construed in any manner as granting an exclusive franchise." It is alleged in the amended complaint that Ewer assigned all of his interest in said franchise to defendant St. Helena Water Company in 1901.

[1] Appellant says in its brief:

"That while the general structure (of the ordinance) follows the statute (Stats. 1897, p. 135), there is a clause inserted therein which places it entirely without the statute."

The clause referred to reads, "Nothing herein contained shall be construed in any manner as granting an exclusive franchise," and hence, it is claimed, takes the case out of the operation of the decision in *Pereria v. Wallace*, 129 Cal. 397, 62 Pac. 61, in which the act of 1897 was held to be unconstitutional. It is further contended that, while that decision so decided, the bidder for a franchise has the right, independently of the statute, to enter into a private contract with the trustees of the town on terms proposed by or agreeable to him.

Appellant still further contends that, conceding the contract to pay the claim here made to be invalid, it is not illegal or unlawful, and hence defendant is estopped to dispute its validity.

It was held, in *Pereria v. Wallace*, supra, that the act of 1897, in so far as it attempted to provide a method of sale of franchises for the purpose of supplying municipalities with light or water, was unconstitutional, and that the Legislature cannot modify or change the provisions of section 19, article 11 of the Constitution, as to the privileges therein granted.

The case of *People v. Stephens*, 62 Cal. 209, decided that the section and article of the Constitution just referred to granted the

privileges therein specified without legislative action, and in *Pereria v. Wallace*, supra, the court said:

"The Constitution intended that there should be no restriction upon competition in supplying those prime necessities, as would necessarily result if the privilege would only be granted to the highest bidder, for such bidder would necessarily secure an exclusive right to the exercise of the franchise, the only condition imposed by the Constitution being the right of the municipality to 'regulate the charges thereof.'"

The question is discussed in more recent cases, among them *In re Johnston*, 137 Cal. 115, 69 Pac. 973; *Stockton Gas, etc., Co. v. San Joaquin County*, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511; *Clark v. Los Angeles*, 160 Cal. 30, 39, 116 Pac. 722; *Matter of Russell*, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914A, 152. Speaking of the constitutional provision above referred to, the court said, in *Re Johnston*, supra:

"When the sovereign authority of the state, either in its Constitution or through its Legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality where such right is sought to be exercised or enjoyed to impose additional burdens as a condition to its exercise."

[2] It is urged that in declaring in the ordinance that "nothing herein contained shall be construed in any manner as granting an exclusive franchise" relieves it from any constitutional inhibition and differentiates it from the acts of municipalities brought under review in the cases cited. We cannot so regard the effect of the ordinance. The town authorities had no power to impose the condition to granting the franchise that the successful bidder should pay a per cent. of the "gross annual receipts, the franchise to be forfeited by failure to make the payments stated in the bid on which the award is made." This, we think, was a burden placed upon the bidder unauthorized by the Constitution. The declaration that the franchise should not be regarded as exclusive did no more than to announce what would have been true without it, for the Constitution gives to every person the right to use the public streets of a municipality for the purposes indicated, and, as the cases cited hold, it deprives not only the municipality from granting but the Legislature from authorizing the granting of franchises upon conditions other than those specified in the Constitution. *Clark v. Los Angeles*, supra.

[3] The contention that the claim may be enforced as the subject of private contract between Ewer and the town cannot be maintained. The facts alleged show beyond dispute that in dealing with the public, as respondent points out, the municipality was acting in its legislative capacity, and that its action is not referable, for its support, to the power of making contracts. In *City of South Pasadena v. Los Angeles, etc., Co.*, 109 Cal. 315, 41 Pac. 1093, the court said:

"The streets of a city are not held as corporate or municipal property, and are not subject to the power of contractual disposition, like the property of an individual."

[4] Plaintiff cannot avoid the restraining effect of the Constitution by attempting to convert its legislative acts into contracts. The essence of the ordinance is found in the grant of a franchise for the use of the streets of St. Helena to supply the town and its inhabitants with water, which is purely a legislative act. We cannot escape the fact that the grant was made on condition that the grantee pay for the privilege granted—a condition, as we have seen, which is beyond the power of the municipality to impose. It is no answer that defendant voluntarily entered into the engagement. In its legal sense his acceptance was not voluntary for the reason that his bid would not, nor could that of any other person, have been received without agreeing that he would pay at least three per cent. of his gross annual receipts. In fact, probably under the spur of competition, defendant Ewer bid 7 $\frac{7}{8}$ per cent. In the *Arcata Case*, which was an action to recover on a bond given in connection with a grant to build an exclusive railroad, the court said:

"We do not overlook the allegation that the bond was voluntarily given by the appellants. But, reading the allegation in connection with the averments showing that the giving of such bond was a condition upon which the trustees, by their ordinance, made the grant of the franchise depend, it means no more than that the grantees accepted the franchise upon the only terms available. They consented to furnish the undertaking, but their consent was required in order to enable them to take any benefit under the grant."

[5] Nor do we think the plea of estoppel available to plaintiff. The town had no power to impose the condition that the bidder should pay a per cent. of his gross annual earnings.

In the case of *City of Arcata v. Green*, 156 Cal. 759, 764, 106 Pac. 86, 88, the court said:

"A party contracting with a city regarding a subject-matter within the scope of the city's powers may, where he has received the benefit of the contract, be precluded from asserting that the contract was not, on the part of the city, executed in the manner required by law. The doctrine, however, cannot be made to cover contracts entirely beyond the range of municipal authority."

The town of St. Helena had no authority to require the grantee of a franchise to pay any part of the gross proceeds of the franchise as a condition to its enjoyment. "There is no room for the application of the doctrine of estoppel." *Foxen v. City of Santa Barbara*, 166 Cal. 77, 83, 134 Pac. 1142, 1145.

We do not find it necessary to consider the special demurrer. We are satisfied that the amended complaint does not state facts sufficient to constitute a cause of action.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

26 Cal. App. 169

SCHIRMER v. UNION BREWING & MALTING CO. (Civ. 1302.)

(District Court of Appeal, Third District, California. Dec. 11, 1914.)

1. REFORMATION OF INSTRUMENTS ⚡44—**PAROL EVIDENCE.**

Under Civ. Code, § 3399, providing for reformation when, through fraud or mutual mistake, or a mistake of one party, known or suspected by the other, a contract does not express the intention of the parties, and section 3401, providing that in revising a written instrument the court may inquire what it was intended to mean, and is not confined to what the language of the instrument was intended to be, parol evidence is admissible to correct a contract which, through mistake, did not express the intention of the parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 155, 156; Dec. Dig. ⚡44.]

2. PLEADING ⚡428—**SUFFICIENCY—WAIVER OF OBJECTION.**

Civ. Code, § 3399, provides for the reformation of instruments which, through mutual mistake, or mistake of one of the parties, known or suspected by the other, do not express the parties' intention. Defendant's cross-complaint alleged that the contract, through mistake, did not express the intention of the parties. *Held* that, while the failure of the cross-complaint to allege the nature of the mistake might have been ground for special demurrer, defendant was not precluded from giving evidence of the mistake where plaintiff answered without objection.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1433-1436; Dec. Dig. ⚡428.]

3. REFORMATION OF INSTRUMENTS ⚡11—**MISTAKE—MATERIAL MISTAKE.**

Where a purchaser made the seller's guaranty that the freight rate on the goods bought which were to be delivered to the carrier at the point of sale a condition of the contract, such provision was material, and, having been omitted by mistake, the instrument would be reformed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 24-27, 32-41; Dec. Dig. ⚡11.]

4. REFORMATION OF INSTRUMENTS ⚡11 — **RIGHT TO—LATENT AMBIGUITY—"F. O. B."**

A contract of sale provided for delivery of the article f. o. b. at place of sale, and the seller agreed to guarantee that the freight rate from the place of sale to the point of destination should not exceed a fixed sum. *Held* that, as the term "f. o. b." means free on board, or that the goods should be delivered to the carrier free from drayage charges, the reformation of the contract to include the guaranty of the freight rate would not create a latent ambiguity; there being no conflict between the provisions (citing Words and Phrases, Free on Board).

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 24-27, 32-41; Dec. Dig. ⚡11.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by O. H. Schirmer against the Union Brewing & Malting Company. From a judgment for plaintiff and an order denying new trial, defendant appeals. *Reversed.*

G. Gunzendorfer, for San Francisco, for appellant. H. G. W. Dinkelspiel and John R. Jones, both of San Francisco, for respondent.

CHIPMAN, P. J. Plaintiff brings the action as assignee of the Loew Manufacturing Company, a corporation, for the sum of \$481, which, plaintiff alleges in his complaint, is the balance due on a written contract, entered into on January 22, 1907, whereby defendant agreed to purchase from plaintiff's assignor "one No. 4 New Era pasteurizer, having a capacity of one hundred barrels, together with trucks, beams, regulators, thermostats and thermometer, centrifugal pump and pulley, for the agreed sum of \$3,800.00." It is alleged that said corporation delivered said merchandise to defendant, and that defendant has paid therefor the sum of \$3,319, and no more, leaving \$481 due and unpaid.

Defendant demurred generally and specially, which being overruled, it answered; admitted the execution of a written contract on the day claimed, which is attached to the complaint as part thereof, for the purchase of said articles at the price named, "but it was agreed by said Loew Manufacturing Company and this defendant that the railroad rate for transportation of the said pasteurizer would be \$1.40 per 100 pounds, which said rate said Loew Manufacturing Company guaranteed to defendant, and that said rate was the sole consideration for the execution of said agreement and the purchase by defendant from said Loew Manufacturing Company of the said pasteurizer and appurtenants"; that, when said merchandise was received by defendant, the transportation company demanded \$3 per 100 pounds, being \$1.60 per 100 pounds in excess of the agreement and guarantee made by said Loew Company; that defendant was obliged to pay such excess, amounting to \$481, and immediately thereafter so notified said Loew Company, and demanded credit for the same.

By way of affirmative relief and cross-complaint, defendant sets forth the said written contract; alleges that plaintiff "at all times hereinafter mentioned has been and now is the agent of said Loew Manufacturing Company, and that plaintiff has at all times hereinafter mentioned had actual and personal knowledge of all the facts hereinafter alleged." Defendant, further answering, alleges: That defendant entered into a written agreement with said Loew Manufacturing Company, "acting through its agent, the plaintiff above named, as its resident agent, whereby this defendant agreed to buy from said Loew Manufacturing Company, and said company agreed to sell to this defendant [describing the property], but conditioned nevertheless and subject to a freight rate from said city of Cleveland, Ohio, to the city of San Francisco at \$1.40 per 100 pounds"; that but for said agreement and guarantee defendant would not have made the purchase, "and this defendant at all times believed that the said contract and agreement with the said Loew Manufacturing Company contained the said

agreement and guaranty that the freight rate of said pasteurizer and appurtenants would be \$1.40 per 100 pounds"; that "it was the agreement and intention of this defendant and of said the Loew Manufacturing Company that the said written agreement should truly express and set forth all the terms and conditions of the aforesaid agreement between them, particularly that portion of the agreement by which said Loew Manufacturing Company agreed and guaranteed that the freight rate of said pasteurizer and appurtenants should be at the rate of \$1.40 per 100 pounds"; that "by mistake and inadvertence said written agreement did not truly represent nor fully and truly express the agreement and particulars thereof with reference to the said freight rate"; that "defendant believed that the said contract and agreement and guarantee with respect to the said freight rate was contained in and formed part of said written agreement, and this defendant did not discover that the same was omitted therefrom until after the commencement of this action"; that, unless said contract is reformed and corrected so as to express the true intention of defendant and of the said Loew Manufacturing Company as alleged, defendant will be damaged in the sum of \$481. Defendant prays that said contract be reformed to express the true intention of the parties thereto and as in the cross-complaint alleged, and, when so corrected, it be adjudged that neither plaintiff nor said Loew Manufacturing Company has any claim against defendant.

The contract is of considerable length, and need not be set forth in its entirety. Among other provisions are the following:

"Said party of the second part [defendant] hereby agrees to pay said party of the first part as the purchase price, the sum of \$3,800.00 f. o. b. Cleveland, Ohio. * * * Party of the first part retains title of the property until fully paid in cash. This agreement is not binding on the party of the first part until approved by its own officers at Cleveland, Ohio."

It was signed, "The Loew Manufacturing Company, per Otto H. Schirmer, Party of the First Part" (plaintiff in the action), and by defendant.

Plaintiff admits the execution of the contract, but denies all the averments of the answer and cross-complaint relating to the alleged mistake; alleges that said contract was entered into without any guarantee whatever as to freight rate or any guarantee other than as set out in the contract; on information and belief alleges that defendant knew at all times that said contract did not contain any agreement "as to the amount of freight rate or as to freight rate at all," and that said agreement did fully and truthfully express all the terms and conditions agreed upon by the parties thereto.

The court found that the agreement pleaded was entered into as written, and the goods delivered as agreed upon, and that defendant had paid therefor in full except \$481; that

said agreement, as written, expresses all the agreement entered into with reference to the purchase of said goods, and there was no other consideration save as expressed in said written agreement; that defendant is not entitled to have the agreement reformed and corrected. Judgment accordingly passed in plaintiff's favor for \$481. Defendant appealed from the judgment and from the order denying its motion for a new trial. As we understand, the appeal now pending is from the order; the appeal from the judgment having been dismissed.

[1] It is not disputed that defendant paid for the goods, except the amount now claimed of \$481, which it withholds for reasons fully set forth in its answer and cross-complaint. At the trial defendant's counsel, by numerous appropriate questions to witnesses, endeavored to show the facts upon which defendant based its alleged mistake. The objection to the questions was that they were immaterial and irrelevant, "and as seeking to vary a written contract." Defendant's offer of proof was full and specific, and embraced facts from which an inference might be drawn that the agreement was as alleged by defendant, and that by the mistake of the parties it failed to include the alleged provision concerning the freight rate. A letter to defendant, written by plaintiff, who was, as defendant offered to prove, the agent of the Loew Manufacturing Company and signed the contract for it, was offered in evidence, in which letter he stated, among other things:

"I have written Cleveland about how you feel on the frt. rate, and that thru my saying \$1.40 to you [defendant], you gave me the order."

All the offers of proof were refused, and objections to all questions tending to show that there was an agreement such as defendant alleged and a mistake in its not so showing, and that defendant did not discover the omission of the particular covenant relied upon until the commencement of the action, were sustained, on the ground that "it was seeking to vary the terms of a written contract." As a result of these rulings, the findings were necessarily for plaintiff, and it is because of these findings and of these rulings defendant now urges that the trial court erred.

The question here is whether the evidence was offered and had the effect to vary the terms of the contract, or whether the writing itself, through mistake, did not express the intention of the parties who entered into it, and does not, therefore, contain the real contract between the parties. If the latter, defendant was entitled to reformation. *Kee v. Davis*, 137 Cal. 456, 458, 70 Pac. 294, 671.

"When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised upon the application of a party aggrieved, so as to express that intention, so far as it can be done

without prejudice to rights acquired by third persons, in good faith and for value." Civ. Code, § 3399. "In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be." *Id.* § 3401.

Mr. Pomeroy says:

"The general doctrine is firmly settled as one of the elementary principles of the equitable jurisdiction that a court of equity will grant its affirmative or defensive relief, as may be required by the circumstances, from the consequences of any mistake of fact which is a material element of the transaction, and which is not the result of the mistaken party's own violation of some legal duty, provided that no adequate remedy can be had at law" (2 Pom. Eq. Juris. [3d Ed.] § 852), and "the mistake may arise after the parties have verbally concluded their agreement, and may occur in reducing that agreement to writing, by erroneously adding, omitting, or altering some term." *Id.* § 853.

If the contract is such as to admit of reformation, parol evidence may be resorted to to prove the mistake. *Id.* § 862.

[2, 3] Respondent does not seriously question the soundness of these principles. He contends, among other things, that only mutual mistakes may be corrected; that the defendant did not plead the mistake as mutual, and hence defendant is not entitled to reformation. Had plaintiff demurred specially, the court may have compelled the defendant to state specifically whether the mistake was mutual or the mistake of one party which the other at the time knew or suspected. Civ. Code, § 3399. He answered the averments in the pleading, and we know of no rule that would preclude defendant from proving the mistake, such as it was, if entitled to reform the contract. *Peasley v. McFadden*, 68 Cal. 616, 10 Pac. 179. Respondent contends that the order should stand because the alleged mistake was not material to the contract, and hence the cross-complaint did not state facts sufficient to constitute a cause of action for reformation. The contract provided that defendant was to pay for the goods "the sum of \$3,800.00 f. o. b. cars Cleveland, Ohio," which, it is alleged, was "conditioned nevertheless, and subject to a freight rate from the said city of Cleveland to the city of San Francisco of \$1.40 per 100 pounds."

The argument is that the writing is silent upon the subject, and expressly provides for delivery of the goods f. o. b. at a price fixed; that the matter of freight rate was a matter incidental to, and not a material part of, the contract. Quoting from Mr. Pomeroy, it is said:

"The fact concerning which the mistake is made must be material to the transaction affecting its substance, and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject-matter, or essence of its terms, * * * the mistake

will not be ground for any relief affirmative or defensive." 2 Pom. Eq. Juris. (3d Ed.) § 856.

Defendant alleged that but for the guarantee that the freight rate would not exceed \$1.40 per 100 pounds defendant would not have made the purchase. The allegations make this matter something more than an incident. To defendant it was of the essence of the agreement, as we must assume from the averments of the cross-complaint. The transportation cost was "a material element of the transaction." The difference in the freight rate alleged to have been agreed upon and the rate defendant was compelled to pay was more than 12 per cent. of the cost of the goods, and more than double the guaranteed rate.

It would be an exceptional case where the court would be justified in refusing evidence of mistake because upon the face of the pleadings, in the opinion of the court, the asserted mistake was not material. Ordinarily, this fact should be developed and determined by the evidence at the trial. It would seem but reasonable that what the parties in fact have agreed to should be treated as by them intended to be material.

"The written instrument is not required to be certain and complete in any respect. The only condition is that there shall be an honest endeavor to reduce the contract to writing where the statute of frauds requires it, and that the mistake shall be such as is recognized in this branch of equitable jurisdiction." *House v. McMullen*, 9 Cal. App. 670, 100 Pac. 347.

[4] It is further contended that:

"The reformation of the contract by the insertion of the added term would create a latent ambiguity; it would be contradictory of the term 'f. o. b. Cleveland, Ohio.'"

It is understood in mercantile parlance that these letters thus used stand for "free on board"—that is, when used in an agreement that goods are to be delivered at a certain place f. o. b. means that they will be delivered to a carrier at that place free of drayage charges, etc. (*Muskegon Curtain Roll Co. v. Keystone Mfg. Co.*, 135 Pa. 132, 19 Atl. 1008), and the phrase is only evidence, and not conclusive, that the goods were to be so delivered to the purchaser (*Dannenmiller v. Kirkpatrick*, 201 Pa. 218, 50 Atl. 928)—cited in "Words and Phrases."

Respondent also contends that the reformation would not only create a latent ambiguity, but would leave the instrument in such condition as "would require the aid of equity to construe and harmonize." We cannot see that the introduction in the contract of the simple statement that "first party guarantees that the freight rate from Cleveland to San Francisco shall not exceed \$1.40 per hundred" would have conflicted with the provision "f. o. b. Cleveland," which only meant that the goods were to be delivered to the carrier at the place (Cleveland) free of drayage charges, etc. The phrase had no reference to the freight rate between the two cities, and hence the additional clause would

not vary the terms expressed. There may have been an implication that the buyer was to pay this freight, but there would have been no contradiction of terms had the contract guaranteed a freight rate of \$1.40 per 100 pounds. In fact, evidence was offered to show that this had been the rate, and respondent's assignor might well have assumed that this rate was in force at the time it entered into the contract, and hence made the guaranty, as is alleged it did. The parties, had they so intended, might have provided that the goods should be delivered f. o. b. San Francisco. No ambiguity would have existed in that case, nor can we see that there would be by making the delivery at Cleveland f. o. b. with a guarantee that the freight rate to San Francisco would not exceed \$1.40 per 100 pounds. The parties were free to make any contract they saw fit as to the carriage charges after delivery f. o. b., either that the seller or the buyer should pay them, and they had the equal right to agree, should the buyer pay them, that they should not exceed a certain cost. The contract provided that title should remain in the seller until the property was fully paid for and the seller was to send an expert to San Francisco to set up the machine, besides agreeing to do certain stipulated things after it had reached appellant's premises. It seems to us that the guarantee pleaded was such as equity should enforce by giving the defendant the opportunity to make good its averments of fact, if it can, and that it is entitled to have the contract reformed, and to have the defensive relief given him as prayed for, if the facts should warrant it.

The order is reversed.

We concur: HART, J.; BURNETT, J.

26 Cal. App. 186

KURZE v. DOUGLAS. (Civ. 1294.)

(District Court of Appeal, Third District, California. Dec. 11, 1914.)

1. APPEAL AND ERROR ⇨837—REVIEW—SUFFICIENCY OF EVIDENCE — AFFIDAVITS ATTACKING EVIDENCE.

Affidavits of appellant made subsequent to the judgment cannot be considered on appeal on the question of the sufficiency of the evidence to support the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. ⇨837.]

2. APPEAL AND ERROR ⇨1011—FINDINGS OF COURT—CONCLUSIVENESS.

Where the evidence is conflicting, the question is for the trier of the facts and not for the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ⇨1011.]

3. NEW TRIAL ⇨102—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Evidence on motion for new trial held to show that plaintiff's alleged newly discovered

evidence was not newly discovered nor was any diligence used to produce it at the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210-214; Dec. Dig. ⇨102.]

Appeal from Superior Court, Alameda County; W. H. Waste, Judge.

Action by Henry Kurze against Jessie M. Douglas. Judgment for defendant, and plaintiff appeals. Affirmed.

John Yule, of Oakland, for appellant. II. L. Breed, of Oakland, for respondent.

CHIPMAN, P. J. Plaintiff commenced the action to quiet title in him to certain premises situated in the town of Emeryville, alleging that he "for more than five years last past has been in the actual, exclusive, and adverse possession" thereof (describing the premises) and "has paid all taxes of every kind and nature levied and assessed on or against said premises for more than five years continuously next preceding the filing of the complaint herein," which was filed October 17, 1911. Defendant denies the averments of the complaint and alleges ownership in herself by virtue of a deed from plaintiff to her, "executed and delivered by plaintiff to defendant on or about the 15th day of September, 1909"; that said deed was duly recorded on January 10, 1910; "alleges that the Jessie M. Kurze referred to in said deed is the same person as Jessie M. Douglas; that this defendant is an unmarried person." Claiming ownership in fee, she asks to have her title quieted and that it be decreed that plaintiff has no right, title, or interest in said premises. The court found that plaintiff had paid all taxes levied or assessed on the premises for more than 25 years continuously next preceding the filing of the complaint. No further finding was made on the subject of plaintiff's alleged adverse possession, and there was no evidence supporting such averment of the complaint. Plaintiff's ownership, however, prior to the alleged conveyance to defendant, is not disputed. The court found that plaintiff executed and delivered to defendant a deed conveying said property, on the 15th day of September, 1909, and "thereupon defendant became and ever since has been the owner of all said real property, land, and premises by virtue of said deed"; that said deed was duly recorded on January 10, 1910; that, "at the date of the execution and delivery of said deed and of the recording thereof, this defendant, Jessie M. Douglas, was sometimes called and known as Jessie M. Kurze; that the Jessie M. Kurze named in said deed as the grantee and party of the second part is the same person as said defendant Jessie M. Douglas; that this defendant, Jessie M. Douglas, is an unmarried person." "As conclusions of law from the above findings and the admissions of the pleadings, the court finds that defendant is entitled to a judg-

ment of this court as prayed for in her answer." Judgment was accordingly duly made and entered. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

Plaintiff's motion for a new trial purports to have been made on the following grounds: (1) Newly discovered evidence; (2) insufficiency of the evidence to justify the decision of the court; (3) that the decision of the court is against law; (4) errors of law occurring at the trial and excepted to by the plaintiff. It was stated in the notice that the motion "would be made upon affidavits and upon a statement of the case hereafter to be prepared."

[1] In his brief, appellant does not seriously urge the ground of newly discovered evidence, and he makes no mention of errors of law committed at the trial. Upon the alleged insufficiency of the evidence to justify the decision, appellant so mixes up the testimony given at the trial with statements made in affidavits taken after the judgment was entered, that we find it difficult to separate the one from the other. Clearly, these affidavits have no place in considering the sufficiency of the evidence to justify the decision which was necessarily based upon the evidence taken at the trial. Subsequent affidavits cannot be used to attack findings. Affidavits may not be used for any such purpose. Code Civ. Proc. §§ 658, 2009; *Eddy v. American Amusement Co.*, 21 Cal. App. 487, 132 Pac. 83. The essence of appellant's contention as to the deed made by him to respondent is that there was no delivery.

It appeared that defendant went to work for plaintiff as his housekeeper for wages. After about two months plaintiff asked defendant to marry him. She was then a married woman and explained why she could not marry him then. The story of their relations may better be told by defendant. She testified:

"I was left in poverty with two children to support myself, and I went there to work in the first place to make an honest living. And when he saw I could not marry him in the condition I was in and under the circumstances, he proposed to live together. I refused him and kept refusing him and told him I did not want to live with him, and I threatened to leave. He kept after me and after me until finally it did happen, and I lived with him. I assumed the name of Kurze when I began to live with him as his wife. I began living with him as his wife about two months after I was there. I lived with him as his wife about four months before he gave me the deed. When I first went there, I told him how I was situated. I told him then if I got free, and nothing happened, 'I will marry you when I am free.' (She was then a married woman.) That is the only time I promised to marry him. * * * After I was there about two months, we were talking one day about wills, and he had made his will out to me. We were talking about people trying to make trouble over wills. He had had some trouble with the place next door—it belonged to his first wife—and he said: 'Jessie, I will give you one of those places. Whichever one you want I will make a gift deed and give it to you.' That is what he said. I never asked him for the place. He gave it.

There was no consideration for the deed. He gave it willingly, and he gave it to me. I did not ask him for it. The deed was not given in consideration of marrying him. There was no consideration for the deed. He gave me the place willingly. When I first went there I promised to marry him, as I told you. Three or four months before the deed was given. * * * When I first went there I intended to marry him. I changed my mind after he commenced to abuse me the way he did, treating me so. The last year I was there I lived in continual fear. I was afraid of the man. I felt that I could not stay with him no longer, and, when I got a place to work, I left. That is why I left. * * * The deed was recorded January 10, 1910. In the intervening months after recording the deed, he did not again refer to recording the deed. On one occasion after recording the deed, the children were out in the yard picking flowers, and he came in, and he says: 'I think you could make your children behave themselves and let the flowers alone. The place is yours, and, if you do not want to take care of it, I don't.' There was another time after that we had some words, and he says: 'I will beat you out of the place if you leave.' One day at the table, before my mother, we were speaking about the street work, and I says, 'I guess I will have to mortgage my place to pay the street work.' He said, 'You will have to mortgage your place to pay the street work.' Q. Why was it you recorded the deed? A. Because he told me a couple of times it did not need to be recorded, so finally my brother George asked me if the deed was recorded, and I said, 'No.' He said: 'You better have it recorded. It is no good if you do not. He can turn it to somebody else.' And even then I took Mr. Kurze's word for it. I said, 'Haden't I better have it recorded?' He said, 'No, it don't need to be recorded.' My brother and my mother talked together, and he said, 'You better have it recorded to make sure.' I got suspicious the way he acted and treated me, so I had it recorded."

[2] Plaintiff testified that he did not believe the deed to defendant, but that after its execution he placed it in a bookcase where he kept his papers, and that defendant took it from there without his knowledge and had it recorded, and that the first he knew about its recordation he learned from seeing it stated in a local paper. On this question of delivery (no question of want of consideration or failure of consideration is raised) there was a conflict which it was the province of the court to resolve. There was evidence tending to corroborate defendant's testimony.

[3] The facts brought out in the affidavits used on the hearing of the motion for a new trial are in hopeless conflict. The point relied upon was that plaintiff did not know until the day of the trial that defendant claimed a delivery of the deed, and hence he could not produce George Larabee, the witness by whom he expected to show that the deed was not delivered. This claim does not appear to us as having merit. He knew from the answer of defendant that she claimed both the execution and delivery of the deed. He knew within a week after it was recorded that defendant claimed the property under the deed. Plaintiff and Larabee were friends and had been partners in business. At the trial several members of the Larabee family (defendant was George Larabee's sister) were

witnesses, including George Larabee's wife. Slight diligence would have enabled plaintiff to produce Larabee at the trial. In fact, he showed no diligence, relying on his ignorance or forgetfulness that the delivery of the deed was an important issue in the case. Furthermore, counter affidavits were introduced by defendant which brought about an irreconcilable conflict between the facts stated by George Larabee in his affidavit and those controverting it. The court might well have concluded, from the facts shown by these affidavits at the hearing of the motion, that but little credence should be given the statements of George Larabee. The deed was recorded in January, 1910, and plaintiff knew the fact a week later. Defendant did not leave the premises or cease living with plaintiff until in October, 1911, and plaintiff commenced the action a few days thereafter. For nearly two years he knew that defendant claimed the property by virtue of his deed to her. It does not seem reasonable that during all that time he believed the deed to be invalid for want of delivery.

We are unable to discover any ground for reversing the order. There is sufficient evidence to support the findings, and the latter support the judgment.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

26 Cal. App. 203

FORD v. LOU KUM SHU et al. (Civ. 1253.)
(District Court of Appeal, Third District, California. Dec. 16, 1914. Rehearing Denied by Supreme Court Feb. 11, 1915.)

1. PRINCIPAL AND AGENT ⇨22—EVIDENCE OF AGENCY—DECLARATIONS OF AGENT.

While the fact of agency may not be established by declarations of the agent, he may nevertheless testify as to the existence of the agency if the appointment rests in parol.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. ⇨22.]

2. PRINCIPAL AND AGENT ⇨99—IMPLIED AUTHORITY OF AGENT—ACTS.

Where the authority of an agent is by parol, and not satisfactorily shown to be express, it may be implied from acts and circumstances.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 254-261; Dec. Dig. ⇨99.]

3. PRINCIPAL AND AGENT ⇨123—AGENT'S AUTHORITY—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to show that the principal had conferred express authority on his agent to purchase on open account for him.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420-429; Dec. Dig. ⇨123.]

4. APPEAL AND ERROR ⇨1011—TRIAL WITHOUT JURY—EFFECT OF INCONSISTENCY ON WEIGHT OF TESTIMONY.

The effect and weight, as impeaching its integrity, of inconsistency in the testimony of a witness is wholly for the trier of the facts, and, where such inconsistency marks the testimony of an alleged agent as to his authority, the trial court sitting without a jury, can give what effect it chooses, within the limits of

reason, to the testimony of the witness tending to establish agency, although, besides being somewhat inconsistent, it was contradicted by the alleged principal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ⇨1011.]

5. PRINCIPAL AND AGENT ⇨173—AGENCY—RATIFICATION AND ESTOPPEL—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to find a ratification by defendant of past purchases on open account by his agent, and likewise a representation giving rise to a future agency by way of estoppel.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 659-661; Dec. Dig. ⇨173.]

6. PRINCIPAL AND AGENT ⇨169—AGENCY—IMPLIED RATIFICATION.

Ratification of a contract made by an agent need not be made in express terms to bind the principal, but may be implied from words and conduct inconsistent with the holding of an intention to repudiate.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 636, 637; Dec. Dig. ⇨169.]

7. PRINCIPAL AND AGENT ⇨137—AUTHORITY BY ESTOPPEL—DUTY OF PRINCIPAL TO QUALIFY REPRESENTATIONS.

Where defendant principal employed defendant agent to run his ranch, and the agent ordered various ranch supplies, such as seeds, which were charged to the so-called "Ranch Account," and groceries, charged to "Groceries Account," such separation of the accounts being directed by agent for the convenience of himself and principal, and the principal, in paying the "Ranch Account," made such statements as to partnership existing between himself and agent as to give rise to an agency by estoppel to purchase in the future, to restrict the agent's authority to the purchase of seeds, excluding groceries, the principal was under duty to limit his representations as to authority at time of payment of the "Ranch Account" by express notice to that effect at time of payment of the ranch account; the failure to object to the ordering of the groceries under the circumstances being acquiescence therein.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 492-494; Dec. Dig. ⇨137.]

8. APPEAL AND ERROR ⇨931—PRESUMPTIONS—DISREGARD OF INCOMPETENT EVIDENCE.

Where the trial court sits without a jury, the court on appeal will assume that, if incompetent testimony was admitted, it was disregarded by the court in reaching its findings, if there was ample admissible testimony to support the conclusion reached.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. ⇨931.]

9. TRIAL ⇨56—RECEPTION OF EVIDENCE—REPETITION OF IMPEACHING QUESTION.

Where the action was against two defendants for the price of goods purchased by one as agent of the other, it was not error for the court to exclude a question to the plaintiff whether he was suing both defendants for the full amount, where the question had been repeatedly put and answered, and the only purpose it could serve was to impeach the witness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 131, 132; Dec. Dig. ⇨56.]

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by A. F. Ford against Lou Kum Shu and E. G. Covey. Judgment for plaintiff, and first-named defendant appeals. Affirmed.

W. B. Lardner, of Auburn, and Sterling Carr, of San Francisco, for appellant. Meredith & Landis, of Sacramento, for respondent.

HART, J. This is an action by the plaintiff to recover from the defendants the sum of \$534.19, alleged to be the reasonable value of goods, wares, merchandise, materials, and supplies sold and delivered to the defendants by A. F. Ford & Co., a copartnership.

Prior to the commencement of the action, the complaint alleges, said copartnership sold, assigned, and transferred to the plaintiff all its claim and demand against the defendants on account of the sale and delivery of the goods, wares, etc., referred to. The complaint does not proceed upon the theory of a copartnership existing between the defendants, nor was the trial had upon that theory, but it is the claim that the goods, wares, merchandise, etc., to recover the reasonable value of which is the object of this action, were procured from the plaintiff by the defendant Covey, as the agent of the defendant Lou Kum Shu. The defendant Covey did not answer the complaint, but default for such omission was not entered until the trial was had. The defendant Lou Kum Shu answered the complaint, specifically traversing the material averments thereof, claiming that the goods, etc., in question were not purchased by or for him. The judgment was in favor of the plaintiff and against the defendant Lou Kum Shu in the sum of \$331, and against the defendant Covey in the sum of \$223.19.

This appeal is prosecuted by the defendant Lou Kum Shu from the judgment rendered and entered against him, supported by a transcript of the testimony prepared pursuant to the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure. The assignments are: That the evidence does not support the findings, and that the court committed prejudicial error in admitting and excluding certain evidence.

The real point in controversy is whether the defendant Covey in the transactions from which this action arises, was or was not the agent, ostensible or real, of the defendant Lou Kum Shu.

The facts developed by the evidence from which the court manifestly made its findings are, briefly, these: The Lou Kum Shu Company, of which the defendant of that name was the head, was the owner of some 1,300 acres of land in Placer county adapted to farming and stock-raising purposes. In the early part of the year 1911 Lou Kum Shu, acting for his company, and the defendant Covey, entered into an agreement, which was not committed to writing, or, at any rate, not so executed, by the terms of which said Covey entered into the possession and occu-

pation of said land as the agent of said company for the purpose of carrying on the business of farming and stock raising thereon. The agreement was that Covey should so remain in possession of and manage said business for a period of five years from the date of the making of the agreement, and was to receive for his services rendered in that capacity the sum of \$50 per month, and, in addition thereto, 20 per cent. of the net proceeds derived from the farm during that period. Covey was to employ such labor as he might find necessary to carry on the farming and stock-raising business. Lou Kum Shu was to furnish the financial means with which to carry on the business for the first year, in which, presumably, the work would practically be of a preparatory character, and the farm and the business conducted thereon incapable of producing returns in any considerable amount. Under this arrangement, Covey, as stated, took possession of the farm and charge of the business thereof. He employed the necessary labor to assist in carrying on the farm, and, according to his testimony, under the authority vested in him by the said agreement with Lou Kum Shu, opened an account for such goods, wares, merchandise, and farming supplies as might, in his judgment, be required, with the plaintiff's assignor, a firm engaged in the general merchandising business in Placer county. At the request of Covey, the plaintiff's assignor kept two separate accounts of the dealings of the former with the latter—the one designated on the books of account as the "Ranch Account," under which were noted and charged all goods or supplies furnished by the firm to Covey and used by him for strictly farming purposes, such as wheat, barley, seeds, etc., and the other designated as the "Groceries Account," under which were charged all the groceries purchased by Covey for use on the farm.

The hired laborers were to board at Covey's home on the farm, and Covey, in paying them their wages each month, was to, and did, deduct therefrom the amount which they were to pay for their board, varying, during the period of time Covey was in charge of the farm before the misunderstanding leading to this action transpired, from \$16 to \$25 per month. At no time, testified Covey (and in this statement we find no contradiction), did he actually receive any money for boarding the hired help. The agreement was, as before intimated, that Lou Kum Shu would pay all bills contracted by Covey on account of the farm and the business thereof during the latter's management of said farm and business, or, as Covey himself stated it, "all provisions and all bills that I contracted were agreed upon by Lou Kum Shu to be paid by him on the ordering of those supplies by me." The accounts against the farm were always submitted by Covey to Lou Kum Shu and the latter always ap-

proved them when he found no mistakes or errors therein. During the time that the firm of Ford & Co. was furnishing supplies to Covey, Lou Kum Shu called at the firm's store and paid that part of the account designated in the firm's books as the "Ranch Account." On that occasion the plaintiff said to him: "This [referring to the whole account] is a large account, and what arrangements have you and Covey made?" And further said to him that the firm could not continue to furnish groceries unless he (Lou Kum Shu) acquainted the firm with knowledge of the nature of the business relations existing between him and Covey. To this Lou Kum Shu replied that he and Covey were partners, and were to sustain that relation for five years, and upon the faith of that statement by Lou Kum Shu the assignor of plaintiff "continued the account right along," so testified the plaintiff.

Ford declared that there was no difference, so far as the understanding the firm had of the transactions, between the "Ranch" and the "Groceries" accounts; that they were, as before stated, kept separately at the request of Covey, who said, in effect, that thus keeping the accounts would amount only to a matter of convenience to him in dealing with Lou Kum Shu.

After making the payment on the account, as above explained, and on the 30th day of May, 1912, Lou Kum Shu notified Ford & Co. to cease furnishing Covey any more goods unless he (Lou Kum Shu) gave Covey an order for the same. Covey, however, continued to procure groceries from Ford & Co. after the latter was notified by Lou Kum Shu not to supply him with goods, etc., and this accounts for the judgment herein against Covey for the sum of \$223.19, said amount being the difference between the amount for which the plaintiff obtained judgment against Lou Kum Shu and the amount sued for.

Upon the facts above briefly narrated, although in many important particulars flatly contradicted by Lou Kum Shu, the court was amply warranted in finding and in concluding, as a matter of law, that Lou Kum Shu was liable for the groceries sold by the plaintiff's assignor to Covey, up to May 30, 1912, at which time, as seen, Lou Kum Shu notified Ford & Co. that he would no longer be responsible for supplies furnished Covey by said firm in the absence of an order therefor from him.

[1] While it is a well-settled rule that agency cannot be established by the extrajudicial statements or declarations in pairs of one pretending to act as agent and that such statements or declarations are incompetent, and therefore inadmissible as in proof of agency, it is equally well established that the fact of agency, when it rests in parol, may be established on the trial by the testimony of the agent himself. In other words, "the testimony of an agent sworn as a wit-

ness in a case, when the question of his agency is involved, is competent to establish it and its extent and nature." *Kast v. Miller & Lux*, 159 Cal. 723, 727, 728, 115 Pac. 932. See, also, *Mechem on Agency*, § 101; *Parker v. Bond*, 121 Ala. 529, 25 South. 898; *O'Leary v. German A. Ins. Co.*, 100 Iowa, 390, 69 N. W. 686; *Brown v. Cone*, 80 App. Div. 413, 81 N. Y. Supp. 89; *Lawall v. Groman*, 180 Pa. 532, 37 Atl. 98, 57 Am. St. Rep. 662; *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222; *New Home S. M. Co. v. Leago*, 128 N. C. 158, 38 S. E. 805; *Union Hosiery Co. v. Hodgson*, 72 N. H. 427, 57 Atl. 384; *Nostrum v. Halliday*, 39 Neb. 829, 58 N. W. 429; *Hubback v. Ross*, 96 Cal. 426, 31 Pac. 353; *Bergtholdt v. Porter Bros.*, 114 Cal. 681, 46 Pac. 738; *Feris v. Baker*, 127 Cal. 520, 59 Pac. 937; *Peterson v. Stockton, etc., Co.*, 134 Cal. 244, 66 Pac. 304.

[2] And "it cannot be doubted that, where the authority of an agent is unwritten, and express oral authority is not satisfactorily shown, such authority may be implied from acts and circumstances shown." *Anglo-Californian Bank v. Cerf*, 147 Cal. 393, 81 Pac. 1081; *Reinhard on Agency*, § 203.

[3] From the testimony of Covey the fact is fairly deducible that express authority was conferred upon him by Lou Kum Shu to purchase groceries for him, to be consumed on the farm. Covey not only so declared in so many words, but he testified that the hired help were to be fed by him; that, while he deducted from their wages each month the amount of their board, he actually received no money from Lou Kum Shu for such board; and that the latter always inspected the "Groceries" as well as the "Ranch" account, and invariably approved the same when correct. Thus it clearly enough appears from the testimony of Covey that, as manager of the farm and the business thereof, and in all transactions connected therewith, he was, at all times, subject to the superior authority and his transactions to the supervisory control of Lou Kum Shu.

[4] It may be conceded that in certain parts of his testimony Covey made what appear to be statements inconsistent with the theory that included within his powers as agent of Lou Kum Shu was the authority to purchase groceries for consumption on the farm. Whether these inconsistencies were real or only the result of the inaptitude of the witness to express himself clearly it is difficult for this court to say. But it is quite apparent, from the general character of his answers to direct and cross questions, that the trial court could reasonably have accounted for the seeming inconsistencies in his answers upon the hypothesis that, while at all times he intended to convey the idea that he was the agent of Lou Kum Shu, with authority to purchase for the latter supplies of all kinds required on the farm, he was not at all times, while testifying, happy in the

selection of the precise words or phrases essential to a clear expression of that idea. But, however that may be, the effect of inconsistent statements in the testimony of a witness is merely to impeach the integrity of the entire testimony of such witness or impair its evidentiary force, but whether it has such effect or to what extent, if any, is a proposition whose determination is wholly with the trier of the facts. Hence, in this case the trial court, in the exercise of the discretion vested in it as the trier and arbiter of the questions of fact, was at liberty to accept parts of Covey's testimony and reject other parts thereof, if such a course was not inherently unreasonable, and, if it believed certain parts thereof which covered the salient points in issue, it had the right to accept the parts so credited as the bases of its findings, even though such parts, besides being inconsistent with other parts of the witness' testimony, were directly opposed by adversary testimony presented by Lou Kum Shu.

[5] But, granting that the testimony was not sufficient to justify a finding of express antecedent authority in Covey to purchase the groceries in question for Lou Kum Shu, it cannot be doubted that the latter's statements and conduct, long after the "Groceries Account" had been running, and while it was still running, were sufficient to warrant the inference and therefrom a finding that Lou Kum Shu acquiesced in and ratified the transactions of Covey as to groceries, and the authority in Covey to buy the groceries already charged in the account and to continue so to purchase groceries thereafter, until otherwise ordered by Lou Kum Shu, as heretofore explained.

It will be recalled that, while Covey was yet buying groceries at the store of the assignor of plaintiff, the latter asked Lou Kum Shu to explain to him the nature of the business relations then and theretofore subsisting between him and Covey, and, at the same time, said to him that the existing account was large, and that the firm did not propose to continue to furnish groceries to Covey unless it was apprised of the nature of the business agreement with respect to the farm into which the two men had entered, and that Lou Kum Shu replied that they were partners, and would, under their agreement, remain so for a period of five years. On the occasion thus referred to there was no repudiation by Lou Kum Shu of Covey's authority to buy groceries for the farm for the former, nor did Lou Kum Shu state to the plaintiff that the scope of Covey's authority as his agent was limited to the purchasing of "ranch supplies," so-called.

[6] Ratification of a contract made by an agent need not be in express terms in order to bind the principal. "If it is fairly inferable from the words or conduct of the party, it is sufficient. Like the act of conferring

antecedent authority upon an agent, it may be express or implied." *Pope v. Armsby Co.*, 111 Cal. 159, 163, 43 Pac. 589, 590; *Ralphs v. Hensler*, 97 Cal. 296, 32 Pac. 243; *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237, 26 Pac. 902.

"It may be said, as to the character of proof from which ratification may be inferred, that it is most frequently established by implication from the conduct and acts of the party in whose behalf the unauthorized agency was assumed, inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it." *Ballard v. Nye*, 138 Cal. 588, 597, 72 Pac. 156, 159.

[7] Lou Kum Shu was sufficiently made to understand by the plaintiff that the firm of Ford & Co. looked to him as the responsible party for the whole account opened by Covey at its store—the "Groceries" as well as the "Ranch" account. If Covey's authority, under the agreement between him and Lou Kum Shu, was, so far as purchasing supplies was concerned, restricted to the purchasing of wheat, barley, and other seeds, as is the contention of the appellant, it was his duty to have so notified Ford & Co. at the time the above conversation was had between him and the plaintiff, and to have expressly repudiated the account for groceries as one not within the rightful power of Covey as his agent to cause to be opened. Upon this proposition, however, he was silent and passive, and thus he led the firm to believe that the purchase of the groceries, like that of the other supplies, was within the scope of Covey's authority, as his agent, or, in other words, the effect of such conduct, taken in connection with his payment of part of the whole account, may and should be construed as an acquiescence in or ratification of Covey's transactions as to the groceries. *Pacific Vinegar, etc., Works v. Smith*, 152 Cal. 507, 511, 93 Pac. 85. "Quiescence is tantamount to acquiescence," as some of the law writers have phrased the proposition, and therefore the law forbids the principal denying an authority the existence of which is implied from his own conduct, where such authority concerns and affects the rights of third parties. This rule is not alone applicable to the doctrine of ostensible agency, but is equally applicable to the doctrine of ratification.

[8, 9] We have carefully examined all the points involving attacks upon the rulings allowing answers to certain questions propounded to the witness. We do not conceive it to be necessary to give those assignments specific notice in this opinion. Even if it be conceded that some of said rulings were technically wrong, we see nothing in them which could have affected the substantial rights of the appellant, since it is manifest that a different conclusion would not have been reached upon the ultimate facts if the testimony allowed as the effect of said rulings had been

viewed by the court, so far as the question of its admissibility was concerned, in harmony with the theory of the appellant with respect thereto, and, consequently, different rulings touching said testimony had been made. The cause was tried by the court without a jury, and we have the right to assume that, if incompetent testimony crept into the record, the court disregarded it in deciding the questions at issue, there being ample competent testimony to support the conclusion reached. The only ruling of those complained of excluding evidence was the one by which the court foreclosed an answer to a certain cross-question propounded to the plaintiff, and which had reference to the averment of the complaint that Lou Kum Shu was severally liable for the full sum of \$554.19, the total amount sued for; the appellant thus attempting to show that when verifying the complaint the plaintiff knew that he was "swearing to something that was incorrect," since it appeared from the evidence that Lou Kum Shu was liable, if at all, for a part only of the sum sued for. The question, which could have served no other purpose than to impeach the witness, was repeatedly put to the witness, who as often answered it by saying, in effect, that he understood that he was suing both defendants for the full amount, etc. Finally, the court said that it understood what the witness intended to say, and refused to allow counsel to proceed further on that line of cross-examination. This action of the court was not, under the circumstances, erroneous.

All the points calling for special consideration have now been disposed of.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

pay rent, the breach of the lessor's covenant does not justify the nonpayment of rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 782-784, 786; Dec. Dig. ¶188.]

3. LANDLORD AND TENANT ¶290—ACTIONS OF "UNLAWFUL DETAINER"—DEFENSES.

Under Code Civ. Proc. § 1161, providing that a tenant is guilty of "unlawful detainer" when he continues in possession after default in the payment of rent, and after three days' notice in writing, requiring its payment or the possession of the property, shall have been served upon him, in an action in unlawful detainer, the defendant may show that there was no forfeiture of the lease because there was no breach of the covenants of the lease, and if by reason of dealings between the lessor and lessee the rent was paid or discharged by applying thereon claims due the tenant from the landlord, he may show this fact, but this showing can only go to the question whether or not, when the notice to quit was given, the rent claimed therein was due.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1207-1215; Dec. Dig. ¶290.]

For other definitions, see Words and Phrases, First and Second Series, Unlawful Detainer.]

4. LANDLORD AND TENANT ¶152—REPAIRS—RIGHT OF TENANT TO REPAIR AT LANDLORD'S COST.

Under Civ. Code, § 1942, providing that if within a reasonable time after notice to the lessor of dilapidations which he ought to repair, he neglects to do so, the lessee may repair them himself if the cost is not greater than one month's rent, and deduct the expense from the rent, this right to make repairs at the expense of the lessor is waived by an express provision to that effect in the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 152, 538-543, 545-549, 551-557; Dec. Dig. ¶152.]

5. LANDLORD AND TENANT ¶291—UNLAWFUL DETAINER—SUFFICIENCY OF COMPLAINT.

In an action in unlawful detainer against a tenant, a complaint, which pleaded in full a copy of the notice to quit and alleged service thereof upon the tenants, was sufficient as against the objection that the details of the service of the notice were not sufficiently set forth.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1217-1241, 1243-1269; Dec. Dig. ¶291.]

6. LANDLORD AND TENANT ¶291—NONPAYMENT OF RENT—NOTICE TO QUIT—SUFFICIENCY.

A notice to a tenant to pay rent overdue or surrender possession, under Code Civ. Proc. § 1161, signed by the lessor's "attorney," was not insufficient because of its failure to show whether the person signing it was the lessor's attorney at law, or her attorney in fact.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1217-1241, 1243-1269; Dec. Dig. ¶291.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Jas. M. Trout, Judge.

Action by Ella H. Arnold against Helen M. Krigbaum and another. From a judgment for plaintiff, defendants appeal. Affirmed.

R. H. Countryman, of San Francisco, for appellants. Burrell G. White and Leo C. Tuck, both of San Francisco, for respondent.

(169 Cal. 143)

ARNOLD v. KRIGBAUM et al. (S. F. 6921.)

(Supreme Court of California. Jan. 19, 1915.
Rehearing Denied Feb. 18, 1915.)

1. LANDLORD AND TENANT ¶290—UNLAWFUL DETAINER—SET-OFF OR COUNTERCLAIM.

In an action in unlawful detainer against a tenant, neither a counterclaim nor a cross-complaint of any kind is permissible, whether the subject-matter arises out of a violation of the terms of the lease or not.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1207-1215; Dec. Dig. ¶290.]

2. LANDLORD AND TENANT ¶188—RENT—FAILURE TO REPAIR.

A lessor's covenant to repair and the lessee's covenant to pay rent are usually considered as independent covenants, and unless the covenant to repair is expressly or impliedly made a condition precedent to the covenant to

ANGELLOTTI, C. J. This is an action in unlawful detainer and to recover the amount of rent due. The defendants in their answer set up by way of defense an alleged violation by the lessor of a covenant on her part to make certain repairs, whereby they had been damaged in the sum of \$10,000, and also had been compelled to make expenditures to the extent of \$900 in making certain necessary repairs. They also pleaded the same matters by way of counterclaim and also by cross-complaint. On motion the court struck out the counterclaim and cross-complaint, and at the trial refused them permission to introduce evidence in support of their defense on this ground and entered judgment for the plaintiff for the sum of \$875 and costs. By stipulation of the parties said judgment contained no provision for the forfeiture of the lease. We have before us an appeal by defendants from said judgment.

[1, 2] It appears to be thoroughly established both in this state and in other jurisdictions having substantially similar statutes to our unlawful detainer statutes, that neither a counterclaim nor cross-complaint of any kind is permissible in an action in unlawful detainer. This question was discussed by the District Court of Appeal of the First District in the recent case of *Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512, where many authorities are cited. There is no distinction in the authorities between cases where the subject-matter of the attempted counterclaim or cross-complaint arises out of a violation of the terms of the lease upon which the action is brought and other cases. It is said in 24 Cyc. 1424, that the interposition of a set-off or counterclaim is usually not permissible in an action for unlawful detainer, or summary proceeding. A covenant to repair on the part of the lessor and a covenant to pay rent on the part of the lessee are usually considered as independent covenants, and unless the covenant to repair is expressly or impliedly made a condition precedent to the covenant to pay rent, the breach of the former does not justify the refusal on the part of the lessee to perform the latter. In *Peterson v. Kreuger*, 67 Minn. 450, 70 N. W. 568, the precise question here involved was presented, and the court said:

"A tenant against whom an action is brought under this statute is not permitted to counterclaim for damages arising from a breach of any covenant in the lease which is independent of the covenant to pay rent. He cannot justify an unlawful detainer by alleging a violation of a covenant to repair prior to the commencement of the proceedings (citing cases). There is no difference of opinion upon this question. All of the cases cited to the contrary by defendants' counsel simply bear upon the right of a tenant to counterclaim for damages in an action brought to recover rent."

In *Phillips v. Port Townsend Lodge*, 8 Wash. 529 [36 Pac. 476], the answer set up a counterclaim on account of repairs made by the tenant which it was the duty of the land-

lord to make, and it was held that this was demurrable as not constituting a defense. The court said:

"The very object the Legislature had in view in enacting the statute under which the appellants were proceeding was to afford a summary and adequate remedy for obtaining possession of premises withheld by tenants in violation of the covenants of their lease, and this object would be entirely frustrated if tenants were permitted to interpose every defense usual or permissible in ordinary actions at law. * * * In such proceedings counterclaims and offsets are not available."

[3] The idea that such defenses are permissible in unlawful detainer is based on a misconception of the grounds on which that action rests. The Code (section 1161, Code Civ. Proc.), in effect, provides that, upon failure of a tenant to pay rent or perform other covenants of his lease before the expiration of the three days' notice, the lease becomes forfeited and his subsequent possession of the premises is unlawful; he is then "guilty of unlawful detainer." His possession, formerly lawful in virtue of his lease, has become unlawful because of the forfeiture. The statute has provided a special action for the recovery of possession by the landlord, because it was deemed that a more expeditious proceeding and more complete relief than was afforded by an ordinary action for possession was desirable. In order to provide for the collection of the rent in the same action, it provides that the court shall give judgment for the rent found due, which means the rent which accrued before the forfeiture. This, however, is a mere incident to the main object—the recovery of possession. It does not transform the action into an action on contract. The defendant may, if he can, show that there was no forfeiture, because there was no breach of the covenants of the lease on which to found such forfeiture. If, by reason of dealings between them prior to the alleged forfeiture, the rent was paid or discharged at that time, he may show that fact, and in that way questions of contractual relations may properly arise in such an action. But this is not to be allowed to extend to a right of set-off; it can only go to the question whether or not, when the notice to quit was given, the *rent claimed therein was due*; that is, the question whether or not, by some agreement, express or implied, between them, the claims due to the tenant from the landlord were to be applied on the rent.

[4] As we have said, it was alleged that some \$900 had been expended by the defendants in the making of necessary repairs, which it was the duty of the plaintiff to make. If it be assumed that under ordinary circumstances the defendants should be credited with such an expenditure as a payment on account of the rent, provided such expenditure was not greater than one month's rent of the premises, in view of the provisions of section 1942 of the Civil Code, the complete answer to any such claim in this

case is to be found in the provisions of the lease, whereby the lessee, "hereby waives all rights to make repairs of said premises at the expense of the lessor as provided in section 1942 of the Civil Code of the State of California."

If follows that the matters of the set-off, as above stated, by way of answer, counter-claim, and cross-complaint, were not entitled to consideration in this proceeding.

[5] Upon the other matters suggested upon behalf of appellants in their brief, the District Court of Appeal of the First District, in which this case was first decided, said as follows:

"Equally untenable is the claim that the details of the service of the three days' notice to quit were not sufficiently set forth in the complaint. A copy of the notice in full was pleaded, and service was alleged to have been made upon each of the defendants. This was all that was required. *Cowell v. Linforth*, 10 Cal. App. 3, 100 Pac. 1071.

[6] "The notice is also claimed to be insufficient for the reason that it fails to show whether the representative who signed it for the owner as 'her attorney' was the attorney in fact or at law. There is no merit in this contention. The precise question was decided adversely to defendants' contention in *Felton v. Millard*, 81 Cal. 540 [21 Pac. 533, 22 Pac. 750]."

We adopt these expressions of the District Court of Appeal as a part of our opinion.

The judgment appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

169 Cal. 156

In re COWELL'S ESTATE.

VALENTE v. COWELL.

(S. F. 7015.)

(Supreme Court of California. Jan. 22, 1915.)
APPEAL AND ERROR ⇐1002 — FINDINGS — CONCLUSIVENESS.

A finding on conflicting evidence and sustained by circumstantial evidence and the direct testimony of a witness will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇐1002.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

In the matter of the estate of Ernest V. Cowell, deceased. Petition by J. Valente against S. H. Cowell. There was a judgment for petitioner, and defendant appeals. Affirmed.

Mastick & Partridge, of San Francisco, for appellant. Eugene D. Sullivan, of San Francisco, for respondent.

SHAW, J. The record in this case presents an appeal by certain heirs of Ernest V. Cowell, deceased, from an order of partial distribution of the estate of Ernest V. Cowell, distributing to Valente \$1,000 under the sixth

clause of the will. That clause has been before this court heretofore in the Estate of Cowell on the Application of Minkel, reported in 167 Cal. 229, 139 Pac. 84. The legal questions arising under the will have all been settled in that case and in the case preceding it in the same volume. The only question presented here is whether or not Mr. Valente had been an employé of Cowell & Co. for three years or more preceding January 1, 1911, the date fixed in the will. It is a mere question of the sufficiency of the evidence to sustain the finding, and, of course, the rule is too well known to require more than the statement that whenever the evidence is in conflict this court cannot interfere with the finding of the court below, if the conflict is substantial. Taking this evidence as a whole, there is ample circumstantial evidence in connection with the evidence of Mr. Valente to justify a finding that Mr. Valente was an employé of Cowell & Co. for more than three years preceding the date stated. While there is other evidence that might have justified a contrary decision, the court was not obliged to believe that evidence in the face of the facts established by the circumstantial evidence and the evidence of Valente. It is not necessary to state the evidence more fully. The conclusion of the court is that the evidence justified the conclusion of the court below on that ground.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

169 Cal. 162

In re PICKARD'S ESTATE. (S. F. 7068.)

(Supreme Court of California. Jan. 25, 1915.)

HUSBAND AND WIFE ⇐273—HOMESTEAD—ALLOWANCE TO WIDOW—COMMUNITY PROPERTY.

Where there was evidence sufficient to sustain a finding that property set off to a widow as homestead was community property, the court properly awarded it to her in fee.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1008-1024; Dec. Dig. ⇐273.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Judicial settlement of the estate of Orson L. Pickard, deceased. On appeal from an order setting apart the homestead to the widow. Affirmed.

Wilbur G. Zeigler, of San Francisco, for appellant. Edward J. Lynch, of San Francisco, for respondent.

SHAW, J. This is an appeal from an order setting apart a homestead to the widow of the decedent.

So far as the character of the property and its suitability for a homestead are concerned, the case cannot be distinguished from the cases of *Heathman v. Holmes*, 94 Cal.

291, 29 Pac. 404, Estate of Levy, 141 Cal. 646, 75 Pac. 317, and McKay v. Gesford, 163 Cal. 243, 124 Pac. 1016, 41 L. R. A. (N. S.) 303, Ann. Cas. 1913E, 1253. The decision of the lower court is sustained on that point on the authority of those cases.

In regard to the proposition that it is community property, that, of course, is a matter of evidence; the presumption being, to start with, that it was community property. Taking the evidence as a whole, there is enough to sustain the finding of the lower court that it was community property. That being the case, the court was justified in setting it apart in fee as a homestead.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

169 Cal. 174

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO., Inc., v. FRESNO FLUME & IRRIGATION CO. (S. F. 6477.)

(Supreme Court of California. Jan. 28, 1915.

Rehearing Denied Feb. 25, 1915.)

JUDGMENT 586 — CONCLUSIVENESS — NEW ISSUES.

An irrigation company is not concluded by a former judgment in favor of a reservoir company in an action to prevent the diversion of water to its reservoir, which was entered upon the reservoir company's disclaimer of right to the natural flow of the stream and a finding that its diversion was only of the flood water, in a subsequent action against the same reservoir company for the diminution of the natural flow of the stream by the diversion from the reservoir of water which would otherwise naturally flow into the stream.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1066, 1093, 1099; Dec. Dig. 586.]

Department 1. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, against the Fresno Flume & Irrigation Company. Judgment for the defendant, and plaintiff appeals. Reversed.

Frank H. Short, of Fresno, and Edward F. Treadwell, of San Francisco, for appellant. L. L. Cory, of Fresno, for respondent.

SHAW, J. The plaintiff appeals from a judgment against it, rendered upon an order sustaining a general demurrer to its complaint.

It appears from the allegations of the complaint that the defendant had built a dam across Stevinson creek, a tributary of the San Joaquin river, and had by means of said dam impounded a large quantity of the water falling upon the watershed tributary to said creek; that the plaintiff was the owner of the right to divert from said river, below the mouth of said creek, a large quantity of the water of the river; that theretofore plaintiff had brought suit against the de-

fendant for alleged diversion of water from said creek; and that in that action it had been determined that plaintiff was entitled to said quantity of water of said river, and to that extent possessed the right to maintain the natural flow of said creek; that thereafter the defendant had diverted from said creek, of the natural flow thereof, quantities of water which otherwise would have continued down the creek into said river and into plaintiff's canal, whereby it had been deprived of the water of said creek and river to which it was entitled, to its damage; and, that defendant threatened to continue such diversions. Judgment was asked for damages and for an injunction to prevent future diversions.

The record sets forth the complaint, answer, findings, and judgment in the former action. Said judgment was affirmed and the findings construed on appeal to this court. See San Joaquin, etc., Co. v. Fresno Flume, etc., Co., 158 Cal. 626, 112 Pac. 182, 35 L. R. A. (N. S.) 832. It appears further that the defendant had built a dam at Stevinson meadows, across said creek, by which it formed a large reservoir in which it collected and retained the waters coming from the watershed thereto during times of unusual flood and rains and melting snows, and that the diversions which the defendant made, both before and since the former judgment, were of water taken directly from this reservoir. It is claimed in support of the demurrer that the former judgment establishes the right of the defendant to take water from the reservoir, although such taking decreases the amount of water naturally flowing in the creek below the reservoir and decreases the amount in the river so that the plaintiff cannot obtain therefrom the quantity to which it is entitled under that judgment.

The opinion of the court is that this complaint alleges a taking of water from this reservoir which, in its effect, diminishes the flow in Stevinson creek below the reservoir from which the water is taken, and that it further shows that that water, thus taken from the stream and from that reservoir, would, if not taken, naturally flow down the stream into the San Joaquin river and into the plaintiff's canal, and that plaintiff is thereby deprived of its rightful quantity. The former judgment was in favor of the defendants solely because of the fact found, that the taking there complained of, and there found to have occurred, was of flood waters, and did not prevent this flow of the natural water of the stream down the creek and into plaintiff's canal. For these reasons the former judgment is not an adjudication of the injury here complained of, nor is it an adjudication of rights which prevents a complaint of the injury here alleged. The theory of the court below seems to have been that because the same reservoir is there, and because the water is taken out by defendant at

the same place as found upon the former trial, there can be no other cause of action arising from another taking at a different time and after the rendition of the former judgment. That we think is a fallacy. The former judgment was rendered upon a disclaimer by the defendant of all right or claim to the natural flow of the creek and upon a finding that the former diversion from the reservoir did not decrease the natural flow of the stream as it had been accustomed to flow. It merely determined that the defendant was entitled to take water from that reservoir so long as its taking did not diminish the natural flow of the stream in its bed below. For these reasons we think the court below erred in its order sustaining the demurrer.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

169 Cal. 166

In re BAINBRIDGE'S ESTATE.

MAYFIELD v. MCCARTHY et al.

(S. F. 7233.)

(Supreme Court of California. Jan. 26, 1915.)

1. JURY ⇨34—RIGHT TO TRIAL BY JURY—CONSTITUTIONAL GUARANTY—INSUFFICIENCY OF EVIDENCE.

The guaranty by Const. art. 1, § 7, of trial by jury, is observed where a verdict is rendered and recorded, and under Code Civ. Proc. § 657, subd. 6, the court may set aside a verdict for insufficiency of the evidence, where there is no evidence, or where the evidence in the opinion of the trial court is lacking in probative force to establish essential facts.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 233-235; Dec. Dig. ⇨34.]

2. APPEAL AND ERROR ⇨979—SUFFICIENCY OF EVIDENCE—GRANT OF NEW TRIAL.

The granting of a new trial on the ground of the insufficiency of the evidence to sustain a verdict will not be disturbed, unless there has been a manifest abuse of the trial court's discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. ⇨979.]

Department 1. Appeal from Superior Court, City and County of San Francisco; James V. Coffey, Judge.

Petition by Mary J. Mayfield against Eugene F. McCarthy and others, for the revocation of the probate of the will of Caroline H. Bainbridge, deceased. From an order granting a new trial and setting aside a verdict in favor of contestant for insufficiency of the evidence, contestant appeals. Affirmed.

F. W. Sawyer, James A. Devoto, and Devoto, Richardson & Devoto, all of San Francisco, for appellant. Grant H. Smith, Lindley & Eickhoff, S. Bloom, Cullinan & Hickey, Grant H. Smith, A. G. Kazebeer, T. E. K. Cormac, Corbet & Selby, and Henry Ach, all of San Francisco, for respondents.

LAWLOR, J. This is an appeal from an order of the superior court of the city and county of San Francisco setting aside the verdict of the jury and granting a new trial of the contest of the will of the deceased; the verdict having been in favor of contestant, on the grounds of undue influence, fraud, and unsoundness of mind. The will was admitted to probate, and thereafter Mary J. Mayfield, a niece of the testatrix and a legatee under the will, filed her petition for revocation of the probate thereof. After the verdict of the jury, a motion for a new trial was interposed on behalf of the proponents, and by the court ordered granted on the ground of the insufficiency of the evidence to support the verdict.

[1, 2] The appellant relies for a reversal of the order solely on the ground that, under the provision of the Constitution—"the right of trial by jury shall be secured to all and remain inviolate" (section 7, art. 1)—the trial court was without power to set aside the verdict of the jury on the ground of the insufficiency of the evidence. This point has been decided adversely to the contention of the appellant in many cases. The precise constitutional question was raised in *Ingraham v. Weidler*, 139 Cal. 589, 73 Pac. 415, where it is said:

"Appellant contends that section 657 of the Code of Civil Procedure, so far at least as it provides for a new trial for the causes of 'insufficiency of the evidence to justify the verdict' and 'excessive damages, appearing,' etc., is void, because violative of section 7 of article 1 of the state Constitution, which declares that 'the right of trial by jury shall be secured to all'; but there is no ground for this contention. The courts in this country, and in England since long before the time of Blackstone, had always exercised the power of granting a new trial after verdict, and for the causes, among others, of insufficiency of evidence, or that the damages were either inadequate or excessive (3 Blackstone's Commentaries, 387 et seq.); and this power was a recognized part of the 'right of trial by jury,' as that phrase is used in the Constitution."

This case has been cited approvingly in *Noxon v. Remington*, 78 Conn. 299, 61 Atl. 963, to the proposition that where, in the opinion of the trial court, damages are awarded by the jury in an excessive amount, they may be reduced under penalty of having the verdict set aside and a new trial granted.

The identical question has been considered in a number of criminal cases in this state.

In *People v. Knutte*, 111 Cal. 453, 44 Pac. 166, the trial court, at the conclusion of the evidence in chief for the prosecution, advised the jury to acquit on the ground of the insufficiency of the evidence. Section 1118, Pen. Code. The jury, notwithstanding the advice of the court, found the defendant guilty, and thereupon the court, of its own motion, made an order setting aside the verdict and granting the defendant a new trial. On an appeal from the order the trial court

was upheld, and in the decision the following excerpt is quoted from *People v. Lum Yit*, 83 Cal. 130, 23 Pac. 228:

"While it is the exclusive province of the jury to find the facts, it is nevertheless one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised. In this respect, while he cannot competently interfere with or control the jury in passing upon the evidence, he nevertheless exercises a very salutary supervisory power over their verdict. In the exercise of that power he should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict found, and, if in his sound judgment it is not, he should unhesitatingly say so, and set the verdict aside."

People v. Knutte, supra, was cited to the same point in *People v. Chew Wing Gow*, 120 Cal. 299, 52 Pac. 657, and in *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001. In the latter case the trial court, under a misapprehension of the law, denied the motion of the defendant for a new trial, although the record on appeal showed that the trial judge was not convinced that the evidence was sufficient to justify the verdict. The decision quotes the trial judge as saying, "Therefore, I say the evidence is unsatisfactory," and continues:

"But, after showing clearly that the evidence in his opinion was not sufficient to warrant the verdict, he questions whether 'my doubts amounted to such reasonable doubts as would warrant the court in setting aside the verdict on the ground of the insufficiency of the evidence'; and he concludes as follows: 'I believe I shall deny the motion and let the Supreme Court pass on these questions.' But 'these questions' were questions of fact, over which the trial judge had full jurisdiction, while this court has appellate jurisdiction in criminal cases 'on questions of law alone.' As was said in *People v. Lum Yit*, 83 Cal. 130 [23 Pac. 228]: 'He [the trial judge], too, has to be satisfied that the evidence, as a whole, was sufficient to sustain the verdict; if he was not, it was not only the proper exercise of a legal discretion, but his duty, to grant a new trial.' See, also, *People v. Knutte*, 111 Cal. 453 [44 Pac. 166]; *People v. Baker*, 39 Cal. 686; *People v. Flood*, 102 Cal. 330 [36 Pac. 663]; *People v. Chew Wing Gow*, 120 Cal. 298 [52 Pac. 657]."

In *U. S. v. Meldrum* (D. C.) 146 Fed. 392, it is declared:

"* * * Of like character, as instanced by the foregoing cases, is the discretion reposed in the court to set aside a verdict, or to award a new trial through considerations of fact. It is not arbitrary, vague, or fanciful, nor is it to be controlled by humor or caprice, but to be governed by principle and regular procedure for the accomplishment of the ends of right and justice. If errors of law are relied upon, then the judgment of the court is required as to the right rule of law to be applied, and the questions are strictly of legal cognizance. Says Hammond, Circuit Judge, in *Wright v. Southern Ex. Co.* (C. C.) 80 Fed. 85, 93: 'It must and should be performed in every case with such conscientious intelligence as belongs to the judge, and that is the best that can be done in any case where he is called upon to discharge that duty.' The principle is applied in a criminal case (*People v. Knutte*, 111 Cal. 453, 44 Pac. 166), where the court says: * * *"

(Here follows the excerpt already quoted from *People v. Lum Yit*, supra.)

From these authorities it is clear that the

constitutional guaranty (section 7, art. 1) is fully observed when the verdict of the jury in the case is rendered and recorded. The remaining and different question—whether judgment shall be pronounced upon the verdict or the verdict set aside—is "strictly of legal cognizance," which must be determined by the trial court; and, unless a manifest abuse of discretion is shown, the decision will not be disturbed on appeal. In the determination of a motion for a new trial, the verdict should be set aside if, in the opinion of the trial court, it is not supported by sufficient evidence; and this is equally true whether there be an absence of evidence or that the evidence received, in the individual judgment of the trial judge, is lacking in probative force to establish the proposition of fact to which it is addressed. This is the meaning of the terms "insufficiency of evidence" (subdivision 6, § 657, C. C. P.), and "* * * contrary to * * * evidence" (subdivision 6, § 1181, Pen. Code).

Under the rule imposed by the Constitution, the duty of the trial court in reviewing verdicts on the score of insufficiency of evidence is all the more binding for the reason that on the trial the judge shall not charge the jury as to matters of fact. Section 19, art. 6. And if the verdict is not set aside where the evidence lacks sufficient probative force, the party may not thereafter be relieved from the injustice of the ruling. In criminal cases the appellate authority is limited to questions of law alone (section 4, art. 6, Const.), and under the rule of decision the judgment or order will not be reversed, if there is a substantial conflict in the evidence. And the same rule of decision is followed in civil cases. But where there is an absence of evidence to support a material allegation, and the trial court does not set the verdict aside, the hardship may not be so great, for this presents a pure question of law, of which full advantage may be taken on appeal. The order is affirmed.

We concur: SHAW, J.; SLOSS, J.

169 Cal. 172

AMERICAN SURETY CO. OF NEW YORK
v. CITY STREET IMPROVEMENT
CO. et al. (S. F. 6496.)

(Supreme Court of California. Jan. 28, 1915.
Rehearing Denied Feb. 25, 1915.)

1. JUDGMENT $\Leftarrow$ 405 — EQUITABLE RELIEF — GROUNDS.

Equity will not set aside a judgment regularly obtained and entered, in the absence of fraud, mistake, or collusion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 766, 767; Dec. Dig. $\Leftarrow$ 405.]

2. JUDGMENT $\Leftarrow$ 456 — EQUITABLE RELIEF — LACHES.

Where, in a suit in which judgment was rendered for plaintiff on defendants' failure to appear at the trial, the surety on a bond given to release an attachment did nothing to protect

its interests during a period of over two years between the filing of the complaint and the taking of judgment, and waited for six months after the entry of the judgment before bringing a suit in equity to set aside the judgment, and to be permitted to defend the original action, during which time the situation had so changed that the plaintiff in the original action had lost all possible chance of recovery on its claim from any source other than the bond, the suit was properly dismissed for laches.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 863-866; Dec. Dig.  456.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the American Surety Company of New York against the City Street Improvement Company and others. From a judgment for defendants on demurrer, plaintiff appeals. Affirmed.

John E. Bennett, of San Francisco (Charles A. Shurtleff, of San Francisco, of counsel), for appellant. Hoefler, Cook, Harwood & Morris, of San Francisco (William Rix, of San Francisco, of counsel), for respondents.

SLOSS, J. The plaintiff, American Surety Company of New York, became the surety on a bond in the sum of \$10,000, given to release an attachment issued in an action brought by the City Street Improvement Company against the Edgemar Realty Syndicate to recover money claimed to be due under a contract for certain street improvements. While that action was pending, the Edgemar Realty Syndicate became insolvent and forfeited its charter for failure to pay the license tax. Subsequently the plaintiff in the former action, City Street Improvement Company, brought the case on for trial and took judgment without any one appearing in opposition. The surety company knew, of course, when it gave the bond, that the action was pending, and it had knowledge of the fact that the case was set for trial some days before it came on for hearing. It now comes in by a bill in equity and seeks to set aside the judgment and to be permitted to assert the defense of the Edgemar Realty Syndicate to the original action, it being alleged in the bill that there was a meritorious defense. The court below sustained a demurrer to the complaint, and gave judgment in favor of the defendants. The plaintiff appeals.

[1, 2] The ruling on the demurrer was properly made. The complaint is entirely devoid of any allegations tending to show fraud, mistake, or collusion, and, in the absence of a showing of one of these grounds for relief, a court of equity will not set aside a judgment regularly obtained and entered. The complaint is also subject to the objection that it shows upon its face that the plaintiff was guilty of laches. A period of over two years elapsed between the filing of the complaint in the former action and the tak-

ing of judgment, and during all of this time the surety company took no step to protect its interests. Furthermore, the surety company waited a period of almost six months after the entry of the judgment against the Edgemar Realty Syndicate before seeking the relief asked for in this action. During this interval, the situation of the property formerly owned by the syndicate had changed in such a manner that the creditor—the City Street Improvement Company—has lost all possible chance of recovery on its claim from any source other than the bond. The bill is without equity and does not state a cause of action.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

169 Cal. 170

GOLDMAN v. PALMTAG. (S. F. 6408.)

(Supreme Court of California. Jan. 26, 1915.)

DISMISSAL AND NONSUIT  60 — WANT OF PROSECUTION.

Defendant's amended answer was filed April 7, 1910, and nothing was thereafter done until April 17, 1912, when defendant moved to dismiss for want of prosecution. The only excuse for the delay was that plaintiff's counsel had been prevented from attending to business for four months by illness, and had been engaged in other affairs during the balance of the time. *Held*, that whether such excuse was sufficient was for the determination of the trial court in the first instance, and a determination of such question in the negative was not an abuse of discretion, though the time elapsed was but little more than the period provided by Code Civ. Proc. § 583, after which the court has a discretion to dismiss.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig.  60.]

Department 1. Appeal from Superior Court, San Benito County; M. T. Dooling, Judge.

Action by Joseph H. Goldman against William Palmtag. From a judgment dismissing the action for want of prosecution, plaintiff appeals. Affirmed.

C. H. Wilson, of San Francisco, and Geo. W. Jean, of Hollister, for appellant. F. H. Gould, of San Francisco, and H. W. Scott and Briggs & Hudner, all of Hollister, for respondent.

SLOSS, J. The plaintiff appeals from a judgment dismissing his action for want of prosecution.

The court is of the opinion that, while the case presents elements of hardship, it is one in which we cannot say, as an appellate court, that there was an abuse of discretion in granting the motion. It appears that the amended answer, if we look to that alone, was filed on the 7th of April, 1910, the notice of motion to dismiss for want of prosecution was filed on April 17, 1912, and the motion granted and the case dismissed on May 15,

1912. The notice was therefore given more than two years after the filing of the amended answer. The time was but little more than the statutory period after which the court has discretion to dismiss (Code of Civil Procedure, § 583), and there is an undisputed showing of facts which to some extent excuse the delay. But, if we analyze these facts, we find a period of four months during which Mr. Wilson's illness prevented his attending to business, while for the rest of the two years the only showing is that he was engaged with other business affairs. It was for the court below to determine, in the first instance, whether the other engagements of counsel afforded sufficient excuse for the failure to bring this action on for trial. I think furthermore that the court had the right to consider the history of the case prior to the filing of the amended answer, and that upon the entire record enough appears to protect the ruling of the trial court from successful attack here.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

169 Cal. 163

In re MAGORTY'S ESTATE. (S. F. 7199.)
(Supreme Court of California. Jan. 25, 1915.
Rehearing Denied Feb. 23, 1915.)

1. EXECUTORS AND ADMINISTRATORS ☞277—
CLAIMS—PAYMENT—FUNERAL EXPENSES.

Code Civ. Proc. § 1643, relating to the payment of claims against decedents' estates, makes funeral expenses rank as a debt similar to other debts in many respects, but payable in preference to all other debts; the provision requiring that the administrator shall pay them as soon as he has sufficient funds in his hands, meaning as soon as he has funds applicable to that purpose, and the succeeding clause, that he may retain in his hands the necessary expenses of administration, qualifying the preceding provision so as to allow the administrator, subject to the discretion of the court, to retain enough to pay his expenses of administration until it becomes due under the order of the court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1074, 1075, 1124; Dec. Dig. ☞277.]

2. EXECUTORS AND ADMINISTRATORS ☞261—
CLAIMS—PAYMENT OF DEBTS—COMMISSIONS.

Under Code Civ. Proc. § 1647, giving to the superior court in the administration of a decedent's estate control of the payment of claims, and authorizing it to order payment of debts as the circumstances of the estate may require, the court may direct the administrator to pay funeral and last sickness expenses, prior to allowance or payment of the administrator's commissions.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 944-974; Dec. Dig. ☞261.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Judicial settlement of the estate of Walter Magorty, deceased. On appeal from an order directing a payment of claims. Reversed, with directions.

Maurice J. Rankin, of San Jose, for appellant. T. A. Perkins, of San Francisco, for respondent.

SHAW, J. [1] It is the opinion of the court that, under section 1643 of the Code of Civil Procedure, funeral expenses rank as a debt of the estate similar in character to other debts in many respects, but payable in preference to all other debts, and that the provision of section 1646 that the executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses, expenses of the last illness, and allowance made for the family of the decedent, means that as soon as he has funds in his hands applicable to that purpose he must pay these claims. The next sentence of that section, "He may retain in his hands the necessary expenses of administration," we think, qualifies the preceding part and allows the administrator, subject to the discretion and power of the court to order him to do otherwise, to retain enough to pay his expenses of administration until it becomes due under an order of the court.

[2] We do not mean that he may in all cases hold out enough to pay his commissions, because, under section 1647, the court has control of that matter, and may order payment of debts as the circumstances of the estate may require. This would give the court authority to direct the payment of money for funeral expenses prior to the allowance or payment of the commissions. In reversing the order we do not intend to approve, or direct the court to allow, the amount claimed as commissions. Whether the fact that this mortgaged property was lost to the estate without any real administration having taken place, if true, would authorize the court to reduce the commissions to the amount allowed on the balance of the estate we do not say.

The order is reversed, with directions to the lower court to proceed to retry the cause in accordance with this opinion, and allow the administrator to receive as commissions whatever amount it holds he is entitled to under the law, in preference to the funeral expenses.

We concur: SLOSS, J.; LAWLOR, J.

169 Cal. 148

In re ROSS'S ESTATE. (S. F. 6982.)
(Supreme Court of California. Jan. 22, 1915.)

1. HUSBAND AND WIFE ☞273—COMMUNITY
PROPERTY—RIGHTS OF WIDOW.

In the absence of contrary provision in the will, a widow takes one-half the community property by survivorship, plus whatever else the will may give her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1008-1024; Dec. Dig. ☞273.]

2. TAXATION ⚭866—WILLS ⚭525—INHERITANCE TAX—SHARE OF WIDOW IN COMMUNITY PROPERTY.

Where a testator wills half his estate, which is wholly community property, to his widow, she takes three-fourths of the whole as of the testator's death, and no subsequent waiver executed by her to the other heirs can defeat the state's right to an inheritance tax on such portion.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. ⚭866; Wills, Cent. Dig. §§ 1129-1139; Dec. Dig. ⚭525.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Pietro Carlo Rossi, etc., deceased. From an order fixing the amount of the inheritance tax, the treasurer appeals. Reversed, with directions.

Albert H. Elliott, Asst. Inheritance Tax Atty., of San Francisco (Hartley F. Peart and U. S. Webb, both of San Francisco, of counsel), for appellant. Ambrose Gherini, of San Francisco, for respondent.

SLOSS, J. By his will the testator left one-half of his "property or possessions" to his wife and the other one-half to be distributed in equal shares among his sons and daughters. The estate was all community property. The court below charged the widow with inheritance tax on only one-half of the entire community property, and from this order the treasurer appeals.

[1, 2] There is nothing in this will to indicate an intention to make the testamentary gift to the widow stand in lieu of her community interest. The rule has been established by many cases that, in the absence of something in the will to indicate that intention, the widow will take one-half of the community property by virtue of survivorship and will take whatever is given her under the will in addition. This rests upon the presumption that the testator made his will in contemplation of the rule of law that his power of testamentary disposition extends to only one-half of the community property. As he cannot give away the widow's half of the community property by will, he is presumed to make his will with reference to the other half only. She therefore takes the one-half as survivor of the community and takes such portion of the other half as the husband has given her by the will. Where he gives her one-half of his estate, she takes three-fourths of the entire community property. This rule and the reasons for it are well stated in *Estate of Gilmore*, 81 Cal. 240, 22 Pac. 655. See, also, *Estate of Prager*, 166 Cal. 450, 137 Pac. 37, approving the rule laid down in the *Gilmore Case*, and citing many other cases. There is no ground of distinction between this case and those referred to. If, as is suggested in

the record before us, the widow filed a "waiver" of her right to anything over one-half of the estate, it was a mere voluntary conveyance or transfer by her of property to which she was entitled under the will or as successor to the community. She had become the absolute owner of three-fourths of the estate upon the death of the testator and was not called upon to make an election or to waive anything. That being so, the right of the state to the inheritance tax, based upon three-fourths of the estate, vested upon the death of the testator (*Estate of Stanford*, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788), and could not be affected by any subsequent arrangement that might be made by the heirs.

The order is reversed, with directions to the court below to fix the inheritance tax in accordance with the views here expressed.

We concur: SHAW, J.; LAWLOR, J.

26 Cal. App. 218

PEOPLE v. MacPIEE et al.
(Cr. 476.)

(District Court of Appeal, First District, California, Dec. 21, 1914. Rehearing Denied by Supreme Court Feb. 19, 1915.)

1. CONSPIRACY ⚡38—CRIMINAL CONSPIRACY—OFFENSES.

Persons forming a conspiracy, within Pen. Code, § 182, punishing two or more persons conspiring to commit any crime, to cheat and defraud any person of any property by criminal means, to commit any act injurious to the public health, public morals, or for the perversion or obstruction of justice, are not relieved from liability for a conspiracy merely because they succeeded in perpetrating the acts of crime enumerated, which became crimes under other provisions of the Code punishing the specific offenses.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 71, 72; Dec. Dig. ⚡38.]

2. CRIMINAL LAW ⚡829—INSTRUCTIONS—REFUSAL OF INSTRUCTION COVERED BY CHARGE GIVEN.

It is not error to refuse requested instructions covered in substance by instructions given, for accused, under the Code permitting the submission of his requests, is entitled only to have the substance of the law applicable to his case embodied in the instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⚡829.]

3. CRIMINAL LAW ⚡423—CONSPIRACY—EVIDENCE OF CONSPIRATORS—ADMISSIBILITY.

Where the state produces evidence tending to establish the fact of a criminal conspiracy, every act and declaration of each member of the conspiracy, in pursuance of the original plan, and with reference to the common object, is original evidence against each, and it is immaterial at what time any one of the persons charged entered into the conspiracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1001; Dec. Dig. ⚡423.]

4. CONSPIRACY ⚡41—CRIMINAL CONSPIRACY—LIABILITY OF CONSPIRATORS.

One entering into a criminal conspiracy is deemed in law a party to every act which had before been done by any of the conspirators, as well as a party to every act which may afterward be done in furtherance of the common design.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 74; Dec. Dig. ⚡41.]

5. CRIMINAL LAW ⚡427—EVIDENCE—CONSPIRACY—DECLARATION OF CONSPIRATORS.

Before acts or declarations of one or more conspirators, done or made prior to the entering into the conspiracy of a particular person charged, can be used in evidence against him, the fact of a conspiracy at the time the acts were done or declarations made must be shown by some degree of proof sufficient to justify the court in admitting the evidence of the prior acts or declarations, and the evidence cannot consist

merely of the acts and declarations of the alleged conspirators, but must be in the nature of an independent showing of the existence of the conspiracy at the very time when the acts were done or declarations made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1012-1017; Dec. Dig. ☞ 427.]

6. CRIMINAL LAW ☞ 1186—APPEAL—REVERSAL—PREJUDICIAL ERROR.

Where, on the trial of two police officers for conspiring with other officers and bunco men to permit bunco men to commit criminal acts and divide the proceeds with the officers, the evidence showed the commission, after defendants joined the conspiracy, of four overt acts of crime by the bunco men and a division of the profits, error in permitting the bunco men to testify to at least 20 specific cases of swindling and larceny prior to 1912, without first requiring the state to prove, by independent testimony, the existence of the conspiracy at that time, resulted in a miscarriage of justice, within Const. art. 6, § 4½, prohibiting the setting aside of a conviction for error, unless the error resulted in a miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. ☞ 1186.]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Arthur F. MacPhee and another were convicted of conspiracy, and they appeal. Reversed and remanded for new trial.

A. L. O'Grady, Thos. V. Eddy, and Nathan C. Coghlan, all of San Francisco, for appellants. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from the judgment of conviction of the defendants upon the charge of having violated the provisions of section 182 of the Penal Code relating to conspiracy, and from an order denying a new trial.

The defendants herein, together with a number of other persons, members of the police force of San Francisco, were accused by an indictment of the grand jury of having entered into a conspiracy with one Mike Gallo, and a number of other persons, alleged to have been bunco men, by which the latter were to be given leeway for the perpetration of various frauds and crimes, out of which the police officers involved in the conspiracy were to receive a share of the ill-gotten gains as the reward of their lack of molestation. The two defendants herein demanded that they be tried separately from the rest of the alleged conspirators, and they were accordingly so tried, and, having been convicted, are now prosecuting this appeal.

[1] It is the first contention of the appellants that the indictment is defective in the fact that it charges the defendants with two crimes, viz., a conspiracy under section 182 of the Penal Code, and also the offense of receiving bribes under section 68 of the Penal Code. We cannot agree with this contention. The indictment is sufficient to

charge the offense of a conspiracy to commit or connive at the commission of the several kinds of offenses enumerated in section 182 of the Penal Code. The language of that section is inclusive and elastic enough to permit the framing of an indictment charging a conspiracy to do or permit the doing of any or all of the illegal acts referred to therein; and the fact that the parties to the conspiracy succeeded in perpetrating the acts of crime or fraud specified in the section, which thus became crimes under those other sections of the Code forbidding these specific offenses, would not in any wise relieve the conspirators from their liability under section 182 of the Penal Code. To hold otherwise would be to practically nullify that section by making success in the consummation of its enumerated acts of fraud and crime a defense to the conspiracy by which that success was made possible.

[2] Appellants also find fault with the action of the court in refusing to give a number of instructions requested by the defendants. It is unnecessary for us to review these several refused instructions in detail, for the reason that, after a careful consideration of the entire body of the court's instructions which were given to the jury, we are satisfied that the substance of the several instructions requested by the defendants and refused by the court is to be found in the instructions which the court gave.

The defendant in any given case is not entitled, under the section of the Code which permits the submission to the court of the defendant's requested instructions, to have his own particular phrasing of the law adopted by the court and given to the jury. All that he is entitled to is to have the substance of the law applicable to his case set forth by the court correctly in its instructions; and this we think was done in this case and in respect of the particular matters at which the present objection to the action of the court is aimed.

The appellants further contend that the court committed numerous errors in the admission of certain testimony going to show that upon specific occasions prior to the time when the defendants are claimed to have entered into this alleged conspiracy, or to have had any knowledge of its existence, between the designated bunco men and their codefendants, other specific crimes had been committed by one or other of the bunco men with whom these defendants are charged with having afterward conspired with a view to the commission by the former of later and similar offenses; and in this same connection it is further contended by the appellants that the court erred in its instruction to the jury that:

"A person coming into a conspiracy after its formation is deemed in law a party to all acts done or declarations made by any of the other al-

leged conspirators either before or afterward in furtherance of the common design."

The particular facts to the admission of which in evidence objection was made, and respecting which the foregoing instruction was given, are these: The evidence offered by the prosecution showed that the defendants were first assigned to the bunco and pickpocket detail by their superior officers in charge of the police department on January 29, 1912, and there is no evidence of any knowledge of or connection with the alleged conspiracy on their part prior to that date. One of the main witnesses for the prosecution was Mike Gallo, a bunco man, and one of the alleged co-conspirators whose acts of crime and fraud were to be winked at by the police. Gallo was asked by the prosecution to testify to specific acts of swindling and crime committed by him prior to the time of the first connection of the defendants with the alleged conspiracy; as, for instance, to the swindling of one Bonacosi on April 23, 1911, of one Pennelli on June 19, 1911, and of one Nadotti on November 29, 1911. Several other bunco men were also called to testify to a number of other specific acts of fraud and crime committed by them during the years 1910 and 1911. The prosecution also, by these several witnesses, sought to introduce evidence of conversations had from time to time during a period prior to January, 1912, and dating as far back as the year 1910, between these several witnesses and members of the police force other than the defendants, who were asserted during this period to have been co-conspirators with these witnesses. To the testimony of each of these witnesses, and to the admission of each detail of the foregoing evidence, the defendants introduced the specific objection that as to them the matters sought to be elicited were incompetent, irrelevant, immaterial, hearsay, and not binding upon these defendants, for the reason that these alleged acts were committed and conversations held without the presence or knowledge of the defendants and before the time of their alleged entrance into the conspiracy in question, and that no foundation had been laid for the admission of such evidence by proof aliunde of the existence of the conspiracy at the time these several acts were done and declarations made. The justification of the prosecution for the offer and of the court for the admission of this line of proof is to be found in that portion of the transcript from which it appears that, after the people had presented some evidence tending to show that the connection of the defendants with the conspiracy began in January, 1912, the district attorney stated to the court that he proposed to go back to 1910, and trace the conspiracy down from that time, showing its then existence and the members who then were enlisted in it; and that he proposed to show that the same

body of conspirators were in it before 1912, when the defendants joined themselves to it; that the same class of crimes were being committed and were being protected in the same way by the police officers who were indicted with these defendants, and that they were receiving the same percentages as their profits from the nefarious scheme. The court, in passing upon the admissibility of this proposed line of evidence, said:

"It is proper, when an individual is shown to have become a member of the conspiracy after the conspiracy was formed, to prove the acts and declarations of the conspirators prior to that time upon the doctrine of adoption; that is to say, when the latter member becomes identified with the conspiracy, by such connection he thereby assumes responsibility for all that has been done up to that time."

Acting upon this ruling the court admitted, over the specific and repeated objections of the defendant, all of the foregoing line of testimony, and later in its charge to the jury gave the above-quoted instruction.

[3, 4] It is a well-established principle of evidence in cases of conspiracy that, *after* the foundation has first been laid by proof tending to establish the fact of the conspiracy, every act and declaration of each member of the confederacy in pursuance of the original concerted plan and with reference to the common object is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them; and it makes no difference at what time any one of the persons charged entered into the conspiracy, for every one who does enter into such a common purpose and design is deemed in law a party to every act which had before been done by the others, as well as a party to every act which may afterward be done by any of the others in furtherance of such common design. 1 Greenl. on Ev. (16th Ed.) p. 305, and cases cited; 2 Whart. Crim. Law (10th Ed.) § 1399; *Id.*, p. 1434, and cases cited.

[5] The statement of the foregoing principle of law, however, presupposes that before the acts or declarations of one or more of the co-conspirators, done or made at a time prior to the entering into the conspiracy by the particular person charged, can be used in evidence against him, the fact of the existence of the conspiracy at the time such acts were done or declarations made must have been shown by some degree of proof sufficient to justify the court in admitting the evidence of such prior acts or declarations; and that such proof cannot consist merely in the acts and declarations of the alleged co-conspirators, but must be in the nature of an independent showing as to the existence of the conspiracy at the very time when the acts were done or declarations made by which the persons alleged to have subsequently joined the conspiracy are sought to be bound.

That this is an equally well-settled principle of law relating to the proof essential in conspiracy cases will be found fully supported in

2 Whart. Crim. Ev. (2d Ed.) pp. 1430-1432, and cases cited. Let us seek to apply this principle to the case in hand. The defendants MacPhee and Taylor, according to the evidence and admissions of the prosecution, first joined the alleged conspiracy in January, 1912. It is claimed by the respondent that this conspiracy had then been in existence for a period of about two years, during which prior period a number of acts of fraud and crime had been perpetrated by the bunco men, and a number of incriminating talks and transactions been indulged in by the policemen then included in the conspiracy. These acts, talks, and transactions among the then alleged co-conspirators are offered and admitted on behalf of the prosecution against these particular defendants upon the theory that, having entered into a going conspiracy, they are bound by what had gone before. It is indispensable, however, that, before this evidence could have been rightfully admitted, some degree of proof aliunde must have been presented tending to prove the existence of the conspiracy among those then associated in it and whose acts and declarations are sought to be so used. The record in this case is voluminous, but a patient and careful examination of it fails to disclose any evidence whatever, either direct or circumstantial, outside of the statements of the co-conspirators themselves, tending in any degree to establish the existence of the conspiracy during the years 1910 and 1911 to which the defendants are alleged to have allied themselves in January, 1912. Not a single victim of any of the acts of fraud and crime to which the bunco men Gallo, Cordano, and others testify in detail as occurring during these former years is produced to support their story; nor is any evidence or record of any kind presented which tends in any degree to establish the commission of the offenses to which these admitted co-conspirators themselves testify with great particularity. In the entire absence of such proof aliunde tending to establish the existence of such conspiracy, during these prior years, the action of the court in admitting in evidence the acts and declarations of the alleged co-conspirators during those years against these defendants must be held to be prejudicial error; and it therefore necessarily follows that the giving of the instruction of the court above quoted, which would be correct in a proper case, but which is predicated upon the admissibility and existence of such evidence in the pending cause, must also be held to be error materially affecting the defendants' case.

There are certain other assignments of error on the part of the appellants, but as these chiefly refer to the rulings of the

court upon matters involved in the taking of the testimony erroneously admitted, as above set forth, they do not require particular consideration.

[6] The foregoing conclusions require a consideration of section 4½ of article 6 of the Constitution as to its application to the case at bar. That the errors of the trial court above set forth were substantial and highly prejudicial to the defendants' case a brief reconsideration of the evidence will serve to demonstrate. The defendants are alleged to have become members of the conspiracy in question in the month of January, 1912. After that time there were four overt acts of the conspiring bunco men, largely, if not chiefly, supported by their own evidence, and in the knowledge, protection, and profits of which the defendants are claimed to have participated, but which participation each of the defendants under oath circumstantially denies. On the other hand, the reporter's transcript discloses that the court permitted a number of these same self-confessed bunco men to testify to at least 20 specific cases of swindling and larceny committed during the years 1910 and 1911, with much of circumstance and detail, and with numerous conversations with the policemen, other than the defendants, who were their alleged co-conspirators during this period, at which interviews percentages of division were agreed upon and a distribution had of ill-gotten gains. This mass of testimony, occupying several hundred pages of the transcript, was, as we have seen, erroneously admitted in evidence by the court. That its admission would have a highly prejudicial effect upon the minds and judgment of jurors there can be no doubt; and that its consideration, especially in view of the charge of the court, would contribute materially to their verdict we think to be a matter beyond dispute. After a most careful consideration of the entire cause, including the evidence, but without the presence of the actual witnesses before us, we are unable to determine whether the defendants would or would not have been convicted by the jury had this erroneously admitted testimony been withdrawn from their consideration. This being so, we do not feel that section 4½ of article 6 of the Constitution can be given application to uphold the judgment in the case at bar. *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042; *People v. Fleming*, 106 Cal. 357, 136 Pac. 291; *People v. Wilson*, 23 Cal. App. 513, 138 Pac. 971.

Judgment and order reversed, and the cause remanded for a new trial.

We concur: LENNON, P. J.; KERRIGAN, J.

28 Cal. App. 213

**KEELEY v. SUPERIOR COURT OF
NEVADA COUNTY.** (Civ. 1319.)

(District Court of Appeal, Third District, California. Dec. 21, 1914.)

1. VENUE — 57 — CHANGE OF — ORDER.

Unless the parties apply for or consent to the transfer of a cause, a disqualified judge cannot, without notice to the parties or hearing, transfer a cause from one county to another.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 87; Dec. Dig. 57.]

2. JUDGES — 39 — DISQUALIFICATION — EFFECT.

Where a judge is disqualified, and there is no motion for a transfer, and the parties do not consent thereto, he may either call in a qualified judge to preside, or secure from the Governor a designation of an unbiased judge from another county for the particular case.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 184, 186; Dec. Dig. 39.]

3. PROHIBITION — 5 — RIGHT TO REMEDY.

Where a disqualified judge, without notice to, or consent of, the parties, transferred the cause to another county, one objecting is entitled to prohibition unless some other remedy is available.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 20-30; Dec. Dig. 5.]

4. PROHIBITION — 3 — RIGHT TO REMEDY — OBJECTIONS.

Where the court, to which a cause was transferred by a disqualified judge without motion or notice to the parties, indicated that it erroneously deemed it had jurisdiction, prohibition will issue to restrain it from proceeding to trial; there being no inference that an appropriate objection would prevent the court from trying the cause.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. 3.]

Application by Lewis Schontz Keeley for a writ of prohibition against the Superior Court of the County of Nevada. Writ issued.

Tuttle & Tuttle, of Auburn, for petitioner. J. M. Walling, of Nevada City, for respondent.

BURNETT, J. The application is for a writ of prohibition to restrain respondent from trying a certain proceeding growing out of the trial of the action of "Dora Alice Keeley, Plaintiff, v. Lewis Schontz Keeley, Defendant." From the petition it appears that said action was begun in the superior court of Placer county, having for its object a judgment of divorce and the custody of the minor child of said parties. An answer and cross-complaint was filed by defendant seeking similar relief for himself. One W. J. Prewett, the son of Hon. J. E. Prewett, judge of said superior court, appeared in said action as attorney for plaintiff.

Thereafter Hon. Wm. M. Finch, judge of the superior court of Glenn county, was requested by Judge Prewett to preside at the trial of said cause, and the latter set the time for said trial. The case was duly tried by Judge Finch, and judgment was rendered denying a divorce to each party, but granting

to plaintiff the custody of said minor child, providing, however, that the child should be allowed to visit and remain with the mother of defendant four months in each year. The petition further alleges:

"That thereafter, on the 24th day of July, 1914, there was served and filed in said action by plaintiff a petition for an order modifying the above-mentioned judgment relative to the custody of said minor child, said petition being made by the plaintiff in said action of Keeley v. Keeley, and J. M. Walling appearing as sole attorney for petitioner therein, and the said W. J. Prewett did not appear in said petition as attorney or in any other manner, and never has appeared in said action after the entry of said judgment as aforesaid." That an order to show cause was made by Judge Finch and set for hearing on September 28th at 10 o'clock a. m., in the superior court of said Placer county, and said order was duly served and filed. On July 24, Judge Prewett also made an order setting said petition for hearing at the same time and place. Thereafter, on August 29th, he made the following order:

"Keeley v. Keeley.

"In this case it is made to appear to this court that the judge thereof is disqualified under the law from further acting herein.

"It is further made to appear to this court that a proceeding regarding the same subject-matter is now pending in the superior court of the county of Nevada, state of California.

"It is further made to appear to the court that the county seat of Nevada county is much nearer to the residences of the respective litigants than any county seat of any other county.

"It is therefore ordered, adjudged, and decreed that the aforesaid cause be, and the same is hereby, transferred to the superior court of the county of Nevada, state of California; and the clerk of this court is hereby directed and requested to transmit to said superior court of said Nevada county all the records and files in said case."

Having alleged that the clerk obeyed said order, the petition proceeds:

"That no motion or any application whatever was made, or ever has been made, for or in respect to said last-mentioned order, nor was any motion made by either party to transfer said action to the superior court of Nevada county, or any other county; that no request was made by plaintiff to transfer said action to any court; that defendant is informed and believes, and therefore alleges it to be a fact, that said order was made without the knowledge of any of the parties or attorneys in said action, and that none of the said parties or attorneys in said action knew or had any intimation whatever that said order would be made, but, on the contrary, all of said parties were prepared to proceed with the hearing of said petition before said Hon. William M. Finch, judge as aforesaid, on September 28, 1914, at 10 o'clock a. m., in the superior court of Placer county; that neither defendant nor his attorneys ever at any time agreed or stipulated that said action should be transferred to the superior court of Nevada county, or any other county, nor was the said matter ever presented to their notice or consideration, nor was any opportunity afforded either party to agree or disagree to the transfer of said action to any court; * * * that there are not now, nor ever have been, proceedings regarding the same subject-matter pending in the superior court of Nevada county, and the matter of the custody of said minor child has never been presented to said superior court of Nevada county in any manner; * * * that said Hon. William M. Finch is now, and during

all the times herein mentioned was qualified to preside in and try said cause, and all matters connected therewith, and your petitioner is informed and believes, and therefore alleges it to be a fact, that said Hon. William M. Finch is ready and willing to hear said petition at the time and place set for the same, and to proceed with the determination of all matters pending in said action."

A demurrer and an answer have been filed herein by respondent. None of the allegations of said petition is denied, however, except as to the disqualification of Judge Pre-wett, it being alleged that he was and is disqualified by reason of his son's connection with the case. The answer also sets forth "that said petitioner, Lewis Schontz Keeley, has not appeared in said superior court of Nevada county at any time, nor has any application been made to, or objection presented in, this court to the court proceeding to hear and determine the matter presented or questioning the jurisdiction of this court in said matter," and, furthermore, "that no application has at any time been made to the superior court of Placer county, or the judge thereof, asking for a revocation of the order of transfer set forth in the petition herein."

[1] There seems to be no question that the order transferring said cause to the superior court of Nevada county was without authority and entirely void. In *Bohn v. Bohn*, 164 Cal. 536, 129 Pac. 983, discussing a change of the place of trial, the Supreme Court said:

"The change can only be effected through an order of the court after its judicial action has been invoked, by bringing the matter on for hearing, where the right of the defendant to the transfer can be contested by the plaintiff. The court must be applied to for an order of transfer."

In the more recent case of *Ex parte Burch* (Sup.) 141 Pac. 813, it is said:

"It may be contended that section 398, Code of Civil Procedure, alone applies to the motion here considered, and that the notice contemplated by section 397 of that Code is not necessary. Subdivision 4 of the latter section indicates, however, that the Legislature intended such notice to be given. *Livermore v. Brundage*, supra (64 Cal. 299 [30 Pac. 848]), does not hold that such a motion need not be noticed at all. It merely decides that the judge who is disqualified need not be served."

[2] Of course, it does not follow that a disqualified judge is compelled to try the cause if no motion is made for a transfer or if the parties do not consent thereto. In such contingency the course for him to pursue is pointed out in said *Burch* decision in the following language:

"In *Imperial Land Co. v. Imperial Irrigation District* [166 Cal. 491], 137 Pac. 234, this court suggested two methods whereby a qualified judge may be secured to preside at a trial in a county in which the only resident judge of the superior court is disqualified; one by calling a judge to hold an extra session; another by securing from the Governor a designation of an unbiased judge from another county for the particular case."

In the present instance, as the petition shows, there was a qualified judge from another county ready and willing to proceed with the hearing. The order in question having been made without motion or notice was therefore in excess of jurisdiction and void, and it could, manifestly, confer upon the superior court of Nevada county no authority to hear the cause.

[3, 4] It is therefore a case for prohibition unless some other adequate remedy is clearly available.

There is force in the suggestion of respondent, in this connection, that petitioner should appear in the court below and object to any proceeding in the matter on the ground that the court has no jurisdiction of the cause; the inference being that the court would adopt petitioner's view and decline to proceed further. As to this, it is said, in *Baughman v. Superior Court*, 72 Cal. 576, 14 Pac. 208:

"It may be added that the petition does not distinctly show that objection was made to the proposed action of the superior court on the ground that it would be beyond its jurisdiction. It has been repeatedly held here that prohibition will not go from this court unless the attention of the court whose proceedings are sought to be arrested, has been called to the alleged excess of jurisdiction. *Southern Pacific R. R. Co. v. Superior Court*, 59 Cal. 475."

Ordinarily, no doubt, such course should be pursued, but in this proceeding an order to show cause was issued, and from the return of respondent contesting the sufficiency of the petition we think it is fairly inferable that the learned trial judge of Nevada county does not agree with petitioner, and that the course suggested would be un-availing.

At any rate, we have some discretion in the matter, and, believing as we do that respondent has no jurisdiction, we think the simplest and most satisfactory course is to issue the writ, assuming that respondent will direct the records to be returned to Placer county. The latter court, no doubt, upon the proper motion being made, will set aside its former order and set the cause down for trial.

It is ordered that the peremptory writ issue.

We concur: CHIPMAN, P. J.; HART, J.

26 Cal. App. 240

BARRY v. SUTTER. (Civ. 1230.)

(District Court of Appeal, Third District, California, Dec. 28, 1914. On Petition for Rehearing, Jan. 27, 1915.)

1. BOUNDARIES — 48 — ESTABLISHMENT — AGREEMENT OF PARTIES.

Where one of two adjoining owners, recognizing their boundary line as such, makes such valuable improvements as to work great injury to him if the line be disturbed, the other, with whose knowledge and acquiescence the improvement was made, will be estopped from afterwards alleging such mistake in the boundary as

would deprive the first party of his improvements.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 232-242; Dec. Dig. ¶48.]

2. DEEDS ¶195, 196—EVIDENCE—PRESUMPTION AND BURDEN OF PROOF—INVALIDITY.

The presumption is in favor of the validity of a deed, and the party seeking to set it aside on the ground of fraud, mistake, failure of consideration, and misrepresentation, has the burden of proving those issues.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 584-593, 649; Dec. Dig. ¶195, 196.]

3. DEEDS ¶210, 211—SUFFICIENCY OF EVIDENCE—VALIDITY.

Where plaintiff sought to set aside deed from his ancestor to defendant's grantor on the ground of fraud, mistake, failure of consideration, and misrepresentation, evidence held to sustain a finding that the deed was not invalid.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 635-647; Dec. Dig. ¶210, 211.]

4. QUIETING TITLE ¶54—COSTS.

In an action to quiet title, wherein judgment for plaintiff was stipulated except as to the part described in the defendant's answer, and where the deed from plaintiff's ancestor to defendant's grantor was unsuccessfully assailed, defendant was entitled to his costs.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 105; Dec. Dig. ¶54.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by John Barry against William Sutter. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuel C. Wiel, of San Francisco, for appellant. Peter A. Breen, of San Francisco, for respondent.

BURNETT, J. The controversy is over a narrow strip of land, constituting a part of Mission block No. 84 in the city and county of San Francisco. There are three counts in the complaint. The first is in the usual form of an action to quiet title; the second and third counts seek to set aside a deed from John Barry, the original plaintiff, to William Lyons, respondent's grantor, on the ground of fraud, mistake, failure of consideration, and misrepresentation. Said instrument is in the form of a quitclaim deed and purports to convey by metes and bounds the land described in defendant's answer. The answer disclaims all interest in the property described in the amended complaint, except so much thereof as is embraced within that described in the answer, and specifically denies the allegations of the second and third counts of the complaint in reference to the execution of said deed, and alleges that it was freely and voluntarily made with full knowledge of the facts. After the commencement of the action, the original plaintiff died, and John Barry, his son, was substituted as plaintiff. On November 28, 1911, by stipulation, plaintiff had entered a "judgment in part," quieting his title to all of the property described in the amended complaint except the portion thereof embraced in the

answer, "said judgment being without prejudice to any rights which the plaintiff or said defendant William Sutter may have in the land or premises in the answer described, as to which last mentioned land and premises the cause was adjudged to remain at issue to be tried upon the law and facts applicable thereto." The adjoining owners acquired their properties in 1873 from a common grantor. A year later they built their houses and occupied them without dispute or question from 1874 to 1910, over 35 years. In 1910, one of the adjoining owners sold his piece to William Sutter, defendant and respondent herein. He had the land surveyed, and found that the boundary line described in the deeds of 1873 was 3 feet and 7 inches from the line which had been recognized as such and upon which the houses had been built. Whereupon, possession was demanded by respondent of said strip, and this action was begun soon thereafter.

[1] Appellant, in addition to his attack upon said quitclaim deed, claims that the facts bring the case within the rule announced in *Dundas v. Lankershim*, 155 Cal. 692, 102 Pac. 925, and other cases, holding that the line actually located and marked on the ground must be accepted as the true boundary regardless of its accuracy as shown by subsequent measurements, but especially and emphatically is it declared that we have the condition pointed out in *Helm v. Wilson*, 76 Cal. 486, 18 Pac. 608, as follows:

"Beside, it appears that in 1884 the defendant, with the knowledge and acquiescence of the plaintiff, erected valuable improvements upon the disputed 'strip.' It has been held that, even without any agreement more than is implied from their acts, if two persons trace their dividing line, and, both recognizing it as such, one goes forward with the knowledge and acquiescence of the other, and makes valuable improvements, so valuable as to work great injury to the party making them if the line be disturbed, the other will be estopped from afterward alleging such mistake as shall deprive the builder of his improvements, and especially if the party seeking to disturb the line knew, at the time the improvements were made, all that he subsequently learned, or if he had the means of knowledge."

Therein is stated what is deemed to be a well-established principle, but we think it is not necessary to determine whether it has application to the case in hand, as we feel constrained to uphold the judgment on the other ground suggested.

After alleging that said deed was signed by John Barry, Sr., and that it purported to convey to W. H. Lyons a portion of the property in controversy, the complaint proceeds:

"That said signature was procured without the presence or advice of his attorney or of any other person upon whom plaintiff is or at any time herein was accustomed to rely for the transaction of his affairs. That the plaintiff was unable to read and did not read said deed, and did not know the contents thereof at the time he signed the same, and that said deed was not read over to him, and that he would have been unable by reason of the aforesaid to understand the purport or effect if it had been read over to

him." Furthermore, that defendant falsely represented to him that he was not thereby conveying any of his property to said Lyons and that he would not be occasioned any loss thereby. That said deed was not acknowledged by him; that it was wholly without consideration, and "that plaintiff at the time of said deed was unconsciously ignorant of the fact that said deed conveyed to W. H. Lyons a portion of the real property first herein described, and of the fact that said deed conveyed to said W. H. Lyons property of which the plaintiff was the rightful owner."

[2, 3] It is not disputed, and indeed cannot be, that the presumptions are in favor of the validity of the deed, and the burden of proof was, of course, upon plaintiff as to the issues affecting the purported conveyance of the title. There is, however, no evidence from which a rational inference can be drawn that any misrepresentations were made to the grantor, that any undue influence was exercised, that he did not have the deed read to him or did not thoroughly understand its terms, that it was not, in other words, his entirely voluntary act made understandingly with the intention to convey to the grantee therein named whatever interest said grantor had in the premises included in the description. At most, we may infer that the grantor was somewhat advanced in years, not very strong physically, and that he acted without the advice of his attorney to whom he generally applied for assistance in matters of such moment. These circumstances, however, fall short of justifying an appellate court in reversing the finding in favor of a deed apparently and presumably executed with the formality and solemnity usually and naturally associated with such transactions, there being no confidential relation between the parties.

All the evidence upon the subject was offered by plaintiff, and is substantially as follows: Witness Lyons testified that, immediately after he discovered from the survey that there was an error in the Barry line, he informed Barry that there was a mistake, and that the latter did not say anything.

"He didn't have anything to say. I did not say anything to him about making a deed to me, or a quitclaim, or moving the line. I didn't at any time ask him for a deed of that property, and I do not know how he came to make the deed that he did make to me."

Augusta Barry, daughter of the grantor, testified that she could not say whether any money passed at the time of the execution of the deed, as she was not present when it was executed. She was asked whether her father was sick at the time, but an objection was sustained; the court, however, stating that plaintiff would be allowed to prove any fact bearing upon the incompetency of the grantor. Counsel for appellant thereafter stated:

"If your honor will give me a chance, I will prove the fact that he was an old man, who had been out of work for a long time. He was getting weak. He was of sound mind, as far as matters go. He left matters in my hands as an

attorney when matters came up. In this instance, without having any consultation at all, he was induced to sign a deed signing away half of his house. That is what I am trying to prove in this connection."

The court then stated:

"You get at this properly, and perchance you can get this testimony before the court; that the plaintiff was unable to read, and did not read the said document; did not know the contents of said document; if you can prove that it was not read to him, and he didn't know anything about it; that he was signing a document he didn't believe he was signing; those are all material facts. But this witness does not seem to know anything about it."

Nothing, however, of importance was elicited, beyond the fact that her father was not able to read English, the witness stating that she did not know "anything about the manner in which the deed was drawn up, or whether he was advised by anybody at all on the subject." In response to the question:

"Did Mr. Sutter, the defendant in this action, in your presence, ever say anything to you or anything in your presence in reference to the matter in dispute?"

She replied:

"Yes, sir. He claimed my father was on his property, and he wanted it. That is about all. He claimed father was on his land. He did not say anything at all about the execution of a deed."

Mr. S. C. Wiel testified that Mr. Barry was accustomed in all matters to come to the former's office and ask advice on everything he did.

"He never did anything in connection with that property, or any other property, without first coming to see me. * * * And he never, independently of his own will, acted on anything at all. I know of my own knowledge, I think I can testify to that fact, that he received nothing for the deed."

Mr. Wiel's testimony is probably the most significant of the showing made in behalf of plaintiff, but it is apparent that he was largely stating conclusions. It does not appear whether he was present at the execution of the deed. If he was there, it is strange that he did not testify further concerning it. If he was not present, his declaration that Mr. Barry received nothing for the deed must have been the result of hearsay. But, according to his evidence the fullest credit, it amounts to nothing more than that no money was paid to the grantor of the deed. Not only did it fail to affect or touch the question whether there were other considerations for the conveyance, but there was not even any attempt on the part of appellant to show that Mr. Barry at the time of the execution of the deed was not of sound mind, that any misrepresentations were made, that he was unduly influenced or influenced at all in the transaction, or that, in other words, the deed was not the result of his free and spontaneous volition.

Such being the condition of the record, we can see no other course than to affirm the judgment. It would seem to be a matter of indifference whether the judgment be considered one of nonsuit or upon final submission.

As to this, the record is somewhat uncertain; it concluding as follows:

"Mr. Wiel: That is our case. I would like to argue my point of mistake, that these parties acted upon a mutual mistake, that the boundary line was according to a survey instead of according to their actual location. Mr. Breen: Is that your case, Mr. Wiel? Mr. Wiel: That is my case. The Court: I think you are out of court. Mr. Breen: If that is the plaintiff's case, I want to make a motion for nonsuit. Mr. Wiel (after discussion): I will submit the case and take your honor's ruling. Mr. Breen: I will submit it also. The Court: Judgment for defendant."

At any rate, the cause was submitted on the evidence offered by plaintiff, findings were made and filed, and we find no sufficient reason to disturb the judgment.

[4] Judgment having been entered, as we have seen, in favor of plaintiff as to all the property except the portion described in defendant's answer, the latter alone presenting the question at issue, and the said deed not having been successfully assailed and conveying from plaintiff's predecessor in interest the land described in said answer, defendant was certainly entitled to his costs. This is all that was awarded him, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Petition for Rehearing.

PER CURIAM. In response to appellant's petition for rehearing, we deem it sufficient to say that there is in the record no more evidence of mistake than of fraud. We cannot assume that because the grantor was occupying the property he did not intend to convey it to the grantee. That would be a dangerous and unauthorized principle of construction to apply to an instrument that is presumed to express the intention of the parties. In the absence of a clear showing that he intended otherwise, one must, of course, be held to the plain meaning of the words he uses in the conveyance of real property.

The petition for rehearing is denied.

169 Cal. 157

LEONARD v. OSBURN. (Civ. 1380.)

(District Court of Appeal, First District, California. Sept. 24, 1914.)

1. DEEDS 42—VALIDITY—CERTAINTY OF DESCRIPTION.

A deed conveying a lot in Twin Lake Park in Santa Cruz county described as lot 10, block 2, subdivision No. 6, on map made by one B., and filed in county recorder's office, when there was no lot 10 in block 2 on the B. map, nor any subdivision 6, and the block was not divided into lots, but was reserved as a church site, on which a church was already built, but from which it appeared that the lot described could be easily located from the description, was not void for uncertainty of description.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 85-87; Dec. Dig. 42.]

2. DEEDS 38—DESCRIPTION—SUFFICIENCY.

It is not essential to the validity of a deed that the description should be by boundaries,

courses, or distances, or by reference to monuments.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65-79; Dec. Dig. 38.]

3. EVIDENCE 460—PAROL EVIDENCE—DESCRIPTION IN DEED.

Where the description in a deed is general, the particular subject-matter to which it applies may be ascertained by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. 460.]

4. VENDOR AND PURCHASER 231 — BONA FIDE PURCHASER—RECORD AS CONSTRUCTIVE NOTICE—INACCURATE DESCRIPTION.

The record of a deed describing the property conveyed as a lot in Twin Lake Park, known as lot 10, block 2, subdivision 6, as shown on the map made by one B., when the map of subdivision 6 was not made by B., but by one P., and there was no lot 10 in block 2 on the B. map, nor any subdivision 6, and block 2 on that map had been reserved as a site for a church already built, was sufficient to put a subsequent purchaser upon inquiry, so as to charge him with notice of what inquiry, duly prosecuted, would have disclosed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 487, 513-539; Dec. Dig. 231.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Thomas J. Leonard against Hugh R. Osburn. Judgment for plaintiff, and defendant appeals. Reversed.

Hugh R. Osburn, of King City, in pro. per. Charles M. Cassin, of San Jose, and Charles B. Younger, of Santa Cruz, for respondent.

KERRIGAN, J. This is an action to quiet title. Plaintiff recovered judgment as prayed for, from which defendant appeals.

The common source of title was in F. S. Lawrence and E. W. Darling. Plaintiff claims by mesne conveyances through a deed dated December 16, 1892, from the common grantors to Mrs. Linda M. Adams. This deed was filed for record in the office of the county recorder of Santa Cruz county on May 23, 1893. By its terms it conveyed a lot of land lying in Twin Lake Park, in Santa Cruz county, described as lot 10, block 2, subdivision No. 6, as the same is shown on the map of Twin Lake Park made by E. D. Perry, surveyor, filed August 22, 1891, in the office of the recorder of Santa Cruz county.

Defendant's claim is based on mesne conveyances through a deed dated August 4, 1892, from the common grantors to Mrs. Celia Higgins. The deed was filed for record August 27, 1892—some four months prior to the date of the deed to Linda M. Adams, under which plaintiff claims—and, according to its terms, conveyed a lot lying in Twin Lake Park in Santa Cruz county, described as lot 10, block 2, subdivision No. 6, as the same is shown on the map of Twin Lake Park made by N. E. Beckwith, surveyor, and filed May 29, 1890, in the office of the recorder of Santa Cruz county.

It thus appears that the deed through which defendant claims was executed and

recorded prior to the one under which the plaintiff claims; and it also appears from the evidence that the reference to the map in the earlier deed was erroneous; the map intended to be referred to being the one made by Perry, and correctly described in the deed to plaintiff's predecessor. The questions for decision are: (1) Is the description in the earlier deed so vague or inaccurate as to be void for uncertainty; and (2) is such description, in a deed duly recorded, sufficient to charge subsequent purchasers with notice that lot 10 of block 2 in subdivision 6, according to a map made by E. D. Perry, had been conveyed?

N. K. Beckwith did make a plat of land lying in Twin Lake Park, but it was not of subdivision No. 6, but of subdivision No. 1. The only map made of subdivision 6 is the one made by E. D. Perry. These two subdivisions were separated by a small lake, and were over 1,000 feet apart. Apparently the lots in subdivision 1 were disposed of before subdivision 6 was platted, and, in selling lots in this last-named subdivision, the same printed form of deed was used as for the sale of lots in the former subdivision. This printed form of deed left blank spaces for the names of the parties, the date and description of the lots; the balance, including the description of the map with reference to which the lots were sold, and its date of filing, etc., being printed. The evidence shows that a number of mistakes were made in selling lots in subdivision 6; and it is the theory of the defendant that, when the common grantors conveyed the lot in controversy to his predecessor, the old printed form of deed was employed, without making any change in the name of the surveyor and the date of filing the plat. It was admitted that each party to this suit was a purchaser for value, and that their predecessors were purchasers of whatever they acquired, for value and without actual notice. It was also admitted that the only notice that the plaintiff or his predecessors had as to the condition of the title to the property was such constructive notice as was disclosed by the records in Santa Cruz county.

[1-3] It appears that there was no lot 10 in block 2 on the Beckwith map, nor any subdivision 6; that that block was not divided into lots, but was reserved as a site for a church, which church was already built in the year 1890. It was also shown by competent testimony that the lot described in the deed through which defendant derives title can, from the description therein, be easily located, notwithstanding the false reference to the map. The deed, therefore, it is plain, cannot be regarded as void for uncertainty. A deed is not void for uncertainty because of errors or inconsistency in some of the particulars of the description. Generally speaking, a deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to

be conveyed. It is not essential to the validity of a deed, says Devlin in his work on Real Estate, § 1012, that the description should be by boundaries, courses, or distances, or by reference to monuments. If the description is general the particular subject-matter to which the description applies may be ascertained by parol evidence. Nor will the deed be void for uncertainty from the fact that the description in part is false or incorrect, if there are sufficient particulars given to enable the premises intended to be conveyed to be identified. Devlin on Real Estate (3d Ed.) § 1016.

[4] The deed not being void for uncertainty, we come now to the second question arising—and which we think is the principal one for decision—viz.: Is the record of such a deed, containing, though it does, an inaccurate description of the property conveyed, sufficient to put subsequent purchasers upon inquiry so as to charge them with notice of what that inquiry, if duly prosecuted, would have disclosed?

In the work by Devlin, already referred to, the author at section 629a says:

"It is the duty of the purchaser to examine the records, and, whether he performs this duty or not, notice will be imputed to him of every fact which an examination of the records would disclose."

And in section 650 the author says:

"In many cases the description is so inaccurate or misleading that the courts have no hesitation in declaring it insufficient to charge purchasers with constructive notice. In others, while the description is erroneous, yet it may be expressed in such a manner, or may be connected with such attendant circumstances, that a purchaser is deemed to be put upon inquiry; and if he fails to prosecute this inquiry he is chargeable with all the notice he might have obtained had he done so."

In the case of *Rogers v. McCartney*, 3 Cal. App. 34, 84 Pac. 215, this same question of whether the record of a deed, containing an incorrect reference to a map was sufficient to charge with notice a subsequent purchaser, was considered. There the description of the lot conveyed was "lot No. 5 in block 42, at Garvanza, according to a map recorded in book No. 9, pages 45 and 46, Miscellaneous Records." This map did not contain any block numbered 42. There was, however, recorded in book 15, p. 54, of such records, a map containing a block and lot described as "lot 5, block 42, Ralph Rogers' subdivision of blocks 41 and 42 of the Garvanza addition No. 1." Block 42 adjoined the town of Garvanza, and was generally known and treated as a part thereof. The court held that the record containing the erroneous description was sufficient to give constructive notice to an innocent purchaser for a valuable consideration.

We think in the present case that, had the plaintiff's predecessor before purchasing the lot examined the record of the deed of defendant's predecessor, including the map therein referred to, she would undoubtedly

have been put upon inquiry, and could not have failed to discover the true facts. She would have discovered that there was no subdivision 6 delineated upon said map, and that in the only subdivision platted thereon, viz., subdivision 1, there was no lot 10 in block 2. Inquiry upon the ground would have quickly brought to light that the lot described in said record was no other than the one she was negotiating to purchase.

For the foregoing reasons the judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

169 Cal. 157

LEONARD v. OSBURN. (S. F. 6221.)

(Supreme Court of California. Jan. 22, 1915.)

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Thomas J. Leonard against Hugh R. Osburn. Judgment for plaintiff was reversed by the District Court of Appeal. 146 Pac. 530. Affirmed on rehearing.

Hugh R. Osburn, of King City, for appellant. Chas. M. Cassin, of San Jose, and Charles B. Younger, of Santa Cruz, for respondent.

PER CURIAM. The court is satisfied with the discussion of the case in the opinion of the District Court of Appeal of the First District, and for the reasons stated in that opinion it is ordered that the judgment be reversed. We cite the additional case of Hall v. Bartlett, 158 Cal. 641, 112 Pac. 176, which is very closely in point.

169 Cal. 150

In re CORDY. (Civ. 1420.)

(District Court of Appeal, First District, California. May 21, 1914.)

PARENT AND CHILD — 17 — "ABANDON" — STATUTE.

Under Civ. Code, § 224, providing that any child left in the care of another by its parents without provision for its support for one year may, after such notice to the parents as the court may require, be determined to be an abandoned child, "abandon," means to relinquish or give up with the intent of never again resuming or claiming one's rights or interest in; to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert; to quit; to forsake. And a deserted and destitute mother, who undertook to, but was unable to, pay for the care and support of her child about a year old, and then gave it to one who without her knowledge found it a comfortable home, and thereafter the mother searched for it, found it, and visited it, and refused to consent to its adoption, and demanded it, being then financially able to care for it, she had not abandoned it, but was entitled to her natural right to its care and custody.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. — 17.

For other definitions, see Words and Phrases, First and Second Series, Abandon.]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Petition by one Thurston and wife to have Florence Cordy declared to be an abandoned child. Order determining her to be an abandoned child, and her mother, Mrs. Annie

Cordy, appeals. Reversed. Judgment affirmed 146 Pac. 534.

R. B. Tappan, of Alameda, and F. A. Berlin, of Oakland, for appellant. West & De Journal, of San Francisco (T. C. West, of San Francisco, of counsel), for respondent.

RICHARDS, J. This is an appeal from an order of the juvenile court of the county of Alameda determining Florence Cordy to be an abandoned child within the meaning of section 224 of the Civil Code. The appeal is prosecuted by the mother of the child.

The practically undisputed facts in the case are these: In the early part of the month of April, 1906, the appellant, Mrs. Annie Cordy, who was then living in San Francisco with her husband and their three children, who were respectively four years, two years, and ten months old, was deserted by her husband, who disappeared, and has not been seen or heard of since. He left his family entirely destitute, and the mother was obliged to turn the children over to the care of a charitable institution and go out to work. This was about three weeks before the earthquake and fire of that year. In that disaster the youngest child, Florence, was badly injured, and was found by its mother in the county hospital. She took the child and nursed it back to health, and then gave it to a Mrs. Zane to keep for her, promising to pay \$10 a month for its board. The child was soon returned, and was then placed with another friend, who cared for it a few weeks, and it was then transferred by its mother to Mrs. Condiff, because, as the mother says, she was herself poor and destitute. The latter kept the child for a brief period, when a certain Miss Smith became interested in the welfare of the child, and proposed to Mrs. Condiff to find a home for it. This she did with a family without children named Thurston, who are the respondents here, but upon the understanding apparently that the mother was not to know the whereabouts of the child. When the mother next came to Mrs. Condiff to see her child, she was directed to Miss Smith, who declined to tell her where it was, but agreed to have it brought to her rooms occasionally, where the mother might visit it. This arrangement was carried out for some time, until Miss Smith became lax in sending for the child, and finally refused to let the mother come there to visit it, and also refused to inform her where the child could be seen. The mother finally located the child at the home of the Thurstons, which was then in San Francisco, and went there, but was denied permission to see the child. Shortly thereafter the Thurstons removed from the city, and the mother again lost track of her daughter; until, persisting in her search, she finally learned indirectly that the Thurstons were in Berkeley; and going over there and searching through the

directory she at length found their address, and went to their home in her endeavor to see the child. Her request was at first refused, but was at length yielded to, and the mother for the first time in several years saw her little girl; and also saw that she was in a good home and was being cared for and nurtured in comfort and even luxury. The child did not know her as its mother, and Mrs. Thurston says that after seeing the state of the child she requested that it should never be told that she was its mother. This Mrs. Cordy denies; but, even if true, it is only to be taken as another example of the self-effacement of mother love. She was presently asked to consent to the Thurstons' adoption of the child, and at first did so, but on the next day retracted her consent and refused to sign the adoption papers; however, finding that the Thurstons were willing and anxious to keep the little girl, and that it would wring their hearts, as Mrs. Thurston said, to let it go away, and being herself still very poor and sick and destitute and without a home, she left the child with the Thurstons, with the understanding that she could occasionally come and see it. This she did for about three years, when, her financial state improving through her own labors and those of her two elder children, whom she had managed to reclaim, she concluded that she would reunite her family; and hence went to the Thurstons with the request that they deliver her the child. This they refused to do, and a legal struggle for the possession of the child was begun on both sides, the mother applying for a writ of habeas corpus, and the Thurstons instituting adoption proceedings, and in aid thereof petitioning the juvenile court to have Florence Cordy declared to be an abandoned child. It is from the order therein made in their favor that this appeal has been taken.

In none of the proceedings instituted in relation to this matter has the moral or maternal quality and fitness of the mother to have the present custody and control of her child restored to her been called into question; nor has her present financial ability to care for the child in a measure, though probably not to the extent or degree of comfort and luxury to which it has been accustomed, been disputed. The sole question presented upon this appeal is as to the construction to be placed on section 224 of the Civil Code, which, in so far as it relates to the matter before us, reads as follows:

"Any child left in the care and custody of another by its parent or parents, without any provision for its support, for the period of one year, may after such notice to the parent or parents residing within the state and to such other relatives of said child residing within the county as the court shall require, be determined by order of the juvenile court of the county in which said child was so left, to be an abandoned child within the terms of this section." Civ. Code, § 224.

The first and most pertinent question raised by a reading of this section is the question

as to whether it contemplates that a child, left in the care and custody of another without provision for its support, may be declared by the court to be "an abandoned child," without an intent on the part of the parent to abandon it having been shown. The word "abandon," as defined by Webster, means:

"To relinquish or give up with the intent of never again resuming or claiming one's rights or interests in; to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert, as a person to whom one is bound by a special relation of allegiance or fidelity; to quit; to forsake." Webster's New International Dictionary.

If this is the usual and ordinary meaning of the word "abandon," then it is not to be construed as having a different signification in the section of the Code above quoted, unless the intent of the Legislature to give it another and narrower meaning is to be clearly discerned in the context and from the whole language of the section. This rule of construction should have an especial application to cases of this character, where the natural relation existing between a parent and child is sought to be severed by law. It is the respondent's contention in this case that the language of the section is plain; and that the mere fact of a parent's leaving her child in the care and custody of another for a space of a year without provision for its support is sufficient in itself to warrant a court in determining that the child is an abandoned child. But this cannot have been the legislative intent, for instances will at once occur to the right-thinking and sympathetic mind of the monstrous injustice of the rigid application of such a rule. We think rather that the meaning of the word "abandoned," as above given, was intended by the makers of the law to dominate the section, and to cause to be read into every part and provision of it the idea that the acts of the parent in relation to the child enumerated in the statute must have been done with an intent to abandon the child. She must have left it to the care and custody of others with that intention, and a like intent must be shown to underlie her failure, if she has failed, to make provision for its support.

In the case of *Guardianship of Snowball*, 156 Cal. 240, 104 Pac. 444, the Supreme Court declared that the term "abandon" was to be given the foregoing meaning in construing section 246 of the Civil Code; and in the later case of *Matter of Cozza*, 163 Cal. 514, 126 Pac. 161, Ann. Cas. 1914A, 214, the same court declared that this word should be given the same meaning in the construction of section 224 of the Civil Code; and further held in the latter case that the power of the court in adoption proceedings to deprive a parent of her child, being in derogation of her natural right to it, and being a special power conferred by the statute, such statute should be strictly construed; that "the law is solicitous toward maintaining the integrity of the

natural relation of parent and child; and in adversary proceedings in adoption, where the absolute severance of that relation is sought, without the consent and against the protest of the parent, the inclination of the courts, as the law contemplates it should be, is in favor of maintaining the natural relation. * * * Every intendment should have been in favor of the claim of the mother under the evidence, and if the statute was open to construction and interpretation it should be construed in support of the right of the natural parent." *Matter of Cozza*, supra, 163 Cal. 524, 126 Pac. 165, Ann. Cas. 1914A, 214.

No nicer illustration of the propriety and justice of applying this rule of construction to the section of the Code in question need be given than that which is afforded in the case at bar. The evidence shows that this mother, from the time when she was deserted and left destitute by her husband, has persisted in following the movements and watching over the welfare of her child with all the power of which she was capable in her deserted and desperate condition, and with a degree of maternal persistence and solicitude worthy of all commendation; that after years of loss and separation she finally found her child in the care of those who had originally been intrusted with it without her knowledge or consent; that she left her child in the comfortable home of the Thurstons; and that she did not expressly make provision for its support. But the undisputed evidence also shows that at the time she did so they were willing to continue in its care and custody without an agreement for its adoption, while she was unable to assume its care and custody because she was working out by the day, and was poor and destitute and sick and had no home. She thus did the only thing she could do, and she did the best thing that her intuitive mother love could have devised for the present welfare of her child. This being so, it is the more rational and humane interpretation of the law that such conduct on the part of a mother under such conditions and compulsion ought not to be construed as evidencing an intent to abandon her offspring, nor deemed to work a forfeiture of her natural right to the care, custody, and responsive affection of her child.

The order is reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

169 Cal. 150

In re CORDY. (S. F. 7039.)

(Supreme Court of California. Jan. 22, 1915.)

1. PARENT AND CHILD §17—ABANDONMENT OF CHILD—STATUTE.

Under Civ. Code, § 224, providing that any child left in the care and custody of another by its parent without provision for its support for one year may, after notice, etc., be determined to be an abandoned child, the intent to abandon

the child is necessary to constitute abandonment.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. § 17.]

2. PARENT AND CHILD §17—ABANDONMENT—DECLARATION—EFFECT.

In a proceeding to declare a child to be an abandoned child within Civ. Code, § 224, the lack of intent to abandon was not conclusively shown by the mother's declaration that she did not intend to abandon it, if the circumstances and facts showed that she did have such intention.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. § 17.]

Department 1. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Petition by one Thurston and wife to have Florence Cordy declared to be an abandoned child. Order determining her to be an abandoned child reversed on hearing after judgment in the district court (146 Pac. 532).

R. B. Tappan, of Alameda, and F. A. Berlin, of Oakland, for appellant. West & De Journal, of San Francisco (T. C. West, of San Francisco, of counsel), for respondent.

SHAW, J. [1, 2] The court is of the opinion that the part of section 224 of the Civil Code upon which the respondent relies does not state all of the elements necessary to constitute abandonment, but only defines the circumstances under which the juvenile court can take charge of cases of that kind and determine whether or not there has been an abandonment, and that one of the things necessary to be shown to constitute abandonment is intent on the part of the parent to abandon the child. This evidence does not show such intent. It should be said that the lack of intent is not conclusively shown by the bald declaration of the parent—the mother—that she did not intend to abandon the child. If the circumstances and facts show that she did have such intent, her declaration would not be conclusive.

The opinion of the District Court of Appeal 146 Pac. 532, is satisfactory to the court, and, for the reasons therein given, in addition to those I have just stated, the judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

169 Cal. 176

WISE REALTY CO. et al. v. STEWART et al. (S. F. 6226.)

(Supreme Court of California. Jan. 30, 1915. Rehearing Denied March 1, 1915.)

1. PARTNERSHIP §94—CONFIDENTIAL RELATIONS BETWEEN PARTNERS—TERMINATION OF RELATION.

Where a sale by a partner of his interest was authorized by him and effected by a copartner under the power conferred, the relation between the partner and a third partner ceased, and thereafter the third partner could deal with the partner without making full disclosures,

though, by virtue of the relationship of partners, each in dealing with the others must make full disclosures.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 141; Dec. Dig. ☞94.]

2. CORPORATIONS ☞28—IRREGULAR TRANSACTIONS—EFFECT ON RIGHTS OF PARTIES.

Where transactions between associates in a business venture, carried on through the form of a corporation, were fair, and the rights of third persons were not affected, corporate irregularities were immaterial in determining the rights of the associates as between themselves.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 26, 70; Dec. Dig. ☞28.]

3. CORPORATIONS ☞121—SALE OF STOCK—FRAUD—EVIDENCE—SUFFICIENCY.

In a suit to declare a trust in corporate stock sold by defendant to codefendants in fraud of the rights of plaintiff, or to hold defendant an involuntary trustee of the proceeds of the sale on the theory that codefendants were innocent purchasers, evidence held to sustain a finding that the sale was fairly made, and not induced by fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. ☞121.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Wise Realty Company and others against Ashby O. Stewart and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Metson, Drew & Mackenzie, of San Francisco, and Albert Fink, of Chicago, Ill., for appellants. W. G. Deal and W. E. F. Deal, Wright & Wright & Stetson, and J. F. Bowie, all of San Francisco, for respondents.

HENSHAW, J. The Wise Realty Company, plaintiff, was the owner of certain stock of the Lincoln Realty Company. J. T. Sullivan and Jafet Lindeberg, plaintiffs, assert a one-third interest in the stock of the Wise Realty Company, and, consequently, in the stock of the Lincoln Realty Company owned by the Wise Realty Company. Defendant Ashby O. Stewart, under claim and color of title to this stock of the Lincoln Realty Company so owned by the Wise Realty Company, sold and conveyed it to his codefendants Kohlberg and others. This action is brought by plaintiffs to have these defendants declared trustees of this stock for the corporation, and, in the event that it should be held that Stewart's fellow defendants are innocent purchasers, then to hold Stewart as involuntary trustee for the proceeds of the sale. This brief statement will aid in the marshaling of the facts, which are somewhat complicated, in their proper relations to the questions involved.

In February, 1908, the board of education of the city and county of San Francisco advertised for bids for the rental of a lot situated at Fifth and Market streets, and known as the Lincoln School property. The call for bids required that each bid be accompanied by a certified check for \$10,000 payable to the

order of the board. Upon the award the successful bidder was to give a good and sufficient undertaking in the penal sum of \$25,000, conditioned upon the faithful performance of the terms and covenants of the lease to be executed. Defendant Stewart possessed moderate means, but much energy. He was worth about \$10,000. He was deeply interested in securing the lease of the property. He could not engage in so large an undertaking alone. He enlisted Maurice Rosenthal as a partner or coventurer. Rosenthal, a man of wealth and of knowledge of real estate values in San Francisco, had organized the Wise Realty Company, all the stock of which (though most of it stood in the name of a trustee) was issued to and owned by him. Rosenthal agreed with Stewart to join him upon equal terms, and it was further agreed that for convenience the bid should be submitted in the name of the Wise Realty Company. This was done, and the Wise Realty Company proved to be the successful bidder. After this, and between the 1st and 5th of May, 1908, and before the execution of the lease, plaintiff Sullivan became interested in the venture. Sullivan did not know Stewart, but was a friend of Rosenthal, and under Rosenthal's representations and with the assent of Stewart, all under the belief that Sullivan was a man of large financial resources and could and would aid in carrying out the enterprise, the half interests of Stewart and Rosenthal were divided, Sullivan coming it for a one-third interest, and paying therefor one-third of the amount of the certified check for \$10,000 which had been deposited by Rosenthal and Stewart with the bid of the Wise Realty Company. Sullivan, in turn, sold one-half of his one-third interest to Jafet Lindeberg, with the understanding between them that Lindeberg should not be expected to devote any of his personal time or attention to the matter, but that Sullivan should look out for, represent, and manage Lindeberg's interest, as well as his own. Over this there is no dispute, and Lindeberg may, therefore, be eliminated upon the understanding that whatever is said touching the Sullivan interest, for the reasons indicated, applies to the Lindeberg interest as well.

The lease, to the execution of which by the board of education the Wise Realty Company, as successful bidder, had acquired a right, covered a term of 35 years, with a rental of \$3,780 per month, payable in advance, for the first 5 years, and \$7,245 per month for the remaining 30 years, or a total rental of \$2,836,000. In addition, the lessee was to covenant to pay all taxes and erect a four-story building upon the property within 18 months from the date of the execution of the lease, and to keep the building insured for at least \$100,000, giving, as has been indicated, an approved undertaking in the sum

of \$25,000, conditioned upon the lessee's due performance of these terms and covenants. The Wise Realty Company at that time owned no property other than the right to this lease. The beneficial ownership of all of its stock was, and was understood to be, one-third each in Stewart, Rosenthal, and Sullivan. They believed it desirable to organize another corporation with a much larger capitalization and, therefore, with a much larger bonding capacity, to manage their undertaking. Therefore they organized the Lincoln Realty Company. It was understood between the three principals that the lease should be executed to and by the Wise Realty Company, and by it transferred to the Lincoln Realty Company, in consideration of the delivery by the Lincoln Realty Company to the Wise Realty Company of a certain amount of the stock of the Lincoln Realty Company. On May 28th, before the execution of the lease to the Wise Realty Company, Sullivan left for Alaska, after depositing with his friend Rosenthal sufficient securities to cover his one-third proportion of the \$25,000 bond which was to accompany the lease.

Following the departure of Sullivan, the associates who remained in San Francisco, and particularly Stewart, were active in the matter of their venture. They sought various modifications of the lease submitted to them for their acceptance, and, in particular, a modification substituting \$5,000 cash for the \$25,000 bond. They interviewed financial men and institutions to secure money for their enterprise by the sale of bonds of the Lincoln Realty Company and by other methods. They sought to engage tenants and to secure from them advance payments of rent. They interviewed contractors to learn how much or how little of their payments for the erection of the building these contractors would take in bonds of their realty company. They wired Sullivan in Alaska asking him to advance \$75,000 "as he had agreed," and again asking him if he could secure "another partner" to whom they would make over a one-sixth interest upon his advancement of \$75,000. The replies were disappointing. Sullivan could or would advance no money, and could find no "other partner." Meantime the board of education, through its secretary, was urging and demanding the execution of the lease, and threatening to forfeit the \$10,000 deposited by certified check for their failure so to do. On June 27th the secretary, in response to their inquiries whether a cash deposit of \$5,000 could be substituted in lieu of the \$25,000 bond, replied that he did not see how the terms could be modified. "In my estimation, the board would not be willing to consider the matter of a cash bond of smaller amount which would serve in lieu of the proposed surety bond." Rosenthal became alarmed, and was anxious to be quit of what he had come to regard as a bad and danger-

ous venture. Upon Sullivan's failure or refusal to advance funds further telegraphic correspondence was opened with him by his San Francisco associates. They first wired him to the effect that they could sell out all of their rights for \$25,000, and would be accept. They followed this by another telegram on June 24th in this language:

"Party reduces offer to ten thousand. Are you still willing to invest seventy-five to end this thing if we can get time on balance or shall we sell? Wire."

Upon the same day they followed this dispatch with the following:

"Party refuses to buy at any price. Will forfeit deposit unless you come through as agreed with seventy-five thousand. Wire."

The refusal of Sullivan to advance money, the attitude of the board of education in demanding the \$25,000 surety bond, the inability of the associates up to that time successfully to finance their venture, the payments of the monthly rent which were inevitably to be made if the lease was once entered into and the liability to loss, all worked to determine Rosenthal to draw out of the venture. Stewart, still sanguine, and of less financial responsibility, was willing to go ahead and "take a chance." Rosenthal thereupon agreed with Stewart to sell to the latter his and Sullivan's interest for \$1,000, and to wait for the remainder of the \$3,333 which each had put into the venture upon what was regarded as the remote contingency that Stewart might meet with success in the enterprise and be able out of its proceeds thus further to reimburse them. On July 1, 1908, therefore, the following telegram, signed by Rosenthal and Stewart, was sent to Sullivan in Alaska:

"Cannot make bond. Board will forfeit deposit today. Stewart offers to pay one month's rent, take all our rights, and try to save all or part of our deposit; shall we accept? Answer immediately."

No reply came to this until July 6th, when Sullivan wired as follows to Rosenthal personally:

"Accept any proposition that has any of our money."

The telegram to Sullivan of July 1st was in all essentials true. They could not give the bond because Rosenthal would not do it, and without Rosenthal Stewart was helpless. The board had declared its intention to forfeit the deposit. Later in the day, however, the board notified the Wise Realty Company that it agreed to a modification of the conditions of the lease as requested; namely, it would accept a \$5,000 cash deposit in lieu of the \$25,000 undertaking. Sullivan, in Alaska, was not notified of this change in the situation, and upon the failure of his associates so to notify him fraud is predicated. This fraud, however, is charged against Stewart, and not against Rosenthal. Yet it is to be remembered that, while the legal obligations of fair play and disclosure were imposed upon all three of the associates by virtue of their relationship, yet that the person-

al obligations of friendship and fidelity existed between Sullivan and Rosenthal, and not between Sullivan and Stewart. Sullivan and Rosenthal were trusted friends. Sullivan and Stewart were mere acquaintances engaged for purposes of profit in this single venture. Moreover, it is to be remembered that it is to his friend Rosenthal, and not to the two associates who had signed the telegram to him of July 1st, that Sullivan makes reply. In that reply he authorizes Rosenthal to accept any proposition that will return to him any of the money he has invested.

It here becomes necessary to digress for a moment and review the story of these transactions as they were carried out through the instrumentality of the corporations, the equitable ownership of the stock in both of which, as has been pointed out, was in the three associates; the corporations themselves being but convenient mediums for the transaction of their business. The Wise Realty Company executed the lease, and in turn assigned it to the Lincoln Realty Company with its right to the \$10,000 deposit. Three shares of the Lincoln Realty Company had been issued standing in the names, one share to each, of the three associates. The Lincoln Realty Company, in consideration of the assignment to it by the Wise Realty Company of the lease, undertook to fulfill all its terms and covenants and to release the Wise Realty Company from all responsibility and liability under the lease, and, further, to deliver to the Wise Realty Company 1,000 shares of the Lincoln Realty Company's stock. All this was done; nominally by the corporations, in fact, however, by Stewart, to whom, prior to July 15th, and after the receipt of Sullivan's telegram of July 6th, Rosenthal had sold all of his and Sullivan's interest, wiring Sullivan to that effect on July 15th, saying:

"Corporation sold lease and deposit for one thousand dollars. What shall I do with your share?"

—and receiving in reply this answer:

"Metson represents us and has authority to collect our share of recovered deposit."

Because of the ostensible corporate ownership the form which the transactions took was the following: The Wise Realty Company sold its 1,000 shares of the Lincoln Realty Company's stock to Williams for \$1,000; Williams being admittedly the dummy representative of Stewart, and the transaction taking this form to avoid the direct sale of this stock of the corporation to one who was a director in both. The \$1,000 was paid to the Wise Realty Company, and the stock was delivered to Williams, who immediately assigned it to Stewart. Thus of the 1,003 issued shares of stock of the Lincoln Realty Company Williams acquired by this transaction 1,000 shares, Rosenthal's 1 share, and Sullivan's 1 share, to the extent that Rosenthal was authorized to represent Sullivan in making the sale. Stewart interviewed Mr. Metson, who was Sullivan's attorney at law,

and Mr. Bernard, who, to a limited extent, was Mr. Sullivan's attorney in fact, and sought the physical indorsement and delivery to himself of the one share of the Lincoln Realty Company stock standing in Sullivan's name, upon the representation that he had purchased it with the Rosenthal interest in the manner above indicated. Mr. Metson refused to make this delivery unless Mr. Sullivan was paid the full amount which he had invested.

While, as has been said, no direct information was conveyed to Sullivan of the fact that the lease was modified, substituting a \$5,000 cash deposit for the \$25,000 undertaking, Sullivan, in Alaska, was not unaware that something of this kind must have been done, for he testifies that when he sent the telegram of July 6th, above quoted, authorizing Rosenthal to accept any proposition, "he realized that if the deposit bond was not forfeited, then the lease had been duly executed and the bond given, or time for doing these things had been obtained, or some substitute for the bond had been arranged."

The subsequent acts of Stewart here require brief presentation. He had purchased the Rosenthal interest, and over this there is not the slightest controversy. He believed that he had also purchased the Sullivan interest. He had left \$5,000 of the \$10,000 deposit as the cash deposit called for by the lease. He used the rest of the money, with other money which he borrowed, in payment of installments of rent as they came due, and he energetically endeavored to enlist upon satisfactory terms capital to aid him in his enterprise. He was unsuccessful in so doing. Finally, in September he received an offer for the outright purchase of the lease. Again, because of the corporate character of the ostensible ownership of the lease, that ownership being represented by the 1,003 shares of the Lincoln Realty Company, the purchase was to take the form of a sale by Stewart with good title of this 1,003 shares of stock. The purchase price was about \$120,000. The net profit of Stewart, reduced by expenditures and obligations, was the difference between \$120,000 and \$35,000. An examination of the records of the corporations cast doubt upon the validity of the purchase by Stewart of the Sullivan share of stock, which doubt was increased by the fact that Stewart could not physically deliver possession of the stock. The associates who contemplated this purchase from Stewart declared that they would withhold \$20,000 to meet any possible demand of Sullivan until Stewart could establish clear title to the Sullivan interest. These associates are the other defendants in this case. Mr. Stewart then went to Mr. Metson and Mr. Bernard and paid them in full the amount of their demand in behalf of Sullivan, the \$3,333.33 which he had invested with interest thereon. This was on October 5th. Upon the next day Sullivan, who had returned from

Alaska, ratified in writing the sale and transfer and assignment of his interest so made, and, having received in full the amount of his demand, relinquished any claim to any share of the \$1,000 paid nominally by Williams, but actually by Stewart to the Wise Realty Company. This ratification by Sullivan was made in the presence of, and after a conversation with, Stewart in which conversation Stewart did tell Sullivan that he was disposing of all his (Stewart's) interest in the venture, that the burden was greater than he could carry, but did not tell Sullivan what price he was receiving for his interest. The second element of fraud is predicated upon Stewart's secrecy in this regard, and is, of course, based upon the contention that the relationship of associates or partners, with the consequent duty of full disclosure, still existed between the parties.

[1] It is because of this asserted continuing relationship and because of the notice of Sullivan's interest which it is charged was brought home to the other defendants that they in turn are charged as having purchased the stock with knowledge and with thus becoming trustees *ex maleficio* for Sullivan.

The trial court took the view, and made findings in accordance therewith, that the sale by Sullivan of his interest was authorized by his telegram of July 6th, was effectuated by Rosenthal under the power conferred by that telegram, and was accepted by Sullivan in his telegraphic answer to Rosenthal's telegram to him of July 15th. If the findings covering this matter are supported, that is the end of this controversy; for with the consummation of that sale the relationship of associates or partners between Sullivan and Stewart immediately ceased, and Stewart was perfectly justified in dealing thereafter with Sullivan at arm's length.

[2] Some of the attacks made upon these findings are in their nature indirect. Thus the validity of all of these corporate transactions is assailed upon various grounds, as for a failure to comply with the by-laws in calling the meetings, the failure to notify Sullivan, who was in Alaska, as the by-laws required, the participation by Rosenthal as director in the transactions after he had sold out to Stewart, and thus stripped himself of his actual ownership of the stock of the Wise Realty Company and the Lincoln Realty Company, and the sale by the Wise Realty Company of all its property, consisting of the 1,000 shares of the stock of the Lincoln Realty Company, without ratification by the stockholders. Mistakes and misrepresentations in the minutes of the meetings are also charged as having been incorporated therein with fraudulent design, though they could not have deceived Sullivan, who was in Alaska, and knew nothing of them. The complete answer to all of these matters is found in the familiar principle

that equity will look through form to substance, and, so looking, it is beyond controversy that these corporations were but the mere instrumentalities through which the associates acted. If the transactions between the associates themselves were fair, then as there are no rights of independent and nonparticipating stockholders involved, the corporate irregularities, however serious, mean nothing. If it were necessary, equity, indeed, would compel the corporations themselves so to adjust, remodel, and reform their transactions as to give them a legal validity commensurate with their equitable validity.

For these reasons no force attaches to these corporate irregularities as between the associates themselves. If, in other words, Sullivan did authorize Rosenthal to sell his interest, and Rosenthal did do this thing, that the mere mechanism of the sale creaked, groaned, was faulty, or even broke down, would not impair the essential validity of the sale itself nor the fair dealing of the parties as between themselves. Only when third persons, such as the other defendant, undertook to buy the corporate stock would any substantial interest in the irregularities of the corporate transactions arise, and these irregularities become important; and it was against these irregularities, as we have seen, that these associates undertook to protect themselves by withholding \$20,000 to meet the possible claims and demands of Sullivan. When Stewart produced to them the indorsed stock with Sullivan's ratification of the transaction, then they concluded their purchase from Stewart and paid him the full amount of money.

[3] We may now at last come to the consideration of the vital issue in this case. Are the court's findings to the effect that Sullivan was not defrauded by Stewart, and did not rely upon the statement in the telegram of July 1st that the deposit would be forfeited, supported by the evidence. That Sullivan in authorizing the sale of his interest did not rely upon this statement (which the associates believed was true when made) is manifest from his own testimony above quoted. Moreover, his answering telegram of July 6th is not an acceptance of the Stewart offer embodied in the telegram of July 1st, but, to the contrary, is a personal telegram to his friend Rosenthal authorizing the latter to sell his interest under "any proposition that has any of our money." It was thus a broad authority to Rosenthal to sell. Rosenthal sold, knowing all of the essential facts. The court so finds. He sold his own interest upon the same terms, \$500 cash, and the balance of the amount of money he had invested payable in the event that Stewart should be able to make a sufficient profit out of the venture. If it be a fraud at all it is Rosenthal's fraud in selling out Sullivan; yet Rosenthal sold out Sullivan's interest upon the same terms as he sold his

own, and promptly notified Sullivan by personal wire that he had done so, in response to which Sullivan notified Rosenthal that Mr. Metson had authority to collect his share of the proceeds of the sale.

In view of this record it may not be said that the findings of the court declaring that in July Sullivan had fully and fairly parted with his interest in the venture are not supported, and this vital fact, being absolutely determinative of the controversy, renders unnecessary the consideration of any other issues or arguments in the case.

The judgment and order appealed from are therefore affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.

2. TRUSTS ⇐78 — RESULTING TRUSTS — REDEMPTION OF MORTGAGE.

Where decedent's land was mortgaged at his death, and defendant, his son-in-law, agreed with his heirs, the plaintiffs, to buy up the mortgage, substitute himself in the foreclosure suit, buy in the land at the sale for the amount of the debt, and hold the land in trust for the plaintiffs, they to repay him the loan with interest, there was a resulting trust in favor of the plaintiffs, subject to a lien on the land in defendant to reimburse him for outlays and interest; the consideration for the purchase of the mortgage and of the land at the foreclosure sale being deemed paid by the heirs.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 110; Dec. Dig. ⇐78.]

3. TRUSTS ⇐366—PARTIES PLAINTIFF—COMMUNITY OF INTEREST.

In an action by decedent's heirs against his son-in-law to declare and enforce a trust in lands formerly decedent's property, his administrator was a proper party plaintiff.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 574-583; Dec. Dig. ⇐366.]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Edward J. O'Rourke, administrator of Owen McCabe, deceased, and others, against Fred C. Skellenger. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. E. Barry and Edward Lande, both of San Francisco, for appellant. Brennan & Lane, of San Francisco, for respondents.

SHAW, J. This is an appeal by the defendant from the judgment. The object of the action is to declare and enforce an alleged trust in certain parcels of land of which the decedent, Owen McCabe, died seised. By his will he devised the land to his wife, Ellen McCabe, for her natural life, with remainder to his children, Nellie McCabe Rosenberger, Margaret C. Skellenger, and Eugene McCabe. Ellen died on March 2, 1907. Eugene, on October 30, 1905, conveyed his interest in the land to the plaintiff, O'Rourke. Margaret C. Skellenger was the wife of the defendant. She died on November 3, 1909.

[1] The record on appeal was made up in the manner prescribed in section 953a. It is not printed. Section 953c provides that such transcripts need not be printed, but it adds that:

"In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

The appellant has not complied with this requirement of the statute. Some short extracts from the record are printed in his briefs, but not enough to enable us to determine the issues or the questions presented for review. In this condition of the case we do not think we are required to make more than a cursory examination of the typewritten record on file. Indeed, we would

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O'ROURKE et al. v. SKELLENGER.
(S. F. 6364.)

(Supreme Court of California. Feb. 11, 1915.
Rehearing Denied March 12, 1915.)

1. APPEAL AND ERROR ⇐757 — REVIEW — STATUTE REGARDING PREPARATION OF PAPERS—EFFECT OF NONCOMPLIANCE.

Under Code Civ. Proc. §§ 953a, 953c, regarding the preparation of papers on appeal, and requiring that parties must print in their briefs such portions of the record as they desire to bring before the court, the court is justified in refusing to examine a typewritten record, and, at most, will only examine it cursorily, where short extracts only are printed in the brief, and those not adequate for the court to determine the issues upon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. ⇐757.]

be fully justified, under the provision above quoted, in refusing to examine it at all. From the examination we have made we find the case, as alleged, proven, and found by the court, is in substance and effect as follows:

[2] Owen McCabe, in his lifetime, had mortgaged the land to one Forster, and the mortgage remained unpaid at his death. Forster began a foreclosure suit thereon. Thereupon the defendant agreed with the heirs of McCabe that he would advance for them the money to buy the Forster mortgage; that he would buy said mortgage therewith; that he would then have himself substituted in the suit as plaintiff, obtain judgment by default against the estate and heirs for the foreclosure thereof, cause execution to issue thereon, buy the land in his own name at the foreclosure sale for the amount of the mortgage debt, interest and costs, obtain the foreclosure deed therefor to himself at the expiration of the period of redemption, and thereafter hold the said land in trust for the benefit of the estate of Owen McCabe and the heirs; it being agreed by them that they would repay him the amount advanced by him in the transaction in the purchase of the mortgage and payment of costs, together with legal interest thereon. In pursuance of this arrangement, he purchased the mortgage and, as arranged, acquired the title to the land under the foreclosure sale. The defendant denied the agreement, and denied that he held the land in trust as alleged. The court adjudged that he held the land in trust for the heirs subject to a lien for his advances and interest.

There were some additional allegations and findings tending to show fraud by the defendant and confidential relations between him and the heirs who made the agreement. We do not deem it necessary to state the facts in greater detail.

The decisions of this court establish the proposition that, under the circumstances stated, the defendant will be held bound as trustee of the land for the benefit of the heirs of McCabe, and that in equity he is entitled only to be reimbursed for his outlays, with interest, with a lien on the land to secure him in the repayment thereof. The consideration for the purchase of the mortgage from Forster, and of the land at the foreclosure sale, is, under the circumstances stated, deemed to have been paid by the heirs, and a resulting trust is created accordingly. The rule is stated in *Brown v. Spencer*, 163 Cal. 592, 593, 126 Pac. 493, and many of our decisions in which may be found illustrations of the applications of the rule are there cited. It is not necessary to consider the question at further length. The court below was correct in its conclusion that the defendant was chargeable as a trustee. Its judgment, in so far as it departed from the strict letter of the prayer for relief, was authorized

by the allegations, under section 580 of the Code of Civil Procedure.

[3] There was no misjoinder of parties plaintiff. The administrator with the will annexed of Owen McCabe's estate was a proper party plaintiff. The estate was interested in having the trust declared and enforced.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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REMILLARD v. BLAKE & BILGER CO.
et al. (S. F. 5623.)

(Supreme Court of California. Feb. 11, 1915.
Rehearing Denied March 12, 1915.)

1. MUNICIPAL CORPORATIONS ⚡339—IMPROVEMENTS—SCOPE OF IMPROVEMENT.

A municipality may, under Vrooman Act (Gen. Laws, 1909, Act 3930) §§ 2, 8, which confer extensive powers on the board of supervisors and provide that there shall be attached to the assessment a diagram exhibiting each street on which work has been done, improve several streets in one locality under a single contract and as a single improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 868, 870-873; Dec. Dig. ⚡339.]

2. MUNICIPAL CORPORATIONS ⚡488, 489—STREET IMPROVEMENTS—LIENS—WAIVER.

Irregularities in an assessment lien for street improvements may be waived by the property owners' acts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1147-1152; Dec. Dig. ⚡488, 489.]

3. MUNICIPAL CORPORATIONS ⚡469—STREET IMPROVEMENTS—ASSESSMENTS—VALIDITY.

Where several streets of varying width were improved as part of a single scheme and assessments were made on a frontage basis, the fact that property owners on narrow streets were required to pay the same amount as those on wider streets did not invalidate the assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1113-1117; Dec. Dig. ⚡469.]

4. MUNICIPAL CORPORATIONS ⚡297—PUBLIC IMPROVEMENTS—STREETS.

Vrooman Act (Gen. Laws 1909, Act 3930) § 3, providing that the owners of a majority of the frontage of the property on a proposed work or improvement may by protest bar the work for six months, does not warrant the owners on each street improved in barring the work by their protest; hence the improvement of several streets together does not deprive a majority of the owners of any one of their rights.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 797, 798; Dec. Dig. ⚡297.]

5. MUNICIPAL CORPORATIONS ⚡318—STREET ASSESSMENTS—WAIVER OF OBJECTIONS.

Where property owners executed an agreement waiving irregularities in street assessments in consideration of a deduction from the amount of the assessment, provided payment should be made within a stipulated time, the fact that the property owners did not make payment within the time fixed, so as to obtain

the deduction, did not work a mutual abandonment of the waiver agreement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 832; Dec. Dig. ☞ 318.]

6. MUNICIPAL CORPORATIONS ☞293—PUBLIC IMPROVEMENTS—RESOLUTION.

A resolution of intention for the construction of wooden bridges at the end of crosswalks is not defective because not describing the kind of wood to be used.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 773-775; Dec. Dig. ☞293.]

Angellotti, C. J., and Lorigan, J., dissenting.

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Evelina Remillard against the Blake & Bilger Company, which counterclaimed, impleading others. From a judgment for plaintiff, defendants appeal. Reversed.

Johnson & Shaw and H. S. Craig, all of Oakland, and W. B. Rinehart, of Oakland, amici curiæ, for appellants. R. M. F. Soto, of San Francisco, and Reed, Black & Reed, of Oakland, for respondent.

SLOSS, J. After judgment on the appeals here presented had been rendered in the District Court of Appeal for the First Appellate District, an order was made transferring the cause to this court for hearing and determination.

Our further examination has led us to the conviction that the District Court of Appeal made a correct disposition of the cause. The opinion in that court, prepared by the late Mr. Justice Hall, was as follows:

"Plaintiff filed her complaint against Blake & Bilger Company, seeking to quiet her title to a piece of land situate in the town of Emeryville. Blake & Bilger Company filed its answer, setting up a claim of lien for an assessment made for street work done under the 'Vrooman Law,' so called, and its amendments, and also a cross-complaint in the usual form for a foreclosure of such lien. The other defendants were made parties to the proceeding under the cross-complaint, but according to the statement of counsel they now have no interest in or claim upon the property. Hereinafter when we refer to defendant we shall mean Blake & Bilger Company. Plaintiff made answer to the cross-complaint of defendant, and the action resolved itself into an action to foreclose the lien of defendant for the asserted assessment. The theory of plaintiff is that the street assessment is void, because it was based upon a single proceeding, order, and contract for the doing of street work of various kinds upon several different streets. In other words, the work was treated and carried out by the town authorities as one improvement, and not as several and distinct improvements. The trial court adopted as correct the theory of plaintiff, and made findings accordingly, and gave judgment for plaintiff, and denied defendant any relief upon its cross-complaint.

"The work called for by the resolution of intention consisted of various sorts of street work authorized by the statute, and to be done upon several distinct streets. The principal street embraced in said resolution was Adeline street. All the other streets intersect said Adeline

street at various points, with the exception of Peralta street and Magnolia street, which are distant therefrom one block. Magnolia street is in fact but a prolongation and widening of Peralta street at its southern end. All the portions of the streets proposed to be improved are contained in a compact V-shaped district, about 3,000 feet long and about 1,500 feet wide at its widest end. The proceedings were under the plan calling for front-foot assessment, and the assessments were made for the several kinds of work according to this plan; the cost of each kind of work being charged only against such property as was liable therefor under this plan. All the work was done under one contract.

"The contention of plaintiff is that, under the general street law, under which this work was done, the municipal authorities have no power to cause several streets to be improved as one improvement, but that the work done upon each street must be done as a separate and distinct improvement. Upon the other hand, defendant insists that the extent of the work to be done as one improvement, and under one contract, lies within the discretion of the board of trustees. The trial court seems to have adopted as correct the theory of plaintiff, and made its findings and decree accordingly.

[1] "While there is some inharmony in the language used by the Supreme Court in different decisions bearing upon the question, we think the contention of defendant and appellant is correct, and that the municipal authorities have jurisdiction and power to order several streets improved in one proceeding and as one improvement, to be performed under one contract.

"Section 2 of the present street law (Gen. Laws 1909, Act 3930) is, as far as the present question is concerned, substantially the same as the street law of 1872 (Stat. 1871-72, p. 804), which the court had before it in *Mahoney v. Braverman*, 54 Cal. 565, where the power of the municipal authorities to cause a sewer to be laid in two streets in one proceeding and under one contract was sustained. It was there said: 'It is objected that the board of supervisors had no jurisdiction or power to order a sewer to be constructed in Willow avenue and Gough street in one and the same award and contract, inasmuch as they were two separate streets.' The court then refers to the statute and quotes the language thereof, which is substantially the same as that of the present statute, and then says: 'On the most cursory perusal of the sections cited, one must be struck with the broad and ample powers conferred by them on the board of supervisors in regard to street improvements. These powers seem to embrace every conceivable variety of street improvement, and they certainly embrace the whole or any portion of the streets to be improved. The language used is not of such a character as to confine the powers vested in the board to each street. If such had been the intention of the Legislature, language suitable to disclose that intention and warrant the interpretation that each several street was referred to, and that the powers granted were to be so confined, could have been readily found and would have been employed. Such an intention would have been clearly manifested by inserting the words "of each" before the words "of the said streets," * * * etc.' This decision was rendered in 1880, and the Vrooman Act was passed in 1885, and yet no change was made in the language of the statute in regard to the power of the board to improve streets.

"Section 8 of the present act, as enacted in 1885 and as it now stands, is that there shall be attached to the assessment 'a diagram exhibiting each street * * * on which any work has been done.' This language clearly indicated that the Legislature intended that sev-

eral streets could be improved under one order and under one contract.

"In *White v. Harris*, 116 Cal. 470 [48 Pac. 382], the resolution of intention was for the construction of a sewer in eight different streets. Thereafter a contract was let doing the work as one improvement. The notices of the work posted along each street referred only to the work done on such street. It was held that the notices were insufficient upon the ground that the work upon the eight streets constituted but one improvement.

"The case principally relied upon by plaintiff to support the contention that the work upon each street must be treated as a distinct and separate improvement to be separately contracted for is *Bates v. Twist*, 138 Cal. 52 [70 Pac. 1023]. In this case the resolution of intention called for work upon widely separated streets. While the report of the case does not make it very clear, the fact was, as disclosed by the record of the case now before us, that the resolution of intention indicated that the work upon the different streets was to be treated as so many distinct pieces of work. It directed that the notice should require that persons objecting to the work should state in their protests the frontage of their property, and upon what street it was located, and also designated a paper for the publication of the notices 'in relation to the several pieces of work described aforesaid respectively.'

"Following the clearly indicated purpose of the resolution of intention, awards of contracts were subsequently made for the several pieces of work called for as distinct improvements. In the suit to foreclose, it was objected that only one contract could be let for all the work called for by the resolution of intention. The only point involved in that case was as to whether or not under such a resolution of intention all the work must be treated as one improvement to be done under one contract. In answering this question in the negative, the court did use language which lends support to the contention of plaintiff in the case at bar. But such language must be understood as limited to the facts then before the court. That the court did not intend to lay down the rule that work on several streets may not be done as one improvement under one contract is manifest from its analysis of *White v. Harris*, supra, in which it distinctly recognizes the power under the statute to cause work to be done on several streets as one improvement under one contract.

"In *San Francisco Paving Co. v. Egan*, 146 Cal. 636 [80 Pac. 1096], the resolution of intention, as disclosed by the record of the case, also clearly indicated the purpose to treat the work upon the different streets as distinct improvements, and they were so treated throughout the proceedings. In no case where the point was involved has it been decided that the city council has no power to order work upon different streets to be done as one improvement under one contract. On the contrary, such power has been distinctly upheld in *Mahoney v. Braverman*, supra.

"The trial court fell into error in holding that the proceeding is void because work on different streets was included in one award and contract, and for that reason the findings it made upon such theory are not supported by the evidence.

[2] "The court also erred in sustaining plaintiff's objections to certain evidence that defendant offered in support of its allegations that plaintiff had waived any defense to the assessment founded upon any illegality in the proceedings under the resolution of intention. Since the time of the trial of this case, it has been determined that such a defense may be waived to an action to enforce a lien for street work in *Allen v. Hance*, 161 Cal. 189 [118 Pac. 527], which overrules *Heft v. Payne*, 97

Cal. 108 [31 Pac. 844], upon which the ruling of the trial court was doubtless based."

The foregoing opinion, which contains a fair statement of the essential facts bearing on the questions discussed, has our complete approval, and is adopted as a part of the opinion of this court. It may be well, however, to add one or two observations concerning the points decided in said opinion, and to refer briefly to the contention of plaintiff and respondent that certain further points advanced by her were not noticed by the court of appeal.

The main question in the case is whether the assessment is void because "based upon a single proceeding, order and contract for the doing of street work of various kinds upon several different streets." The opinion of Mr. Justice Hall shows that the statute, as construed by this court, authorizes the city council to include in a single scheme of improvement work upon more than one street. *Mahoney v. Braverman*, 54 Cal. 565, and *White v. Harris*, 116 Cal. 470, 48 Pac. 382, in which this rule was declared, were cases of sewer improvements. We are unable to find in the statute any language which justifies the drawing of a distinction, in this respect, between the construction of a sewer and any other kind of street improvement authorized by the Vrooman Act. If the various streets, or, rather, the portions thereof to be improved, are so related that the improvement of them as a whole may fairly be deemed to be a benefit to all the property fronting upon such parts, the council does not exceed its jurisdiction by treating the work on the several streets as an entirety, and including it in a single proceeding. Whether one or more streets should form a unit for improvements is a question committed primarily to the discretion of the council. No abuse of discretion appears here.

[3] The fact that some of the streets are wider than others—a circumstance not particularly mentioned in the opinion of the court of appeal—does not affect the conclusion reached. It is true that an owner fronting on a street 60 feet in width will be required to pay the same amount per front foot for grading or paving as one who fronts upon a street 80 or 100 feet wide. But the front-foot method of assessment is not based upon the view that each owner shall pay the cost of so much of the improvement as is made on the portion of the street opposite his lot. The assessment is to be supported upon the ground that each owner is charged with an amount equal or proportionate to the benefit conferred upon his property by the entire improvement, and this benefit, in theory, at least, is regarded as measured by the number of feet of frontage upon the work. The assessment imposed upon an individual owner may be greater or less than the cost of doing the particular part of the work on the portion of the street opposite his lot. This is obviously so,

even where only a part of a single street is improved. If the work be, for example, grading, the expense involved may be far greater on some parts of the street, or of a block, than on others. Yet the assessment per front foot must be equal and without regard to the varying difficulty or cost of the work at different points along the line of improvement.

If the grading or paving of two streets may be united in one proceeding, it is because the property on each of the streets is benefited by the improvement of the others. The work as a whole is a benefit to all of the property to be assessed. The extent of the benefit is not measured by the width of the street, but, under the statute, by the frontage. Property fronting on a narrow street may be benefited by an improvement of the several streets as much as property fronting on a wider street. These are matters to be considered by the council in fixing the extent of the improvement, and its decision is not to be overthrown except upon a showing of fraud or abuse of discretion. The mere fact that the streets are of varying widths, which is all that appears here, is not enough to invalidate the proceeding.

[4] There is no merit in the claim that the construction which we have given to the statute impairs the right of the majority of owners on any single street to bar the work, by protest, for six months. The Vrooman Act does not give this right to the owners of the majority of the frontage on a street, as is assumed in the argument, but to "the owners of a majority of the frontage of the property fronting on said proposed work or improvement." Section 3. If the "work or improvement" may cover more than one street, a majority of the frontage on all the streets covered by the proposed work must join to make the protest effectual.

On the subject of waiver or estoppel, little need be said beyond what is contained in the opinion quoted above. The respondent seeks to distinguish *Allen v. Hance*, 161 Cal. 189, 118 Pac. 527, on the ground that in that case there was a mere irregularity, which might be cured by estoppel or waived, whereas here the defect (i. e., the joinder of the improvement of the various streets in a single proceeding) went to the jurisdiction of the council and the want of power, as is claimed, could not be supplied by estoppel. But, if there be any difference in this respect between a want of power and an irregularity, the point is not applicable to the case at bar, since, as we have seen, the council did not exceed its jurisdiction in ordering the improvements by a single proceeding.

[5] The excluded writing, which was relied upon as creating an estoppel, declared that

the signers waived any illegality or irregularity in the proceedings, "in consideration of a deduction of five per cent. from the total amount (providing the said amount is paid by us within ninety days from the date of the assessment roll) to be assessed to us under the contract. * * *". The payment was not made within the 90 days. This fact did not establish a mutual abandonment of the waiver agreement. If, as alleged in the cross-complaint, the appellant went on and completed the work in reliance upon the agreement, its right to stand upon the waiver was not lost by the failure of the owners to take advantage of the deduction of 5 per cent. which they might have claimed. Their right to this deduction was made conditional upon payment by them within 90 days. The option to obtain the rebate upon this condition was a good consideration for their waiver, and its sufficiency as a consideration was not impaired by the fact that they failed to exercise their option.

The District Court of Appeal did not notice the respondent's point that the assessment was void because "in the cost and expense assessed were included the cost and expense of work done on Adeline street on that portion thereof occupied by the tracks of the Atchison, Topeka & Santa Fé Railway Company." An inspection of the record discloses that the point has merely formal, rather than substantial, support in the evidence. The assessment named, at the outset, a total sum of \$60,072.28, which included the amount payable by the railroad company. But when the apportionment to the various lots was made, credit was given for \$2,150, the cost of work on the railroad right of way, and the balance, \$57,921, was apportioned according to the statute to the various lots. The aforesaid sum of \$2,150 was, as shown by the assessment, paid by the railroad company.

[6] The resolution of intention provided that "wooden bridges" be constructed at each end of crosswalks (i. e., over the gutter from the crosswalk to the sidewalk) at certain points. It is claimed that there was a fatal defect in the failure to describe the kind of wood to be used in these bridges. We think the description was sufficient. *Harney v. Heller*, 47 Cal. 15; *Deady v. Townsend*, 57 Cal. 298.

There are no other points requiring notice.

The judgment and the order appealed from are reversed.

We concur: SHAW, J.; MELVIN, J.; HENSHAW, J.

We dissent: ANGELLOTTI, C. J.; LORIGAN, J.

169 Cal. 209

SAMUELS v. OTTINGER et al. (S. F. 6202.)
(Supreme Court of California. Feb. 8, 1915.
Rehearing Denied March 8, 1915.)

1. LANDLORD AND TENANT ⇨183—RENTS—OCCUPANCY.

An obligation to pay rent, without an express agreement thereto, arises from the mere occupancy of the premises as tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 743-750; Dec. Dig. ⇨183.]

2. LANDLORD AND TENANT ⇨208—PERSONS LIABLE—LESSEE AND ASSIGNEE—"EXPRESS AGREEMENT."

A lessee, who has not agreed to pay rent on assignment with the landlord's consent, is relieved of further obligation to pay rent, which is thereafter due from the assignee who has come into privity of estate with the landlord, but the liability of a lessee who expressly agrees to pay rent remains, notwithstanding an assignment with the landlord's consent, since there is no privity of contract between the landlord and the assignee, and he is a surety for the assignee's payment of rent; the term "express agreement" meaning, not merely a promise in exact words to pay a given sum as rental, but language necessarily importing the lessee's undertaking to pay the rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 737, 821-831; Dec. Dig. ⇨208.]

For other definitions, see Words and Phrases, First and Second Series, Express Agreement.]

3. LANDLORD AND TENANT ⇨208—RENT—LIABILITY OF LESSEE AFTER ASSIGNMENT.

Under a lease for the term of 10 years at a monthly rental payable in advance, providing that the lessee should pay all bills for water, gas, and electricity and all taxes on improvements, and requiring the lessee to insure for the joint benefit of himself and the lessor to secure payment of rent; that improvements should be security for rent, that the lessee holding over should be a tenant from month to month paying rent as under the lease and with the right to sublease, there was a contract or covenant to pay a stipulated rental from the obligation of which the lessee was not released by his assignment, so that he was liable for the rent with interest from the day it fell due.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 737, 821-831; Dec. Dig. ⇨208.]

4. LANDLORD AND TENANT ⇨238—ACTION FOR RENT—RIGHT TO ATTORNEY'S FEE.

Under a lease providing that, if the lessor prevailed in any suit for violation of any covenant of the lease, the lessee should be liable to a reasonable attorney fee in each suit not exceeding \$75, the lessor, entitled to recover rent from the lessee after a sublease, was entitled to an attorney's fee of \$75 in each of three suits for installments of rent, consolidated in one suit.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. ⇨238.]

5. PLEADING ⇨129—FAILURE TO DENY—ADMISSION.

In such suit, where there was no denial of the averment that a reasonable attorney's fee was in excess of \$75, the question of reasonableness was settled by the admission of the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. ⇨129.]

In Bank. Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Louis T. Samuels against Adolph Ottinger and another. Judgment for defendants, and plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

Charles W. Slack, H. U. Brandenstein, and Grover O'Connor, all of San Francisco, for appellant. Leon Samuels, of San Francisco, for respondents.

SLOSS, J. The plaintiff appeals from a judgment in favor of the defendant. The judgment disposed of three separate actions, which, with the consent of the parties, had been consolidated for trial. The appeal is on the judgment roll.

The actions were brought to recover installments of monthly rent accruing under a written lease of real property. The three proceedings differed only in the months for which rental was claimed.

A jury trial having been waived, the court made findings as follows: On December 20, 1906, D. Samuels Realty Company, a corporation, as lessor, leased to the defendants, as lessees, a certain lot in the city of San Francisco. A copy of the lease is set out in the answers and referred to by the findings. The term of the lease was ten years, commencing on the 20th day of December, 1906. The rent of the premises was \$150 per month, payable in advance, for the first five years of the term, and \$175 per month, payable in advance, for the next five years. Other provisions of the lease will be mentioned in the course of the discussion to follow.

The defendants went into possession of the premises under the lease, and paid the monthly installments of rent to and including the 19th day of May, 1908. On that day they sold and assigned the lease to one Altschular. The lessor was, at the same time, notified of the assignment. Altschular paid the rent for the month commencing May 20, 1908, and said payment was received and accepted by the lessor. The monthly installments of rent payable on the 20th days of the successive months from June, 1908, to March, 1910, have not been paid. D. Samuels Realty Company, the original lessor, has conveyed the premises, and assigned its claim against the defendants, to the plaintiff.

The single question presented for decision is whether the defendants, the original lessees, are absolved from liability to pay rent by their assignment to Altschular, and the payment by Altschular to the lessor of one month's rent. The general rule of law governing the controversy is settled beyond the possibility of dispute. A lease has a dual character—it presents the aspect of a contract and also that of a conveyance. Pollock on Contracts (3d Am. Ed.) p. 531.

"Consequently the lease has two sets of rights and obligations—one comprising those growing out of the relation of landlord and tenant, and said to be based on the 'privity of estate,' and

the other comprising those growing out of the express stipulations of the lease, and so said to be based on 'privity of contract.'" *Tiffany on Real Property*, § 46.

[1, 2] An obligation to pay rent, without an express agreement to that end, arises from the mere occupancy, as tenant, of the premises. A lessee who has not agreed to pay rent is, by his transfer to an assignee, with the consent of the landlord, relieved of any further obligation to pay rent. Such obligation is thereafter upon the assignee who has come into "privity of estate" with the landlord. But where the lessee has expressly agreed to pay rent, his liability under his contract remains, notwithstanding an assignment with the consent of the lessor.

"The lessee cannot by assigning his lease rid himself of liability under the covenants." *Brosnan v. Kramer*, 135 Cal. 36, 39, 66 Pac. 979, 980. "The effect of the assignment is to make the lessee a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal bound, whilst he is assignee, to pay the rent and perform the covenants." *Id.*; *Wood on Landl. & Ten.* (2d Ed.) § 347; *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; *Sutliff v. Atwood*, 15 Ohio St. 186; *Sexton v. Chic. Storage Co.*, 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274.

The test of the assigning lessee's liability is, then, whether he has, in the lease, agreed to pay rent during the term. The rule of law is sometimes phrased thus: The obligation to pay rent remains on the lessee, after his assignment, when the obligation was created by his express agreement. It does not survive an assignment with the lessor's consent when the obligation is implied. By "express agreement," in this connection, is meant, not merely a promise, in exact words, to pay a given sum as rental. Any language necessarily importing an undertaking on the part of the lessee to pay the rent will satisfy the requirement of the rule, for the distinction to which we have referred rests on the nature of the lessee's obligation. If that obligation arises solely from the fact that he occupies the premises as tenant, if, in other words, it is based on the "privity of estate" alone, the assignee who succeeds to that privity becomes the party to whom the landlord must look. But if the obligation be one arising from the tenant's contract to pay rent, it is not ended by the assignment. Whether there be a contract to pay rent must depend on whether such contract is to be found in the words of the lease, giving such words a fair and reasonable interpretation. *Tiffany, Land & Ten.* § 50.

[3] The lease in question was executed by the lessees, as well as by the lessor. It begins by stating that the lessor leases the premises to the lessees, for the term of 10 years, at the monthly rental above stated, "payable in advance on the twentieth day of each and every month." By subsequent clauses the lessees agree to pay all bills for water, gas, and electricity furnished to the premises, and all taxes on improvements to be erected by said

lessees. The privilege of subleasing is expressly given, as is permission to erect buildings, which, if they comply with certain conditions, are to be purchased by the lessor at the expiration of the term. The lessees agree to insure the improvements, "and said insurance shall be made payable to the lessor and the lessees jointly, for the purpose of securing the said lessor in the payment of the rents herein stipulated. * * *" By another clause it is agreed that the improvements to be erected "shall be security for the rent herein stipulated to be paid. * * *" Finally, it is agreed that, if the lessees hold over beyond the term provided in the lease, such holding over shall be deemed merely a tenancy from month to month, "and at the same monthly rental that shall have been payable hereunder by said lessees immediately prior to such holding over."

If it is possible to express a contractual obligation to pay rent by any form of words other than a direct promise, in exact terms, to pay such rent, the language we have quoted from the lease before us imposes that obligation on the lessees. The lessor agrees to lease the premises to the lessees at a given rental, "payable" at stated times. The writing is signed by the lessees as well as by the lessor. Where both parties sign an agreement whereby one agrees to sell to the other a tract of land at a certain price, and to convey a good title upon payment of that price, the writing, as has been held in this court, imposes upon the vendee the obligation to buy and pay for the land, although he has not in words agreed to buy or to pay. *Preamble v. Abrahams*, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301. See, also, *King Keystone Oil Co. v. S. F. Brick Co.*, 148 Cal. 87, 82 Pac. 849.

But, beyond this, there are various other provisions in the lease plainly indicating the intention and understanding of the parties that the lessees were bound to pay the rent. Insurance is to be taken out for the purpose of securing the lessor in the "payment of the rents herein stipulated." Improvements are to be security for the rent "herein stipulated to be paid." A holding over shall be deemed a tenancy from month to month at the same monthly rental as shall have been "payable hereunder by said lessees" prior to such holding over. We find, first, a reference to the payment of "rents herein stipulated," then a provision for security for "rent herein stipulated to be paid," and finally a clause which speaks of "rents payable hereunder by said lessees." These expressions afford a convincing showing that the parties to the lease believed and understood that the writing embodied a "stipulation" for the payment of rents, and that it made such rents payable by the lessees. The obligation to pay rent is not implied from the relation of landlord and tenant, but is expressed by the words used by the parties in their writing.

There are decisions to the effect that a lease which merely provides for a letting upon a certain rental, "payable at the expiration of each and every year of the lease" (*Fanning v. Stimson*, 13 Iowa, 42), or which demises the premises to the tenant, he "yielding and paying" certain rents (*Kimpton v. Walker*, 9 Vt. 191), creates only an implied obligation, which does not survive an assignment of the leasehold interest and acceptance of rent from the assignee. On the other hand, a contrary view has been declared in cases involving the liability of a lessee to pay rent notwithstanding the destruction of the buildings by fire. The obligation to pay rent in the event of such destruction rests upon the lessee where the lease contains a covenant on his part to pay rent during the term, and the underlying principle is therefore the same as that governing the case at bar. A covenant to pay rent was held to be expressed in a lease, signed by both parties, in which the lessor let the premises to the lessee for two years, "for \$300.00 per annum, payable quarter-yearly." *Linn v. Ross*, 10 Ohio, 412, 36 Am. Dec. 95. So of a lease of land with a building, "at the rent of \$600.00 per annum, until the first day of April, 1869, and thereafter, for the term of five years, at the rate of \$800.00 per annum, the rent to be paid monthly." *Bussman v. Ganster*, 72 Pa. 285.

But if it be held that mere words of demise, "at" or "subject to" a given rental, "payable" at stated times, will not import an agreement by the lessee to pay rent, the other provisions of the lease are certainly sufficient to establish such agreement. In this aspect the case is very similar to *Consumers' Ice Co. v. Bixler*, 84 Md. 437, 35 Atl. 1086, where the court reached the conclusion just expressed by us.

[4] On the facts found, the plaintiff was therefore entitled to recover the amount claimed as rent, with interest at the legal rate on each monthly installment from the date upon which it fell due. The appellant asks, also, that judgment be entered in his favor for attorneys' fees in the three consolidated actions. The lease contained a provision that:

"In case the lessor prevails in any suit against the lessees for violation of any of the covenants of this lease, * * * the lessees shall be liable to the lessor for a reasonable attorney fee in such suit, not exceeding the sum of \$75."

Each of the three complaints counts upon this clause, and alleges that "a reasonable attorney's fee in this action exceeds the said sum of \$75." The answer in each of the actions denies, merely, that defendants "have violated any of the covenants of said lease, or that plaintiff is entitled to any attorney's fee in this action." The only finding on the subject is "that the plaintiff is not entitled to any attorney's fee in this action."

[5] As we have seen, the plaintiff was en-

titled to recover for a violation of the covenant to pay rent. This being so, his right to a reasonable attorney's fee, not exceeding \$75 in each suit, necessarily followed from the express agreement of the lessees to pay such fee, in case the lessor should prevail in a suit for violation of any covenant of the lease. The only question of fact in this connection was the amount which would constitute a reasonable fee. Since there was no denial of the averment that a reasonable fee was in excess of \$75, this question was settled by the admission of the pleadings. The finding that plaintiff is not entitled to an attorney's fee is no more than a conclusion of law, and it is a conclusion that must be held to be erroneous in view of the finding of facts showing that plaintiff was entitled to recover for a breach of the covenant of the lessees to pay rent. There can therefore be no obstacle to a direction, on this appeal taken on the judgment roll alone, that judgment be entered in favor of the plaintiff for the attorney's fees demanded.

The judgment is reversed, with directions to the court below to enter judgment in favor of the plaintiff as prayed in the three several complaints.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LORIGAN, J.; MELVIN, J.

169 Cal. 318

LUKRAWKA et al. v. SPRING VALLEY
WATER CO. (S. F. 6297.)

(Supreme Court of California. Feb. 13, 1915.)

1. WATERS AND WATER COURSES ⇨ 194—MUNICIPAL WATER SUPPLY—DUTY TO MAKE EXTENSIONS—CONSTITUTIONAL AND STATUTORY PROVISIONS.

A waterworks company, defendant's predecessor, was organized under St. 1858, p. 218, providing that all corporations formed or claiming any privileges thereunder should furnish pure, fresh water to the inhabitants of the city and county for family use so long as the supply permitted, at reasonable rates and without distinction of persons, on proper demand therefor, vesting it with the right of eminent domain, and granting an irrevocable easement in the streets of the city for laying its pipes, etc. Civ. Code, § 549, imposed the obligations expressly enumerated in the act of 1858, and Const. § 19, art. 11, as amended February 12, 1885 (St. 1885, p. 228), provided that any duly incorporated company engaged in municipal water supply might use the public streets for its pipes and connections, so far as necessary. *Held* that, when the company accepted the franchise offered by the state, it assumed a contractual duty to be discharged for the public benefit; a community service commensurate with the privileges of its franchise requiring it to provide a system reasonably adequate to meet the wants of the inhabitants at its commencement, and also to extend its system as the reasonable wants of the growing community might require, so that, when in a position to make reasonable extensions of its mains bounding a populous part of the city, it was bound to and might be compelled to do so.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 280; Dec. Dig. ⇨ 194.]

2. **WATERS AND WATER COURSES** ⇐194—**WATER SUPPLY COMPANY—DUTY TO MAKE EXTENSIONS—REASONABLENESS.**

Such right to compel an extension to serve inhabitants of a particular section was not an absolute and unqualified right, but only to do so where there was a reasonable demand and a reasonable extension of service could be made to meet the demand, depending on the particular facts of the case; but the expenditure in extending the service was not controlling in determining the reasonableness of a demand for it, because the water rates established by the municipality must be sufficient to yield a fair and reasonable income on the property devoted to the public use, which would include such necessary expenses.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 280; Dec. Dig. ⇐194.]

3. **MANDAMUS** ⇐23—**WATER SUPPLY COMPANY—DUTY TO MAKE EXTENSIONS—PERSONS ENTITLED TO RELIEF.**

Where defendant's predecessor accepted a franchise requiring it to supply the inhabitants of a city and county with water, and, in the absence of any showing that the primary and exclusive right to initiate proceedings to compel it to extend its water mains to a growing part of the community was conferred on the board of supervisors or the State Railroad Commission, mandamus was the proper remedy of the inhabitants of the part of the city clearly entitled to compel the company to extend its pipes and furnish water service to them.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 55-58; Dec. Dig. ⇐23.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Charles Monroe, Judge.

Mandamus by August Lukrawka and others against the Spring Valley Water Company. Judgment for defendant was affirmed by the District Court of Appeal. On hearing after such judgment. Reversed.

Daniel O'Connell, of San Francisco (L. Horwitz, of San Francisco, of counsel), for appellants. McCutchen, Olney & Willard and Page, McCutchen, Knight & Olney, all of San Francisco, for respondent.

LORIGAN, J. Petitioners brought this proceeding in mandamus in the superior court of the city and county of San Francisco to compel the respondent to extend its water mains and supply petitioners with water. The superior court sustained a demurrer to an amended petition of petitioners without leave to them to further amend, and entered judgment in favor of respondent. Petitioners appealed from that judgment, and it was affirmed by the District Court of Appeal. A further hearing was granted in this court.

The following are the principal facts alleged and relied on in the petition: The petitioners are all residents of and property owners in that portion of the city and county of San Francisco bounded on the north by Geary street, on the south by Fulton street, on the east by Fifteenth avenue, and on the west by Nineteenth avenue. Within this area is embraced a district of approximately eight

blocks square intersected by Sixteenth, Seventeenth, and Eighteenth avenues, running northerly and southerly, and by Anza, Balboa, and Cabrillo streets, running easterly and westerly therethrough. Within this described district there are more than 100 buildings occupied by some 100 families, the value of said buildings aggregating an amount in excess of \$500,000. The respondent is a corporation duly organized and existing under the laws of the state of California, and the grantee and successor of the rights, franchises, duties, and responsibilities of the Spring Valley Waterworks, a corporation organized about June 19, 1858, under the act of April, 1858, for the purpose of supplying the city and county of San Francisco and the inhabitants thereof with a sufficient supply of water for domestic use and other purposes. The respondent has been for a long time, and is now, engaged in the business of furnishing and distributing water to the greater portion of the inhabitants of the said city and county through a system of mains and lateral water pipes which are laid in, through and along various streets, avenues, alleys, and highways of said municipality; that a large main of the respondent more than 16 inches in diameter extends along Geary street on the northerly line of the district heretofore described within which petitioners reside and on the avenues and streets of which they own property, and a smaller main extends along Fulton street on the southerly line of said district; that some extensions of smaller mains or laterals have been made by respondent northerly from its main on Fulton street along Sixteenth, Eighteenth, and Nineteenth avenues in said district for a block, and southerly from the main on Geary street about two blocks along Fifteenth, Sixteenth, and Nineteenth avenues in said district, but no mains or lateral water pipes have been yet extended to the streets in said district on which the petitioners reside and own property; that, in order to supply some of the petitioners with water, it would only be necessary for the respondent to extend its mains by lateral connections 50 feet southerly from the Geary street main along the avenues on which such petitioners reside, and, in order to supply all the petitioners with water, respondent will be required to install lateral connections with said Geary street main extending some 2,000 feet southerly along the avenues upon which the greater number of the petitioners reside. Respondent has in its various reservoirs far more than enough water to furnish a sufficient and adequate supply of water regularly each day to each and every part of said city and county of San Francisco and to all the inhabitants and residents thereof, and could, if its water mains and laterals were extended some 2,000 feet, as above set forth, along the avenues

and streets of said district, readily and easily supply water to all the petitioners for all proper uses and purposes without depriving the inhabitants of any portion of said city and county of their accustomed and necessary daily supply of water. The petitioners have demanded of respondent repeatedly that it extend its water mains into and through said streets and avenues upon which petitioners reside, and that they be served with water sufficient for domestic purposes and for protection against fire, and have offered to pay all lawful rates and charges of respondent therefor, but respondent has refused to comply with the demand of petitioners in whole or in part, and refuses to do so.

The attack of respondent upon this petition by demurrer was based upon a large number of grounds, but the principal one presented and relied on is that the facts alleged in the petition do not sustain any right in petitioners to be granted the relief they seek.

The predecessor and grantor of respondent, the Spring Valley Waterworks, was organized under the act of 1858 which provided that:

"All corporations formed under the provisions of this act, or claiming any of the privileges of the same, shall furnish pure, fresh water to the inhabitants of such city and county, or city or town, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor, and shall furnish water, to the extent of their means, to such city and county, or city or town, in case of fire, or other great necessity, free of charge." Stats. 1858, p. 218.

It is further provided by section 549 of the Civil Code:

"That all corporations formed to supply water to cities or towns must furnish pure, fresh water to the inhabitants thereof, for family uses so long as the supply permits, at reasonable rates and without distinction of persons upon proper demand therefor; and must furnish water to the extent of their means, in case of fire or other great necessity, free of charge. The board of supervisors, or proper city or town authorities, may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the state."

The Constitution of the state of California (section 19, art. 11, as amended on February 12, 1885 [St. 1885, p. 228]) provided as follows:

"In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages, and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits, therein, and connections therewith, so far as may be necessary for introducing into and supplying such city, and its inhabitants, either with gas light, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

The contention of the petitioners is, and the petition was drafted upon that theory, that under the terms of the franchise by which its right to operate in the city and county of San Francisco was granted to and accepted by the respondent, as well as under the statute and constitutional provision, the duty was assumed by the company and the implied obligation was cast upon it of taking all reasonable measures to supply the entire city and its inhabitants with water, and, in the discharge of that obligation, to lay its pipes in the streets thereof so as to make the supply accessible to such inhabitants.

The claim of respondent is that neither its franchise nor the provisions relied on by petitioner requires it to make any extensions of its system by the addition of water mains to districts within the city other than it may deem proper to do; that the only legal duty which it owes to such inhabitants is that when it had laid its mains or laterals along the streets of the city it must allow service connections to be made therewith for the benefit of property owners along the line of said mains and laterals.

Having stated the contentions of the respective parties, we proceed to examine their merits.

The predecessor of respondent and respondent itself was not organized and is not engaged in a private enterprise, the conduct of which is within its own control. It was organized for, and is engaged in, a public enterprise, and its rights, duties, and responsibilities are to be determined from a consideration of the provisions of the franchise which it acquired under the act of 1858 and the obligations which it assumed when it accepted it. By incorporating under that act it unquestionably assumed the public duty of supplying the city and county of San Francisco and its inhabitants with water, which was the specific purpose for which the franchise was extended to it. Under the franchise the corporation was invested with a right of eminent domain to effect the public duty which it had undertaken and in the municipality where it undertook to carry out its assumption of this duty, and, for the purpose of effectively doing so, it was granted an irrevocable easement in the streets of the entire city for the purpose of laying its pipes therein and discharging the duty it had assumed. The act of 1858 in express terms confers on corporations accepting the franchise extended under it the privilege of using the streets of the municipality in which it has undertaken to operate for laying its pipes and conduits. The respondent could acquire no right to engage in the business of supplying water to the city and county of San Francisco, with an easement over all the streets of the municipality, unless under a franchise granted by the state for that purpose and with such a right. It was for the benefit of the public that the franchise was extended; to secure

to the municipality of the city and county of San Francisco and its inhabitants an adequate supply of water as the reasonable and necessary wants of the community in that respect might require. This was the purpose and this the condition upon which the franchise was offered, and when it was accepted by the respondent it constituted a contract between the state and the respondent under which the rights, duties, and responsibilities of each were fixed, and by which they were bound. The franchise was offered by the state as an entirety, and, where a corporation organizing under the act offering it undertook the public duty which such franchise contemplated of supplying water to a municipality and its inhabitants, it accepts the franchise in its entirety. It was a community service which was contemplated by the extension of the franchise, and which was intended should be assumed by a corporation accepting it, and it was solely that this assumed duty might be properly and entirely discharged that an easement over all the streets of the municipality was granted with the franchise. The franchise was not offered, nor could it be accepted, with any limitation as to the area to be fixed by the corporation organized under the act within which in the municipality it would furnish water to its inhabitants. It was intended that the public duty assumed should be discharged for the benefit of the municipality and its inhabitants as a community; that when a water company organized under the act undertook to furnish water to the inhabitants of a city it should be charged with the obligation of taking adequate measures to supply the reasonable needs and wants of all the inhabitants as they arose. The proper discharge of this public duty required not only that the company should provide a supply of water and establish a system for its distribution to meet the reasonable needs of the municipal community as it then existed, but it was under the obligation to keep in view the prospective and probable increase in population of the municipality and the necessarily increasing demand for a water supply which would be consequent therefrom; to anticipate the natural growth of the municipality it had undertaken to serve as a whole; and to take reasonable measures to have under its control a sufficient supply of water and make gradual extensions of its distributive system to meet the reasonable demands for water by the growing community. This duty the respondent assumed by accepting its franchise under the act of 1858, and, as it appears from the petition that it has in its possession and under its control more than an adequate supply of water whereby all the inhabitants of the city and county of San Francisco may be served without at all disturbing the claims of existing consumers, and that only a reasonable extension of its existing mains is required to supply the petitioners, who are inhabitants of the city, with the wa-

ter service they have demanded, it was the legal duty of the respondent to have complied with the demand and made the extension.

We are not cited to any authority by petitioners where the precise question now under consideration was involved—the extension of a water system into new territory in a city—and to none by respondent where it is held that a corporation operating under the terms of a franchise such as is involved here is not required to do so. Our own investigation of the subject has disclosed some authorities which support the right to have such extensions made within reasonable limits. In fact, in one of them (decided after this appeal was determined by the District Court of Appeal) there was under consideration the rights and obligations of a public service corporation organized under the constitutional provision (section 19, art. 11, as amended in 1885) which we have quoted above, and which, as far as the franchise thereby granted is concerned, is in no respect different from the franchise acquired by the respondent under the act of 1858, and the benefit of which constitutional amendment is available to respondent. That case is *Russell v. Sebastian*, decided by the Supreme Court of the United States, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. Ed. 912, Ann. Cas. 1914C, 1282. It involved the right of gas and water companies to excavate streets in municipalities for their mains under the constitutional amendment of 1885 above referred to. The Economic Gas Company had organized in 1909 for the purpose of manufacturing and delivering gas in the city of Los Angeles. It had established its works for that purpose, and prior to October 10, 1911, had extended its distributing system along the streets of that city into a portion of its territory. On October 10, 1911, said section 19, art. 11, of the Constitution of this state was further amended to provide, among other things, that:

"Persons or corporations may establish and operate works for supplying the inhabitants with such services (gas, water, etc.) upon such conditions and under such regulations as the municipality may prescribe under its organic law. * * *"

Subsequent to this constitutional amendment, and in 1911, the city of Los Angeles passed an ordinance providing that no one should exercise any franchise or privilege to lay or maintain pipes or conduits in the streets of the city for conveying gas, water, etc., without having obtained a grant from the city in accordance with the city charter, unless entitled to do so by direct and unlimited authority of the Constitution of the state of California, and making it unlawful to make any excavation in a street for any purpose whatever without permission from the city, to be granted on a showing by the applicant therefor of legal authority to use the streets for the purposes specified. In 1912 the Economic Gas Company was proceeding to open trenches in the streets of the city

of Los Angeles for the purpose of extending its mains into territory in that city which it was not theretofore serving, and its employé Russell was arrested at the instance of the city. The question in the case—in reality one between the gas company and the city, and so presented before the Supreme Court—was as to the nature and extent of the right acquired by the gas company by the establishment of its works and extension of its distributing system into a portion of the city under the amendment of 1885 to the constitutional provision, and how far, having undertaken its public service prior to the amendment of 1911, it could be affected by the attempt of the city under this last amendment to the Constitution to prohibit further extensions of its system through all the streets of the city without a grant or franchise from the city and permission so to do. It was held that the establishment of its plant by the gas company and the undertaking by it under the constitutional amendment of 1885 to perform the service incident to a public utility constituted a contract between the state and the company; that the actual usage of certain streets by the company did not measure the range of its acceptance of the public franchise as to streets of the city or define the limits of the operation of the company; that the offer was of a privilege to lay pipes as far as they might be required in order to effect the adequate distribution of gas, and was commensurate with the requirement of the undertaking which was assumed by a public service company, namely, of supplying such city and its inhabitants either with light or water, as the case might be; that the constitutional offer of the privilege of supplying a municipality with gas or water was intended to be extended by the state in an entirety, and to be accepted as an entirety by the company undertaking to do so, and hence granted to the Economic Gas Company the right to continue to lay its pipes in the streets of the city wherever necessary to extend its service and perform the duty of supplying the service which it had undertaken by such acceptance; and that the company could not be prevented or interfered with in doing so by subsequent legislation impairing the grant.

The court, after discussing the policy of the state in making the constitutional offer of such a franchise, declared:

"That there was no ambiguity in the scope of the [constitutional] offer. It was not simply a privilege to maintain pipes actually laid, but to lay pipes as far as they might be required in order to effect an adequate distribution. * * * The breadth of the offer was commensurate with the requirements of the undertaking which was invoked. The service to which the provision refers was a community service. It was the supplying of a municipality—which had no municipal works—with water or light. * * * In view of the nature of the undertaking in contemplation, and of the terms of the offer, we find no ground for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to

be accepted in its entirety as made, and that acceptance lay in conduct committing the person accepting to the described service. * * * This construction of the constitutional provision is the only one that is compatible with the existence of the duty which it was intended, as it seems to us, that the recipient of the state's grant should assume. The service, as has been said, was a community service. Incident to the undertaking in response to the state's offer was the obligation to provide facilities that were reasonably adequate. * * * It would not be said that either a water company or a gas company, establishing its service under the constitutional grant, could stop its mains at its pleasure and withhold its supply by refusing to extend its distributing conduits so as to meet the reasonable requirements of the community. But this duty and the right to serve, embracing the right under the granted privilege to install the means of service, were correlative."

In this connection the said Supreme Court quoted with approval from *People ex rel. Woodhaven Gas Co. v. Deeham*, 153 N. Y. 528, 47 N. E. 787, as follows:

"It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth and expansion. A franchise for supplying gas not only confers a privilege, but imposes an obligation, upon the corporation to serve the public in a reasonable way. The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations. It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old."

And in the conclusion of its opinion the Supreme Court said, with respect to the acceptance by the gas company of the franchise offered by the constitutional amendment of 1885 to supply gas to the inhabitants of the city of Los Angeles:

"The company, by its investment, had irrevocably committed itself to the understanding and its acceptance of the offer of the right to lay its pipes, so far as necessary to serve the municipality, was complete."

In a comparatively recent work (Wyman on Public Service Corporations) the author says (vol. 1, § 797):

"In most of the public employments of the modern type what is undertaken is not merely the devoting of particular equipment to public use, but rather the rendering of a certain service to the community with which it professes to deal. * * * All this is particularly true of the municipal services, such as waterworks, gas plants, electric plants, and telephone systems. * * * Such companies are held to undertake the service of their communities; and they must, to speak in general, be prepared to extend this system throughout their district to meet the reasonable demands of the growing community. If this involves the acquisition of new sources of supply, or a laying of pipes in new streets, or extension of wires to other streets or the construction of new exchanges, all these new facilities must be provided to meet the expansion

of the business within the community to the service of which the company has committed itself. But it is true of such supply, as it is of other public service, that the duty to give adequate service to those to whom it owes this primary duty is relative, not absolute. The service company will be held to the exercise of due foresight in anticipating the progress of the demand for its supply accompanying the growth of the community."

Elsewhere, in discussing this same subject, the same author declares (section 281):

"It is obvious that the problems raised in this topic have not been disposed of as yet. It is plain that the existing facilities must in many instances be further developed in readiness to give service to those beyond the present lines, since what has really been undertaken is the proper service of the whole community dependent upon the established company. This at least involves the well-settled central territory within which service is plainly demanded, whether mains have been laid in all the streets or not. Certainly all premises situated within the network of the existing mains and within convenient connecting distance of their lines should be served. All of these premises come within the sphere of influence, already established, differing slightly from premises abutting. But the law will soon require, if it does not already, that the existing mains must be gradually extended as the growth of population in the community which the corporation has undertaken to serve demands the expansion."

See, also, 2 Morawetz on Corporations, § 1129; Haugen v. Albina Light & Water Co., 21 Or. 418, 28 Pac. 244, 14 L. R. A. 424; Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518.

In the case of Bothwell v. Consumers' Co., 13 Idaho, 568, 92 Pac. 533, 24 L. R. A. (N. S.) 495, the action was brought to compel the water company to attach its mains and connect with the water pipe of the plaintiff on the line of his property. The court, reversing a judgment entered on an order sustaining a demurrer to the complaint, in the course of its opinion said, as to the extent of the implied obligation of a water company under a franchise similar in terms to that of respondent here:

"The franchise for laying pipes in the streets and alleys and maintaining and operating a water system is granted by the municipality to the water company. The property owner has no right or franchise to dig in the streets and alleys and lay pipes, and if he should do so he would acquire no property right therein. The main and all laterals, fixtures, and connections within the franchise limits belong to the water company, and all together constitute the water system. It is not the business of the citizen or consumer to construct any part of the company's system. * * * The company, in the enjoyment of its franchise privileges, is placed by the Constitution under a public duty to supply water to all living within the franchise limits on payment of the rental rates. It owes this duty to every one so long as it has water to sell, whether it be on the line of its main or at a great distance therefrom."

In addition to these cases which deal with or discuss the duty of a public service corporation to reasonably extend its service to meet the necessary wants of a community which under its franchise it has undertaken generally to serve, we are cited by counsel for petitioners to a number of cases, all of

which involved directly the refusal of a water company to make service connections for the benefit of property owners whose property abutted upon streets through which the supply mains of the company were already laid, and which sustain the right to have the service connections made. Counsel for respondent contends that these cases are distinguishable in principle from the case at bar. But the only difference we perceive is that the petitioners here do not reside directly on the streets through which the respondent has laid its mains. It is true that in none of the cases cited was there the question involved, nor do they declare anything as to the duty of a water company organized and chartered for the purpose of supplying all the inhabitants of a community with water to reasonably extend its mains so that all residing therein may be served. But, in our judgment, there is no difference in the principle applied in the cited cases and that which governs in the case at bar, which is that, where a public service water company has obligated itself under its franchise to supply the inhabitants of a community with water, and has the water with which to do so, it is under legal compulsion to discharge its assumed obligations on a reasonable demand. In the cited cases the water company had actually extended its mains along the streets of a city to a point where the water supply was accessible to the property owners fronting on the mains, and, in the discharge of its franchise obligation, was compelled to give them water service connections as inhabitants of the community it had undertaken to serve. In the case at bar the respondent company, having under the terms of its franchise undertaken to furnish water to the inhabitants of the city and county of San Francisco, of whom petitioners are a part, and having a water supply more than sufficient for that purpose, which by a reasonable extension of its mains may be served to petitioners, is equally legally required to make the extension in discharge of its franchise obligation.

[1] We are of the opinion, therefore, for the reasons given and under the authorities we have referred to, that when the respondent accepted the franchise offered by the state, and undertook to supply the municipality of San Francisco and its inhabitants with water, it assumed a public duty to be discharged for the public benefit; a community service commensurate with the offer of the franchise which involved the duty of providing a service system which would be reasonably adequate to meet the wants of the municipality, not only at the time it began its service, but likewise to keep pace with the growth of the municipality, and to gradually extend its system as the reasonable wants of the growing community might require, and, as it appears from the petition in this case that respondent is in a position to discharge this duty towards petitioners by a

reasonable extension of its mains, it should have done so on their demand, and, having refused, may be compelled to do it.

[2] In reaching this conclusion it is, of course, to be borne in mind that the right of an inhabitant of the municipality or the inhabitants of a particular portion of it to compel the service to them by the water company through the extension of its system is not an absolute and unqualified right. The fact that the water company has undertaken to serve the entire municipality, and that it would be of advantage to an inhabitant thereof, or a number of them, to have the water system extended to supply them, would not of itself be sufficient to require or compel the company to make the extension. The duty which the water company has undertaken is of a public nature and to meet a public necessity for the supplying of water to the community. The obligation of the company is not to supply each or any number of inhabitants of the municipality on demand as an absolute right on their part, but it has only assumed and become charged with the public duty of furnishing it where there is a reasonable demand for it and a reasonable extension of the service can be made to meet the demand. The right to require the service and the duty of furnishing it by an extension of the water system is to be determined from a consideration of the reasonableness of the demand therefor. It would hardly be claimed that the obligation of a water company exercising a public service franchise would require it on the demand of an inhabitant of the city, or even a number of them, residing at a long distance from a point in the city to which its mains are already extended, to further excavate the streets of the municipality at its own expense and extend its mains to them, where the rates to be charged for the water to be delivered would but to a slight extent compensate the company for the expenditures entailed in doing so; in fact, without any certainty that there would be a continuous consumption of water or a continuous payment of rates even after it was brought to them. On the other hand, where the extension of an existing main, if made only for a few feet, would supply the water service, the demand for making such an extension would obviously be a reasonable one, as the rates to be charged would ordinarily compensate for the expenditure made by the company. Between these particular cases suggested there is a wide field for the play of the rule of reasonableness of demand for service, and whether it does or does not exist must be determined by a court as a fact in each particular case where it is sought to compel an extension of service. Of course, the matter of expenditure to be entailed by the public service company in extending its service is not a controlling feature in determining the reasonableness of a demand for it, because the water rates established as a whole be-

tween the public service corporation and the city by the public body to which that duty is committed must be sufficient to yield a fair, just, and reasonable income on the property of the company devoted to public use, which would include such necessary expenditures. But additional expenditure by the company or an additional burden on the water rate payers as a whole should not be imposed for the benefit of a particular portion of the community unless a reasonable necessity for it exists. Whether it does or not is to be determined by a consideration of the facts in each particular case, and, among other things, by a consideration of the duties of the company, the rights of its stockholders, the supply of water which the company may control for distribution, the facilities for making extensions to a locality beyond its present point of service, the rights of existing customers, the wants and necessities of the locality demanding it, and how far the right of the community as a whole may be affected by the demanded extension. We refer to this matter of reasonableness of demand to be considered in determining the right to require the extension of service on account of the general language used in the authorities cited in sustaining the implied obligation of a public service corporation under its charter to supply all the inhabitants of a municipality with water. While this is the obligation it undertakes, the right of the inhabitants of the municipality to have it discharged is, as we have said, not an absolute, but a relative, one, which may be enforced only when conditions are such that there exists a reasonable demand for the fulfillment of the obligation. In the case at bar the facts charged in the petition show that there is such a reasonable demand for such an extension, and, as there is a liability on the respondent under such circumstances to comply with it, it may be compelled to do so.

[3] The special point is made by respondent, for the first time in this case, in a supplemental brief filed by it on the hearing in this court, that the petitioners, as private individuals, may not maintain this action in mandamus; that the primary right to compel respondent to extend its mains (if it exists anywhere, which respondent does not admit), rests with either the board of supervisors of the city and county of San Francisco or with the State Railroad Commission, and that one or the other of these bodies can alone invoke by mandamus the aid of this court to compel the extension of existing mains in compliance with the order of either requiring respondent to do so. Hence respondent asserts that the demurrer was properly sustained by the superior court because the amended petition itself does not show a cause of action which the petitioners could assert. Counsel do not point out in which of the public bodies referred to the alleged primary or exclusive right to compel the extension of its mains is vested. It asserts, after

simply quoting provisions of the charter of the city and county of San Francisco, general provisions of the Constitution, and the special constitutional provision respecting the powers of the State Railroad Commission, that the right of compulsion exists in either the one or the other of these public bodies to the exclusion of any right in these petitioners to maintain this action.

We perceive nothing in the charter provisions nor the constitutional provision respecting the power of the board of supervisors or the State Railroad Commission which confers upon either of these public bodies primary and exclusive right to initiate proceedings compelling respondent to extend its water system to meet the present wants of particular inhabitants of the municipality, or anything which precludes the inhabitants of a city, or any portion thereof, which a public service corporation exercising such a franchise has obligated itself to serve with water, from applying directly to the courts to enforce the obligation to them which the corporation has undertaken to discharge. It may be assumed in the same general way that respondent asserts it (though we decline to express any opinion on the subject) that one or the other of the public bodies referred to also has the power to compel the respondent, as a public service corporation, to discharge the public duty assumed under its franchise to meet the public wants and necessities as they arise in the municipality. But the legislation under which these bodies are created does not pretend to interfere with the personal right of the inhabitant of a city to invoke the aid of the court to compel the respondent to enforce toward him the obligation which it has assumed for his personal benefit. It is not pretended that mandamus as invoked here is not the proper remedy, if the petitioners have a remedy. The only insistence is that it is not available to them because, as asserted, the relief which they ask can only be afforded them through the medium of the public bodies referred to. But, as no primary or exclusive control of this subject is vested in these bodies, the right of the petitioners to compel the discharge of its duty to them by respondent cannot be doubted. The franchise of 1858 accepted by respondent constituted, as we have said, a contract between it and the state under which the respondent undertook a public use of which the inhabitants of the city of San Francisco are the beneficiaries. The right of such inhabitants as beneficiaries of such public use was created under the franchise so accepted, and the duty was then assumed by respondent of furnishing and supplying water for their personal use as their reasonable demands for it might arise. The right which this acceptance legally secured to each inhabitant of the municipality was in the nature of a public right accruing to him from his status as a person of the

class for whose benefit the respondent obligated itself to furnish a water supply. The right was extended to, and the obligation of the respondent included, each and every person who might become an inhabitant of the municipality while respondent was exercising the public use that it had assumed. By such acceptance a clear and perfect legal right was created in favor of the inhabitants of the municipality to compel a water service to them, and imposed the clear and legal obligation upon the respondent to do so. Under such circumstances, when the right and the public duty are clear, mandamus is the proper remedy. *Price v. Riverside L. & I. Co.*, 56 Cal. 431; *Hildreth v. Water Co.*, 139 Cal. 26, 72 Pac. 395; *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. 137; *South Pasadena v. Pasadena Land, etc., Co.*, 152 Cal. 579, 93 Pac. 490.

The judgment appealed from is reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

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KENNEDY v. KENNEDY et al. (S. F. 6600.)
(Supreme Court of California. Feb. 11, 1915.)

1. BANKS AND BANKING ⇨129—DEPOSITS—JOINT OWNERSHIP.

A joint ownership, with the incident of survivorship attaching as a matter of law, may be created in a bank deposit by agreement between donor and donee.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 312-315, 326, 388; Dec. Dig. ⇨129.]

2. BANKS AND BANKING ⇨129—DEPOSITS—AGREEMENT CREATING JOINT OWNERSHIP—EFFECT.

Where deceased deposited funds in bank under an instrument signed by himself and defendant, his daughter, declaring that such funds and those thereafter to be deposited were and should be joint between the parties as to time, title, and possession, that they were the separate property of neither, and were payable to either, and that the receipt of either therefor should be an acquittance of the bank as to the other, on deceased's death, defendant was entitled to the fund on deposit as against his personal representative; such a written instrument being conclusive of deceased's intention to create a joint ownership, the right of survivorship following as a legal incident, and so not needing to be expressed.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 312-315, 326, 388; Dec. Dig. ⇨129.]

3. BANKS AND BANKING ⇨129—DEPOSITS—JOINT OWNERSHIP.

The mere fact that a bank deposit is made by one person in the name of himself and another is not conclusive as to his intention thereby to create such a joint ownership in the fund that the incident of survivorship will attach thereto as a matter of law, the absence of a declaration of intention leaving the matter for judicial determination.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 312-315, 326, 388; Dec. Dig. ⇨129.]

4. BANKS AND BANKING —129—DEPOSITS—CONSTRUCTION OF AGREEMENT.

In view of the fact that joint savings accounts are largely opened by near relatives so that the survivor shall take the fund, where such an account was opened by father and daughter, an agreement as to the nature of their interests, executed by them on a form provided by the bank for its own protection, was presumed a valid agreement between the parties furnished by the bank at their request, creating a joint ownership to which the legal incident of survivorship attached.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 312-315, 326, 388; Dec. Dig. —129.]

5. BANKS AND BANKING —129—DEPOSITS—JOINT OWNERSHIP—EVIDENCE.

Evidence held to show that a father, in executing an instrument prepared by his savings bank, intended to create a joint tenancy in the deposit with his daughter to which the right of survivorship should attach.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 312-315, 326, 388; Dec. Dig. —129.]

6. BANKS AND BANKING —154—DEPOSITS—ACTION—GENERAL FINDING OF COURT AS CONTROLLED BY SPECIAL FINDING.

A general finding that one of the alleged owners of a bank deposit was sole owner at his death was controlled by special findings as to the execution of an agreement between the parties constituting them joint owners of the deposit, with the incident of survivorship attaching as a matter of law.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 502-512, 515, 516, 518-533; Dec. Dig. —154.]

In Bank. Appeal from Superior Court, City and County of San Francisco; George E. Church, Judge.

Action by William J. Kennedy, administrator, against Mary E. Kennedy and others. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed, with directions.

Guy C. Earl and W. H. Spaulding, both of San Francisco, for appellant. Rufus H. Kimball, J. C. McKinstry, and D. C. Murphy, all of San Francisco, for respondents.

LORIGAN, C. J. This action was brought to determine diverse claims to \$3,240 and interest on deposit with the defendant bank.

The complaint averred that this deposit consisted of moneys of which the deceased, Bartholomew Kennedy, was the sole owner in his lifetime, and which from time to time he deposited personally in the defendant bank, and that such deposit was at the time of his death a part of his estate; that the defendant Mary E. McMurray asserted a claim to said deposit as her separate property which asserted claim was without right; that both plaintiff and said defendant Mary E. McMurray had demanded payment thereof from the bank separately, and that by reason of said different and conflicting claims thereto the bank had refused to pay the deposit to either. Plaintiff asked for a judgment determining that said Mary E. McMurray had no right or interest in said deposit

and against the bank requiring it to pay over said deposit to plaintiff.

The defendant Mary E. McMurray filed an answer and cross-complaint. In her answer she denied that her claim to said deposit was without right and asserted that it was her sole and separate property. In her cross-complaint she averred that prior to her marriage to the defendant William J. McMurray (and as he filed a disclaimer of any interest in the deposit he may therefore be eliminated from this action) her name was Mary E. Kennedy, also called May E. Kennedy; that on July 26, 1902, said Bartholomew Kennedy, who was her father, and herself opened an account with the defendant in the names of "Bartholomew Kennedy or May E. Kennedy," and then and there said Bartholomew Kennedy deposited with said bank \$3,000, which sum was deposited by him in the names of "Bartholomew Kennedy or May E. Kennedy"; that thereafter during his lifetime other moneys were deposited by said Bartholomew Kennedy and certain moneys were withdrawn from said account by him, and at the death of said Bartholomew Kennedy there was on deposit in said bank in the names of said "Bartholomew Kennedy or May E. Kennedy" the sum of money mentioned in the complaint. The cross-complaint then proceeded to aver: That said account was so opened and said original deposit of \$3,000 and all moneys thereafter deposited therein on the understanding and agreement made and entered into between said defendant bank and said Bartholomew Kennedy and the defendant Mary E. Kennedy that any and all moneys deposited in said account should be held by said defendant bank in trust upon the following terms:

"That all moneys * * * at any time deposited or on deposit * * * in said account were to be paid by said bank upon the order at any time of either said Bartholomew Kennedy or this defendant and upon the death of either said Bartholomew Kennedy or this defendant any and all moneys then at the time of such death on deposit in said account * * * should be the sole and separate property of the survivor of said two persons, to wit, said Bartholomew Kennedy and this defendant and to be payable by said Mutual Savings Bank of San Francisco to such survivor as his or her, as the case might be, sole and separate property."

And that as the survivor of said two persons defendant is the owner of said deposit. It is then alleged that the claim made by the plaintiff as administrator of the estate of said Bartholomew Kennedy, deceased, to the money on deposit is invalid, that the estate of said deceased has no interest therein, but that said money is the sole and separate property of the defendant and cross-complainant. Her prayer was that it be decreed that said property is the sole and separate property of the defendant and for a judgment against the bank requiring it to pay over to her said deposit.

Plaintiff by answer denied the averments of the cross-complaint. The defendant bank filed an answer to both the complaint and cross-complaint, and on information and belief denied that the deceased, Kennedy, was the sole owner in his lifetime of the moneys deposited with it, or that they were the sole and separate property of the cross-complainant. It was conceded by both sides on the trial that the bank was a mere stakeholder in this matter.

The trial court made general and special findings. It found generally that the allegations of the complaint were true, and that the denials in the answer of the defendant Mary E. McMurray were untrue. It found specially that the cross-complainant did not at any time open an account with the defendant bank as alleged by her, but that the account referred to by her in said pleading was opened by said Bartholomew Kennedy and the title of said account opened on the books and records of the bank was "Bartholomew Kennedy or May E. Kennedy," and that none of the moneys deposited in said account were ever deposited upon any trust agreement or understanding as set up in the paragraph of the cross-complaint averring that fact. The court then proceeding made what will be designated as special finding No. 6, in which it found:

"That the only agreement which the defendant bank ever made with said Bartholomew Kennedy in respect to said deposits of money was reduced to writing and was signed by him and said Mary E. McMurray, then May E. Kennedy, and that said agreement so reduced to writing consisted of two separate documents as follows:

"Conditions of deposit account No. 11233:

"San Francisco, Jul. 26, 1902.

"We, the undersigned, each for himself and not one for the other, declare that the sums deposited to this account are, and those sums hereafter to be deposited shall be, joint as to time, title and possession, and further declare that they are not and have never been the separate property of either, and said sums are hereby made payable to either of us; and we hereby agree that the receipt of either of us shall be a full acquittance and discharge to the Mutual Savings Bank of San Francisco therefor.

"Bartholomew Kennedy.

"Mary E. Kennedy.

"Witness: W. H. Cameron."

"Depositors subscriptions to conditions of agreement with the Mutual Savings Bank of San Francisco:

"No. 11233.

Jul. 26, 1912.

"We hereby agree to be governed by the by-laws, copy of which is in our passbook, in regard to all deposits we may have with the Mutual Savings Bank of San Francisco.

"Payable to the individual order of either.

"Signature: Bartholomew Kennedy.

"Signature: May E. Kennedy."

As conclusions of law from the facts found the trial court held that the defendant and cross-complainant Mary E. McMurray had no right to or interest in said deposit and gave plaintiff judgment against the defendant bank for the sum of \$3,240, with interest from January 1, 1910. Defendant and cross-complainant appeals from the judgment and

an order denying her motion for a new trial.

[1, 2] On the appeal from the judgment the contention of the appellant is that special finding No. 6 is controlling in the case; that the trial court should have determined as matter of law therefrom that appellant was the owner of the deposit in controversy and given her judgment accordingly. In this regard her claim is that as a joint ownership or interest in personal property, including a deposit in a savings bank, may be created to which the incident of survivorship attaches (*Denigan v. S. F. Sav. Union*, 127 Cal. 142, 59 Pac. 390, 78 Am. St. Rep. 35), the clear legal effect of the instruments specially found by the court to have been executed by appellant and her father at the time the deposit was made was to create a joint ownership or interest in both as to the deposits then made by her father, and deposits thereafter to be made with the defendant bank; that as an incident to this joint ownership the right of survivorship attached, and appellant, being the survivor of the joint owners, was entitled to the deposit, and the court should, under the special finding referred to, have so held.

[3] We are satisfied that this contention of appellant must be sustained. We are cited by respective counsel to cases in our courts which it is claimed announce principles under which a proper construction of the instruments executed when the deposit here involved was made is to be reached, but we do not think that any of them have particular application to the subject. These cases are *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 Pac. 370; *Carr v. Carr*, 15 Cal. App. 480, 115 Pac. 261; *Drinkhouse v. German Sav. & Loan Soc.*, 17 Cal. App. 162, 118 Pac. 953; *Denigan v. Hibernia Sav. & Loan Soc.*, 127 Cal. 137, 59 Pac. 389; *Robinson v. Mutual Sav. Bank*, 7 Cal. App. 642, 95 Pac. 533; *Estate of Hall*, 154 Cal. 527, 98 Pac. 269. In those cases the question was presented, in one form or another, as to who was entitled to a deposit in a savings bank where a deposit account had been opened on the books of the bank by a depositor in his own name "or" that of another, or where the deposit was entered on the books of the bank to the "joint account" of the depositor and another person, or the question was whether the deposit was made in trust for the benefit of another. The actions were brought either by the survivors to the deposit account or the beneficiaries under the alleged trust. But on examination of those cases it will be observed that in none of them was there any written instrument executed by the parties in whose names the account stood in the bank declaring their rights or interests respecting the deposit, or the terms under which it was made and was to be held by the bank. In the cases referred to the terms of the deposit consisted simply of an entry in the passbook and an entry in the

records of the bank. No written instrument was executed between the parties to the deposit and accompanying its making. So that in the mentioned cases the question was as to the intention of the depositor in making the deposit in the form he did; whether he intended to make a gift, or create a joint interest in the deposit with right of survivorship, or to establish a trust as to any balance on deposit at his death. In the absence of any written instrument clearly disclosing his intention in those respects, such intention was open to inquiry and to be determined from all the facts and circumstances connected with the deposit. The whole matter rested in parol, and whether, as asserted in the Denigan Case, *supra*, it was the intention of Mrs. Denigan, in having a deposit entered in the books of the bank and in her passbook in the names of "Frank Denigan or Ellen Denigan," to thereby create a joint interest or ownership in the deposit to which the incident of survivorship would attach, or in the Carr Case, *supra*, whether it was the intention of Michael Carr, by changing his deposit on the books of the bank to the names of Michael or M. K. Carr as "joint owners" payable to either or the survivor, thereby to create a trust in favor of M. K. Carr, the survivor, was a question open to determination from a consideration of all the facts surrounding the making of the deposit. In none of the cases cited could the mere fact of deposit and the entry in the books of the bank be conclusive of the matter of intention. It was accompanied by no written declaration of the depositor which could be taken as determining his intention respecting it, and hence, as the question was an open one, it was for the court to determine the intention from all the facts and circumstances proven in the case. But in the case at bar we have a written declaration signed by the father and his daughter relative to the deposit declaring the character of the property then deposited or which might thereafter be deposited, the interest which both have and are to have in it and fixing their rights respecting it. It is true that there was evidence in the case showing that prior to making this particular deposit the money constituting it was money which Mr. Kennedy had already on deposit with the bank in his own name. It was at that time his individual property. When the written instruments were executed by himself and his daughter and as part of the transaction he had this money transferred from his account on the books of the bank and deposited in the names of himself or the appellant. The prior ownership by the father of this money, however, is a circumstance of no importance if the written instruments declare and disclose a purpose and intent on his part in having the old deposit transferred to the new deposit account to thereby give his daughter a joint interest with him in it. It was his property,

and he could do with it as he pleased. We are not aware of any Code provision or principle of law which would prevent him by this transfer of deposits from his sole account to a joint account from giving her a joint interest or making her a joint owner with him in the latter deposit. Whether he intended to do so or not is the essential element in the case, and if that clearly appears from the instruments executed by him and his daughter when he made the deposit in their names we cannot look beyond those instruments. If it is clear on the question of intent the right of the parties must be determined solely from its consideration. No parol evidence could affect it.

Coming now to a consideration of the instrument: While it consists of a mutual declaration of the father and the daughter as to the deposits, the particular question is: Does it clearly disclose an intention on the part of the father, when the deposit was made by him to the account of himself and his daughter, to constitute it and future deposits the joint property of himself and her? We do not perceive how any other reasonable construction can be given to the instrument than that he did. The written declaration as applying to him says so in express terms. The moneys were his before the deposit account was opened. He declares that as deposited by him it is not his separate property, but the joint property of himself and his daughter; "that the sums deposited to this account are, and other sums hereafter to be deposited shall be, joint as to time, title, and possession." There is no ambiguity or uncertainty about this language. It was undoubtedly intended to and did create a joint interest or ownership in the deposit, and this being the intention, and as the right of survivorship applies to joint interests or ownership of personal property, it must have been the intention of the deceased Kennedy, in declaring the deposit to be joint property, to have intended that the incident which follows joint ownership should apply to it, and that upon his death his daughter should take the deposit as survivor. Certainly, more apt language, whereby a joint ownership in the deposit or a right to the withdrawal of it (because the legal title to the money deposited was in the bank and the relation of debtor and creditor between Kennedy and appellant and the bank was created by the deposit) could not have been employed than is used in the instrument in question. It was unnecessary to accompany the creation of the joint ownership with a declaration respecting survivorship. That followed as a legal incident to the creation of the joint interest, a matter which Kennedy must be held to have known and intended to effect by the clear creation of the joint interest between himself and appellant in the deposit.

[4, 5] As against such a conclusion from the

terms of the instruments, it is insisted by respondent that they were simply forms prepared by the bank to protect it in its payments to either of the two parties, regardless of their rights as between themselves, and had nothing to do as affecting the relations between themselves concerning the moneys deposited; that, further, the deceased Kennedy by the terms of the instruments retained the right to draw against the deposit and so exhaust it, and likewise himself retained the passbook without the production of which at the bank the appellant would be unable to draw any of the funds; and that these matters are inconsistent with an intention on the part of Kennedy to create a joint ownership between himself and appellant in the deposit with the right of survivorship. No doubt but that as claimed by respondent this form was provided by the bank in a measure to protect itself in making payments. But taking into account the well-known fact that deposit accounts are largely opened with savings banks, particularly between husband and wife and near relations for the express purpose of having the amount remaining on deposit in such bank go on the death of one of the parties to the survivor, this form was doubtless provided by the defendant savings bank here for execution by depositors wishing to do this and as legally sufficient to effect that intention. As to the other matters suggested, we do not see how they can have any bearing to defeat the intention clearly appearing from the instruments that the deposit should be the joint property of the parties to it. There was no exclusive right to draw on the deposit retained by the deceased Kennedy by the terms of the written instruments. On the contrary, thereunder both he and appellant had an equal right to do so. Instead of being inconsistent with an intention to create a joint ownership in the deposit, this right of withdrawal extending fully to either party to the deposit would rather tend to sustain such an intention. Nor could the fact (which would be a matter outside of the terms of the agreement respecting the deposit if proven) that the deceased Kennedy retained exclusive control of the passbook during his lifetime affect the terms of the instrument. As said in *Farrelly v. Emigrant Industrial Sav. Bank*, 92 App. Div. 529, 87 N. Y. Supp. 54:

"Where, however, the deposit is in joint names, and the intent appears to create the joint tenancy, its effect is to vest title to the whole fund in the survivor; and, under such circumstances, whether the book be delivered to the survivor or not, or whether he ever has had it in his possession during the lifetime of his joint owner, is not of consequence, as the intent existing to create the relation of a joint tenancy title vested in the survivor eo instanti upon the death of the joint owner, and no delivery of anything is necessary to effectuate such result."

[6] In our opinion the instrument executed by the deceased Kennedy and the appellant

in opening the account with the bank clearly constituted the moneys deposited therein and in controversy here the joint property of both of them and vested in the appellant as survivor of such joint ownership all interest therein and the sole right to withdraw them. The court found specially as to the execution of these papers, but found generally that Kennedy was the owner of the deposit at his death. This general finding is controlled by such special finding, and on it the trial court should have reached a conclusion in favor of the right of appellant to a recovery. Reaching this conclusion on the appeal from the judgment, it is unnecessary to consider the appeal of appellant from the order denying her motion for a new trial.

Our order is that the judgment and order denying a new trial be reversed; that the trial court set aside its conclusions of law and draw others in conformity with the conclusion reached in this opinion; and that thereon a judgment be entered in favor of appellant on her cross-complaint for the recovery from the defendant bank of the sum of \$3,240 and interest thereon.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

169 Cal. 240

In re SERVAS' ESTATE.

FONTANA, Consul of Greece, v. HYNES,
Public Administrator.
(S. F. 6911.)

(Supreme Court of California. Feb. 9, 1915.)

1. TREATIES ⇐1—SETTLEMENTS OF ESTATES
—POLICY OF FEDERAL GOVERNMENT.

It is the policy of the federal government not to interfere by treaty with the laws of the states in the administration of estates of decedents.

[Ed. Note.—For other cases, see *Treaties*, Cent. Dig. § 1; Dec. Dig. ⇐1.]

2. TREATIES ⇐8 — RIGHT TO ADMINISTRATION—"SO FAR AS THE LAWS OF EACH COUNTRY WILL PERMIT."

The phrase "so far as the laws of each country will permit," in the treaty between the United States and Sweden providing that, in the event of any citizen of either country dying in the territory of the other, the consul of the nation of which deceased may belong shall, "so far as the laws of each country will permit," and pending the appointment of an administrator, take charge of the property of decedent for his lawful heirs and creditors and have the right to be appointed as administrator, refers exclusively to the laws of the state within which the foreigner dies.

[Ed. Note.—For other cases, see *Treaties*, Cent. Dig. § 8; Dec. Dig. ⇐3.]

3. EXECUTORS AND ADMINISTRATORS ⇐24—CONSULS—APPOINTMENT OF ADMINISTRATOR
—TREATY RIGHTS.

The quoted phrase in the treaty between the United States and a foreign country, which provides that, in the event of any citizen of either dying in the territory of the other, the consul of the nation of which the deceased may belong shall, "so far as the laws of each country will permit," and pending the appointment of an administrator, take charge of the proper-

ty of the deceased and have the right to be appointed administrator, applies not only to the temporary possession which the foreign consul may take, but qualifies his right to be appointed administrator, and his right to be appointed administrator is subject to the statute declaring that, in the absence of next of kin entitled to inherit, the public administrator is entitled to letters of administration, and the foreign consul is only to administer in the absence of an application by the next of kin or the public administrator, and then only as to persons legally competent within Code Civ. Proc. § 1365, subd. 10.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 132-140; Dec. Dig. § 24.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Applications by Richard D. Fontana, as Consul of Greece, and by M. J. Hynes, as Public Administrator of City and County of San Francisco, for the appointment of administrator of John Servas, deceased, a subject of Greece. From order appointing M. J. Hynes, Public Administrator, as administrator, Richard D. Fontana, as Consul of Greece, appeals. Affirmed.

W. B. Clark and S. T. Hogevoil, both of San Francisco, for appellant. Ambrose Gherrini, of San Francisco, *amicus curiae*. Cullinan & Hickey, of San Francisco, for respondent.

LORIGAN, J. The deceased, John Servas, a subject of the kingdom of Greece, died intestate in the city and county of San Francisco on December 2, 1913, leaving estate in said city and county. His next of kin reside in Greece. Two applications for letters of administration on his estate were filed in the probate department of the superior court of the city and county of San Francisco, one by the appellant Richard D. Fontana, as consul of Greece at said city and county and other places, the other by the respondent, M. J. Hynes, as public administrator. The superior court held that the public administrator was entitled to letters of administration and the Greek consul appeals from the order.

The only question presented on this appeal is: Does the treaty between the United States and the kingdom of Greece give the appellant, Richard D. Fontana, as consul of Greece, a right paramount to that of all persons, including the public administrator, to letters of administration upon the estate of a subject of Greece dying intestate in this state. The Greek consul contends that it does. He does not rely on any express provision of the treaty between the United States and the kingdom of Greece giving this right, but upon a provision of the treaty between the United States and Sweden and the application of the "most favored nation" clause found in the treaty with Greece.

Article 11 of the treaty of November 19,

1902 (33 Stat. 2129) between the United States and the kingdom of Greece provides that:

"In all that relates to the administration and settlement of estates, the consular officers of the high contracting parties shall have the same rights and privileges as those accorded in the United States of America and Greece respectively, to the consular officers of the most favored nation."

Section 14 of the treaty of March 20, 1911 (37 Stat. 1487) between the United States and Sweden reads:

"In the event of any citizen of either of two contracting parties dying without will or testament, in the territory of the other contracting party, the consul general, consul, vice consul general, or the vice consul of the nation of which the deceased may belong, or, in his absence, the representative of such consul general, consul, vice consul general, or vice consul, shall, so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate."

The claim of appellant is that under the provision of the treaty with Sweden the consular officers of that government are given an exclusive and paramount right to letters of administration on the estates of subjects of that country dying intestate in the United States, and that under the "most favored nation" clause in the treaty with Greece he, as consul of that kingdom, is entitled to the same right to administration in similar cases as is granted to consuls of Sweden.

It may be said, in approaching the consideration of this clause, as was said in *Estate of Ghio*, 157 Cal. 552, 108 Pac. 516, 37 L. R. A. (N. S.) 549, 137 Am. St. Rep. 145, which involved an interpretation of the provisions of a treaty between the United States and the Argentine Republic granting to consuls the right to "intervene * * * in the administration" of the estates of their deceased nationals "conformably with the laws of the country," that:

"The question presented would directly affect the right of administration upon the estates of all citizens of all the above-named countries residing in this state, of whom there is doubtless a large number. It is also of grave importance because its solution in favor of the appellant necessarily ascribes to the federal government the intent, by means of its treaty-making power, to materially abridge the autonomy of the several states and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdictions. It is obvious that such intent is not to be lightly imputed to the federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it."

[1] It is to be observed, also, that while in the present case the claim of the consul of Greece under the provision of the treaty with Sweden is against the public administrator, still, if the interpretation which the consul insists shall be given to the language of the treaty is sound, he is not only entitled to let-

ters of administration in preference to the public administrator, but has an absolute paramount right to them as against the resident heirs of next of kin—the resident widow or children—of the deceased. To give the treaty provision the interpretation the Greek consul contends for is to ascribe to the federal government the intention not only to interfere with the generally accorded right of the states to provide for the distribution of estates of persons dying within their jurisdiction but also to interfere in a manner at variance with the generally recognized right of the resident kindred of a deceased to preference in the administration of his estate, and an interpretation which effects such a result should only follow when the language of the provision clearly requires it. It is a vexed question whether power resides in the federal government by treaty or otherwise to abridge the rights of the states over the administration of estates of persons dying and leaving property within their territorial jurisdiction; whether exclusive jurisdiction over that subject is not a right reserved to the states with which the federal government may not interfere. We mention this, not that we consider the question of such power involved here, but to point out that in the absence of any determination of that question by the Supreme Court of the United States it has been the declared policy of the federal government not to interfere by treaty with the laws of the states in the matter of the administration of estates of deceased persons. Mr. James G. Blaine, as Secretary of State, writing to Mr. Abbott in 1890 (For. Rel. of the U. S., 1890, p. 255) relative to a provision of the treaty of 1850 between our government and New Granada (now the United States of Colombia), which provided that consuls of the contracting parties might take possession of and sell the property of residents of their nation who might die in the country where the consul resides, said:

"The only exception to the exercise of this power is found in the provision that 'consuls shall not discharge this function in those states whose peculiar legislation may not allow it.' The reason and effect of these provisions are clear. In the United States, just as was formerly the case in Colombia, legislative power in respect to the settlement of estates is vested in the several states. It has always been controverted whether the exercise of this power could constitutionally be controlled by the government of the United States, either by law or treaty. In order to meet this difficulty it was provided by the present treaty that consuls should not exercise the function of settling estates in states where 'peculiar legislation' might not allow it. The term 'peculiar legislation' means simply legislation of particular political divisions of the country possessing legislative power with respect to the subject-matter. The term 'those states' was also obviously employed in reference to the same political divisions, and could not have been used in reference to the contracting governments."

Mr. Bayard when Secretary of State, in answer to the proposition that the consuls of the United States and of Brazil respectively

be conceded the privilege of taking out letters of administration in certain cases, declared in 1889:

"Each state, under our system, has exclusive jurisdiction over the administration of property of persons, whether foreigners or citizens, dying within its limits."

Mr. Uhl, acting Secretary of State, in response to a note from the Italian ambassador proposing that the consuls of Italy in the United States be authorized to settle the estates of subjects of Italy dying in this country, wrote in 1894:

"In reply I beg to say that the United States has never entered into any treaty granting to the consuls of foreign countries in this country such authority as that you suggest should be given to the consuls of Italy. The entire question of the administration, settlement and distribution of decedents' estates in this country is under the control of the respective states. * * * These considerations compel me, though with much regret, to dissent from the opinion entertained by you that the Italian consuls should by international agreement be given the authority you demand for them."

The power of our consuls to take charge of the effects of American citizens dying abroad in their jurisdiction is confined to the case "where the laws of the country permit." U. S. Com. Stats. 1901, § 1709.

So that, in determining whether the language used in the treaty with Sweden does express a clear intent to grant an exclusive and paramount right of administration to consular officials of the estates of their deceased nationals, this declared policy of the federal government must be considered as an element in the solution of the question.

[2] It will be noted, on reading the language of the treaty provision with Sweden here involved, that it deals with dual rights to be exercised by a consular officer respecting the estate of his deceased national; it refers first to a right on his part to take charge of the property of said deceased pending the appointment of an administrator of his estate and until letters of administration are granted, and, secondly, provides that such consular officer shall have the right to be appointed as administrator of the estate. All this language in the paragraph is preceded by the words "as far as the laws of each country will permit." This language, "as far as the laws of each country will permit," can have but one meaning as far as the language refers to this country, namely, according to the laws of the particular state in the union within whose jurisdiction the national may have died. There is no federal law for the administration of estates of decedents, and necessarily the language used means as the laws of the several states will permit. Between the phrase referred to by Secretary Blaine "consuls shall not discharge these functions in those states where peculiar legislation does not allow it" found in the treaty with Colombia, the phrase "conformably with the laws of the country" in the treaty with the Argentine Republic involved in the Estate

of Ghio, supra, and the phrase "as far as the laws of each country will permit," in the treaty with Sweden, there is no substantial difference. The construction given by our court to the phrase "laws of the country" in the Argentine treaty in the Ghio Case applies to the same phrase in the treaty provision here under consideration:

"* * * Whatever right was given, it was intended to be a right which should conform to the laws of the country, and that, in view of the well-known complex form of our government, the phrase 'laws of the country,' so far as the United States is concerned, means the local laws of administration and procedure of the respective states. If the right asserted is necessarily contrary to those laws, it cannot be said to conform to them."

[3] The real question here presented, however, is, not so much as to the meaning of the term "as far as the laws of each country will permit," because unquestionably that phrase refers to the laws of the states, but how that language is to be applied as employed in the paragraph of the treaty. The contention of the Greek consul is that the words "as far as the laws of each country will permit," as it immediately precedes that portion of the paragraph granting consular officials the right to take temporary possession of the effects of a deceased national until letters of administration have been granted, qualifies only that right; that it has no reference to the last portion of the paragraph; is not a qualification thereof, and that by that portion the "right to be appointed administrator" is given as an absolute paramount right whether the laws of the state permit it or not. On the other hand, in behalf of the public administrator, the claim is that the term "as far as the laws of each country will permit" qualifies the entire paragraph and affects all rights respecting administration conferred therein on consular officers.

We cannot adopt the construction urged on behalf of the Greek consul. According to that construction, while the treaty provision would not authorize the consul to take temporary charge of the property of his deceased national or be appointed special administrator of his estate unless the laws of the state would permit it, still that, whether the laws of the state permit it or not, he is under the same provision given an exclusive and paramount right to be appointed administrator. We perceive no warrant for the distinction. The entire paragraph deals with the right to the custody and charge of the estates of their deceased nationals by consuls, preliminary to general administration and general administration itself. The whole matter of administrative right is embraced in a single paragraph. Certainly no valid reason can be assigned why the federal government should have declared an intention only partially to interfere with the laws of the states respecting administration. Why an absolute paramount right to general ad-

ministration should be conferred on the consul, anything in the state law to the contrary notwithstanding, but that as to matters ancillary to such general administration—taking charge of the property or special administration—he should not have an absolute right but only such as the laws of the state would permit. Naturally the paragraph would be expected to deal with the whole subject of administration, and the same right granted as to all branches of it whether special or general. We are satisfied that it does; that the phrase "as far as the laws of each country will permit" has reference to the entire subject of administration as mentioned in the paragraph, and qualifies not only the right given to a consular officer to take possession temporarily of the estate of a deceased national pending the grant of general letters of administration, but also the right itself to a grant of such letters. Taking into consideration the settled policy of the federal government as expressed by its Secretaries of State not to interfere with the states in the administration of estates within their jurisdiction and our own consular regulations on the subject, we think it would be an unwarranted and strained construction to put upon the treaty provision to hold that the language "as far as the laws of each country will permit," used in the paragraph of the treaty, applies only to the temporary possession which a foreign consul may take and does not qualify the right to be appointed administrator found in the last section in the same paragraph. In our opinion it qualifies both rights.

This same treaty provision with Sweden was before the Supreme Court of Minnesota for construction in the case of *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N. W. 300. In that case the right to letters of administration of the estate of a subject of Austria who had died in Minnesota was claimed by the Austro-Hungarian consul, his claim being based on the same provision of the treaty with Sweden involved here. There the court construed the provision adversely to the right claimed by the consul. In considering the language "as far as the laws of each country will permit" it was said:

"Grammatically it may well be contended that this qualifying clause applied only to the clause with which it is immediately coupled, thus leaving the right to administration without qualification. In view, however, of the presumption so aptly referred to by Mr. Justice Shaw in *Estate of Ghio*, supra, against any intention on the part of the federal government to invade, by treaty, the province of state law, in a matter so inherently local, as distinguished from national, and likewise from a consideration of the subject-matter and the provisions of this whole article, and especially the latter part, we have concluded that the right to appointment as administrator is conferred by such article upon the expressed condition that it can be claimed only 'as far as the laws of each country will permit.' It would certainly seem strange that the right to temporary possession and control

until appointment of an administrator should thus be qualified, and the right to be appointed administrator be given in unqualified terms. The former is often no less important than the latter. Likewise, we cannot think, in the absence of clearly expressed intention so to do, that the federal government intended to take the matter of administration of the estate of foreigners entirely out of the control of the states."

This is the only decision of a court of final jurisdiction directly involving a consideration of this provision of the treaty with Sweden which has been called to our attention.

In support of the claim of the Greek consul, reliance is placed on some decisions of Surrogates' Courts in the state of New York and the language used by Mr. Justice Day of the Supreme Court of the United States in the case of *Rocca v. Thompson*, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453. This last case was before the said Supreme Court on a writ of error to this court to review our decision in the *Ghio* Case, heretofore referred to. The treaty with Sweden was not involved in the *Rocca* or *Ghio* Cases. It was only the treaty with the Argentine Republic and involved solely the right of a consul to letters of administration on the estate of his deceased national under the provisions therein giving him the right to "intervene * * * in the administration" of the estates of his deceased nationals "conformably to the laws of the country." In pointing out that the Argentine treaty in conferring the right to "intervene" did not confer the right to administration, Mr. Justice Day, it is true, did say that, if it had been the intention under the Argentine treaty to confer the administration of estates of citizens of one country dying in another exclusively to the consul of the foreign nation, it would have been very easy to declare that purpose in unmistakable terms, and then, by way of illustration, referred to the provision in the treaty with Sweden under consideration here. But, as we have said, the treaty with Sweden was not under consideration or involved in the *Rocca* or *Ghio* Cases. The provision in that treaty was simply referred to by Mr. Justice Day as matter of comparison. No discussion or independent reasoning was applied by him in his opinion in the *Rocca* Case to the language "as far as the laws of each country will permit," found in the treaty with Sweden, and his language respecting the latter treaty was mere dictum. Undoubtedly, the provision in the treaty with Sweden does confer the right on a consul to letters of administration on the estates of his deceased nationals. It so expressly provides. But we cannot agree that it confers upon him any exclusive right to administration. Under the laws of this state, in the absence of next of kin entitled to inherit, the public administrator is entitled to letters of administration, and the Greek consul would only be entitled to ad-

minister by virtue of the treaty provision in the absence of an application for letters by the next of kin or the public administrator, and then only "as a person legally competent," within the meaning of subdivision 10 of section 1365 of the Code of Civil Procedure of this state. This is the only right which we think is intended to be conferred by the treaty provision; such a right as our law of administration permits and not a right contrary to it. A careful consideration of the particular provision satisfies us that this is the proper construction to be given to it notwithstanding that a contrary view may be expressed in the dictum in the *Rocca* Case. This language of Mr. Justice Day was relied on in the *Minnesota* case quoted above, and that court said of it:

"In the *Rocca* Case, *supra*, Mr. Justice Day seems to refer to the treaty with Sweden as expressly and clearly giving Swedish consuls an absolute right in the premises; but at most this was a mere dictum, and we cannot follow it without question."

As far as the decisions of the Surrogate Courts of New York are concerned, it is not necessary to cite or discuss them. They are not decisions of courts of last resort, and prior to the *Rocca* decision these courts were not in entire harmony. In none of them prior to the decision in the *Rocca* Case was the provision in the treaty with Sweden involved. Subsequent to the decision in the *Rocca* Case, this treaty provision with Sweden was invoked in the Surrogates' Courts, but in none of the decisions therein was any independent reasoning indulged in with reference to the terms of the treaty, nor any discussion of the meaning of the language "as far as the laws of each country will permit." They simply refer to the *Rocca* Case and sustain the right of the consul to administer on the authority of the language used by Mr. Justice Day in referring to the provision in the treaty with Sweden. Some of these surrogates' decisions were rendered subsequent to the decision in the *Minnesota* case but no reference is made to it.

In the case of *Holmberg's Estate* (D. C.) 193 Fed. 260, all that was held was that the consul of Sweden under this treaty provision was eligible to appointment as administrator under subdivision 10 of section 1365 of the Code of Civil Procedure heretofore referred to, and hence entitled under the federal law to have delivered to him the effects of a deceased national. The proceeding in that case was *ex parte* and involved no question of whether the consul was entitled to an exclusive and paramount right to administration.

Under these views, the order appealed from appointing the public administrator was correctly made by the superior court and is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

169 Cal. 200

HANLON v. ESHLEMAN et al., State Railroad Commission. (L. A. 3888.)

(Supreme Court of California. Feb. 8, 1915.)

1. WATERS AND WATER COURSES 189 — SALE OF PUBLIC UTILITY—ACTION OF RAILROAD COMMISSION—STATUTORY PROVISIONS.

The action of the railroad commission in granting or refusing permission to carry out a contract of sale of a public water system under Public Utilities Act (St. 1911 [Ex. Sess.] p. 44) § 51a, providing for the disposition of property or franchise of public utility by authority of the commission, is merely permissive, and the power must be exercised alone for the protection of the rights of the public interested in the service.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 272; Dec. Dig. 189.]

2. WATERS AND WATER COURSES 189 — SALE OF PUBLIC UTILITY—ACTION OF RAILROAD COMMISSION—STATUTORY PROVISIONS.

Sales affected by Public Utilities Act, § 51a, providing that the property or franchise of a public utility can be disposed of only by authority of the railroad commission, are sales of property of a public utility necessary or useful in the performance of the duties to the public, and the owner of a utility may not transfer the same unless authorized by the commission; but, where the owner does not desire to sell though he has made a contract of sale, the commission will not compel him to do so, and the party complaining must seek his remedy in the courts.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 272; Dec. Dig. 189.]

3. WATERS AND WATER COURSES 189 — SALE OF PUBLIC UTILITY—ACTION OF RAILROAD COMMISSION—STATUTORY PROVISIONS.

A petition to the railroad commission for permission to carry out a contract for the sale of a public utility under Public Utilities Act, § 51a, must be made by the owner of the utility, and, where he declines to invoke the power of the commission, one having a contract for the purchase of the utility cannot resort to the commission for relief, and pending a proceeding before the commission the owner may show to the commission his unwillingness to carry out the contract of sale, and thereby terminate the authority of the commission.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 272; Dec. Dig. 189.]

In Bank. Petition for writ of mandate by John Hanlon against John M. Eshleman and others, as members of and constituting the State Railroad Commission. Alternative writ of mandate discharged, and proceeding dismissed.

Gurney E. Newlin, T. C. Gould, and W. B. Mathews, all of Los Angeles (Roy V. Reppy, of Los Angeles, of counsel), for petitioner. Max Thelen and Douglas Brookman, both of San Francisco, for respondents.

SLOSS, J. This is an original proceeding in mandamus, brought for the purpose of compelling the railroad commission to pass upon an application that permission be granted to P. T. Durfy, the owner of a water system in Los Angeles county, to sell such system to Hanlon, the petitioner, on terms and conditions stated in a contract between Dur-

fy and Hanlon. An alternative writ was issued, and the railroad commission made its return thereto. There is no substantial dispute about the facts.

The power which the commission should, as is claimed, have exercised, is that given by section 51a of the Public Utilities Act, providing that:

"No railroad corporation * * * or water corporation shall henceforth sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant or system, necessary or useful in the performance of its duties to the public * * * without having first secured from the commission an order authorizing it so to do."

Durfy was the owner of a water system, known as the Sherman Waterworks, and was supplying water for domestic purposes to inhabitants of the town of Sherman and vicinity. He also owned about 190 acres of land, in Sherman and in Franklin Canyon, some of which was used for furnishing water to the water system. In March, 1913, Durfy entered into a contract with Hanlon for the sale by the former to the latter of the said water system and land. The contract was made before the public utilities act took effect, but it was evidently entered into in contemplation of that act, since it provides for a transfer of possession upon compliance with certain conditions, including "permission for transfer from railroad commission." Thereafter the city of Los Angeles sought to acquire a part of Durfy's lands for a reservoir site and right of way to be used in connection with the city's aqueduct project, then in course of construction.

In October, 1913, Hanlon filed with the commission a petition, setting forth his contract with Durfy, and praying for an order authorizing the sale of the water system by Durfy and its purchase by him. This proceeding was designated on the files of the commission as No. 941. Before it had been disposed of, Durfy filed a petition, the proceeding upon which became No. 942. Durfy's petition also set forth the contract with Hanlon. It then alleged that the city of Los Angeles desired to acquire Durfy's lands to complete its waterworks; that the Hanlon contract was contrary to the public interest; that it would be for the public interest if a sale to the city was authorized; and that the applicant would sell to Hanlon pursuant to his contract, if the commission should determine that course to be for the best public interest. The prayer of the petition was for such order "as shall be deemed by this commission for the best public interest in the premises."

Both proceedings were heard together. Before a decision had been reached, Durfy filed another petition in No. 942, alleging that he had executed a deed conveying to the city of Los Angeles a portion of his lands necessary for the location of reservoirs and conduits for the Los Angeles aqueduct, and praying for an

order approving said conveyance. The commission dismissed the Hanlon application (No. 941) and, in the other proceeding (No. 942), authorized Durfy to sell to the city of Los Angeles the property described in his deed to the city. The present proceeding seeks to compel the commission to pass upon the application for authority to consummate the sale from Durfy to Hanlon pursuant to the contract between them.

[1, 2] The theory upon which the commission declined to act in proceeding No. 941, by either granting or refusing permission to carry out the Hanlon contract, was that the action of the commission, under section 51a, is merely permissive, and that "the application should be made by the owner of the public utility property, because the authority must run to such owner." This view, we think, is the correct one. The commission's power is to be exercised for the protection of the rights of the public interested in the service, and to that end alone. The sales, leases, or incumbrances affected by section 51a are dispositions of property of a public utility "necessary or useful in the performance of its duties to the public." The owner may not transfer such properties unless authorized by the commission. All that the commission is concerned with, therefore, is whether a proposed transfer will be injurious to the rights of the public. If not, the owner may be authorized to make the transfer. With the rights of an intending purchaser the commission has nothing to do. Nor has it power to determine whether a valid contract of sale exists, or whether either party has a legal claim against the other under such contract. These are questions for the courts, and not for the railroad commission, which is merely authorized to prevent an owner of a public utility from disposing of it where such disposition would not safeguard the interests of the public. If the owner does not desire to sell, the commission cannot compel him to do so. If, having contracted to sell, he refuses to comply with his contract, the commission is not empowered to determine that he should carry out his bargain. The provision that an owner may not sell without the consent of the commission implies that there must be an owner ready to sell and seeking authority so to do before the commission is called upon to act. We conclude therefore that the commission acted properly in determining the application of Hanlon (No. 941).

[3] It is urged, however, that in No. 942 Durfy, the owner, presented a petition which alleged the making of the contract with Hanlon, and asserted Durfy's willingness to carry out that contract, if the commission should give its approval. Here, it is claimed, was a submission of the question by the owner, and, since by such submission the commission obtained jurisdiction to decide whether the sale should be authorized, any person interested has a right to insist that the jurisdiction be

exercised. We do not find it necessary to pass upon the merit of this position. While the matter was still before the commission, Durfy filed a second petition, in which he asked authority to sell a part of the property to the city of Los Angeles. There is some difference between the parties over the question whether this second petition was filed "in substitution" of the first. Be that as it may, the second petition asked for an order, which, if consummated, would make it impossible to carry out the contract with Hanlon. The entire property could not be conveyed to Hanlon, if a part of it had first been conveyed to the city. The second petition was therefore inconsistent with a continued willingness on Durfy's part to abide by his contract with Hanlon. Furthermore, the record, and particularly the opinion of the commission, show with sufficient clearness that Durfy's final position was that the sale to Hanlon should not be approved. At the conclusion of the proceeding, therefore, the commission had before it an owner who, having made a contract of sale, did not desire authority to consummate it, but urged that such authority ought not, in the public interest, to be granted. The only person having the right to invoke the action of the commission declined to invoke it, and the commission was therefore right, in No. 942 as in No. 941, in declining to pass upon the propriety of a sale to Hanlon.

The alternative writ of mandate is discharged and the proceeding dismissed.

We concur: ANGELLOTTI, C. J.; LORIGAN, J.; MELVIN, J.; SHAW, J.

169 Cal. 250

In re GRAFF'S ESTATE. (S. F. 7033.)

(Supreme Court of California. Feb. 9, 1915.)

EXECUTORS AND ADMINISTRATORS $\S$ 17 —
RIGHT UNDER STATUTE OF GUARDIAN OF
GRANDCHILD OF DECEDENT TO ADMINISTER.

Code Civ. Proc. $\S$ 1365, establishes the order in which relatives of deceased persons are entitled to letters of administration, placing grandchildren in the sixth class, and the public administrator in the eighth class, and in the tenth class any legally competent person. Section 1369 provides in part that only an adult and a resident shall serve as administrator. Section 1368 provides that letters of administration may be granted to the guardian of any person who is entitled to administer and who is a minor or incompetent. *Held*, that the guardian of the estate of a nonresident minor grandchild of deceased is not entitled to letters of administration on the estate as against the public administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. $\S\S$ 43-59; Dec. Dig. $\S$ 17.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Petitions for letters of administration on the estate of Esmerencia Sanchez Graff; one by William Rennie, guardian of the es-

tate of Carmelita Muller, resident in Germany, and the other by M. J. Hynes, public administrator of the City and County of San Francisco. Rennie's petition was granted, and Hynes appeals. Reversed.

Cullinan & Hickey, of San Francisco, for appellant. Edmund Tauszky, of San Francisco, for respondent.

LORIGAN, J. The facts in this matter are admitted. Esmerencia Sanchez Graff died intestate leaving estate in the city and county of San Francisco. Her only heirs at law are two grandchildren, Hildegard Melsheimer, of the age of majority, residing in Belgium, and Carmelita Muller, a minor, residing in Germany. The respondent, William Rennie, is the guardian of the estate of Carmelita Muller. Two petitions for letters of administration of the estate of Esmerencia Sanchez Graff, deceased, were filed; one by said William Rennie, claiming the right to administer as guardian of the estate of Carmelita Muller, the other by M. J. Hynes, claiming the right to administer as public administrator of the city and county of San Francisco. The court granted the petition of William Rennie, and denied that of M. J. Hynes, and this appeal is taken by the latter.

The question presented for determination is solely whether the guardian of the estate of a nonresident minor, heir of a deceased person, is entitled to letters of administration. Section 1365 of the Code of Civil Procedure enumerates the persons who are entitled to letters of administration of the estate of a decedent and the preferential order in which the relatives of the deceased or other persons are entitled to administer, placing the grandchildren of the deceased in the sixth class, the public administrator in the eighth, and in the tenth and last class any person legally competent. Section 1369 provides that no person is competent or entitled to serve as administrator or administratrix who is, first, under the age of majority; second, not a bona fide resident of the state; third, convicted of an infamous crime; fourth, adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity. Section 1368 provides that:

"If any person entitled to administration [italics ours] is a minor or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court."

It is this last section which calls for particular consideration, but in determining who is entitled to administration of an estate all the sections of the Code which bear upon the matter are to be examined. Obviously these are the three sections—1365, 1368, and 1369—and they must all be taken together in determining what the law is on the subject.

Counsel for respondent asserts that the question of who is "entitled" to administer

in this particular case is to be determined by a consideration of sections 1365 and 1368 only, but we perceive no reasonable ground advanced by him upon which this restriction should apply. Not only these two sections, but also section 1369, are involved in the inquiry. While section 1365 declares the general rule as to persons who are entitled to administration and the order of preference to be given to them in a grant of letters, this section is to be read in connection with section 1369, which declares that "no person is entitled to serve as administrator" who is subject to the disqualifications mentioned in this latter section. These two sections declare who are "entitled" to administer, and expressly provide that neither a minor, nonresident, convict, or incompetent shall be "competent or entitled" to serve as an administrator. When section 1368 authorizes letters of administration to be granted to his guardian "if any person entitled to administration is a minor or incompetent," the language "any person entitled to administration" has reference to such persons as are under the terms of sections 1365 and 1369, taken together, declared to be so entitled. It refers to those who, if they were not minors or incompetent persons, would otherwise be entitled to administer.

In the case at bar (leaving out for the moment any consideration of section 1365) there are two grounds upon both of which the ward herself would be disqualified from asserting a right to administer, namely, minority and nonresidence. If by a direct provision of law the disqualification of minority alone had been removed, she would still not be entitled to administration, because the other ground of disqualification—nonresidence—would still remain. Now the only ground of disqualification which is removed by section 1368 is the bar of minority, and that only to the extent that, if a minor has a guardian, the guardian shall be entitled to represent him and obtain a grant of administration, where the ward, save for his minority would be entitled to it. The section deals only with the bar of minority, and removes that. No other ground of disqualification affecting the right of the ward to administer is removed. The purpose of the statute is to give to the guardian the same right of administration as the ward would be entitled to if the bar of minority were removed from the latter. If a ward, were the bar of minority removed, would still not be entitled to administration on account of the further disqualification of nonresidence, then the guardian is not entitled to letters. Nonresidence of the ward stands as a fatal bar against both him and his guardian, because by the plain terms of section 1368 it is only the bar of nonage or incompetency of the ward that is removed. Nonresidence still remains as an absolute disqualification, affecting alike the ward and the guardian.

Under this view, the guardian of Carmelita

Muller was not entitled to letters of administration as against the appellant, the public administrator.

The order appealed from is therefore reversed.

We concur: MELVIN, J.; HENSHAW, J.

169 Cal. 190

NEAL PUB. CO. v. ROLPH, Mayor.

(S. F. 6985.)

(Supreme Court of California. Feb. 8, 1915.)

1. MUNICIPAL CORPORATIONS $\S$ 244 — CONTRACT—PROVISION AS TO HOURS AND WAGES — "WORK."

Under charter of city and county of San Francisco, providing that every contract for work to be performed for the city and county shall provide that in its performance eight hours a day shall be the maximum hours of labor and \$3 a day the minimum wage, and that any contract for work not complying with such provisions shall be void, a contract to furnish printed forms and blanks not containing such provisions was valid, since it was not a contract to perform "work" for the city, which implies that work is done to manufacture or prepare the merchandise necessary to be sold either personally or through employes, but a contract for the sale and delivery of goods and merchandise, whether such goods were already in existence ready for delivery or were to be manufactured to fill the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 678-681, 683; Dec. Dig. $\S$ 244.]

For other definitions, see Words and Phrases, First and Second Series, Work.]

2. MUNICIPAL CORPORATIONS $\S$ 120 — CONTRACTS — PROVISION FOR UNION LABOR — HEAD OF DEPARTMENT.

A resolution of the board of supervisors of the city and county of San Francisco, instructing heads of departments to patronize only printing establishments paying full wages, and as a guaranty thereof that all public printing should bear the label of the Printing Trades Council, was simply a direction to heads of departments and the printing committee, not binding on the board itself, or upon the mayor, simply required as a ministerial act to approve awards made by the board, in which action he was not the head of a department.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 274-280; Dec. Dig. $\S$ 120.]

3. MUNICIPAL CORPORATIONS $\S$ 111—RESOLUTION OF SUPERVISORS — CONFLICT WITH SUBSEQUENT CHARTER — "QUANTITY AND QUALITY CONSIDERED."

A resolution of the board of supervisors of the city and county of San Francisco, instructing heads of departments to patronize only printing establishments paying full wages, and whose work bore the union label, was inconsistent with the subsequently enacted charter of San Francisco which continued in force only such resolutions as were not inconsistent therewith, and which provided for competitive bidding for contracts to furnish stationery and supplies and an award to the lowest bidder, and that the supervisors, when they believed that the prices were too high, or that bidders had combined to prevent competition, might reject any and all bids, and must award the contract to the lowest bidder, "quantity and quality being considered," which provision means only that, in determin-

ing the lowest bid, the board may consider quantity and quality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 245-256; Dec. Dig. $\S$ 111.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Mandamus by the Neal Publishing Company against James Rolph, Jr., as Mayor of the City and County of San Francisco. Writ directed to issue, and defendant appeals. Affirmed.

Percy V. Long, City Atty., and J. F. English, Asst. City Atty., both of San Francisco (Geo. B. Benham, of San Francisco, of counsel), for appellant. W. B. Kollmeyer, of San Francisco, for respondent. J. C. Campbell, Weaver, Shelton & Levy, of San Francisco, amici curiæ.

ANGELLOTTI, C. J. Hearing granted in the Supreme Court after decision by the District Court of Appeal, First District.

This is an appeal from a judgment directing that a writ of mandate issue on the application of the petitioner, commanding the appellant, as mayor of the city and county of San Francisco, to sign and execute a certain contract with the petitioner for the furnishing of certain supplies in the way of printed blanks and forms, for use in the several departments of the city government, which contract had been awarded to the petitioner as the successful bidder for such supplies.

There is no dispute as to the facts which, so far as material to the questions raised, are as follows: The board of supervisors of the city and county of San Francisco, acting in conformity with the charter provision, regularly advertised for bids for the furnishing and delivery of a required quantity of specified printed forms and blanks for the use of the various offices and departments of the municipality for the fiscal year 1913-14. The petitioner was the lowest bidder for a considerable portion of these printed forms and blanks, and was regularly awarded the contract to furnish the same at specified prices by the board of supervisors. At the time of the bidding and award of the contract, the petitioner was conducting a union printing office, and was entitled to use and affix to its work the label of the Allied Printing Trades Council of the city and county of San Francisco. On the day following the award, however, the petitioner's right to the use of the label was taken away by the said trades council, which seems to have had the authority so to do; and the petitioner's establishment thereupon ceased to be a union office. Thereafter the mayor approved the resolution of the board of supervisors making said award to the petitioner, being at that time unaware that the petitioner's

right to use the union label had been revoked; but, when a few days later a contract covering the items of petitioner's bid and award was presented to the mayor for his signature, he refused to sign and execute the same for two reasons: First, that at the time of the presentation of the contract for his signature the petitioner was not entitled to the use of the label hereinbefore referred to, as was claimed to be required by resolution No. 2458 (fourth series) of the board of supervisors; and, second, that the said contract so presented by the petitioner for his signature was not sufficient in form in this: That it did not contain the express provisions as to hours of labor and as to the minimum wages of laborers required by the terms of article 2, c. 3, § 1, of the charter. Thereupon the petitioner made its application for the issuance of a writ of mandate to compel the appellant herein, as mayor, to affix his signature to and to execute said contract, which application having been granted, the appellant prosecutes this appeal.

[1] The latter of these objections will be considered first. It is based on a provision at the end of section 1 of chapter 3 of article 2 of the charter of the city and county of San Francisco, which reads as follows:

"Every contract for work to be performed for the city and county must provide that in the performance of the contract eight hours shall be the maximum hours of labor on any calendar day, and that the minimum wages of laborers employed by the contractor in the execution of his contract shall be three dollars a day. Any contract for work to be performed for the city and county which does not comply with the provisions of this section shall be null and void, and any officer who shall sign the same shall be guilty of misfeasance, and upon proof of such misfeasance shall be removed from office."

The proposed contract did not contain this provision. The learned judge of the trial court held that this provision of the charter was not applicable to such a contract as this, and in this conclusion we are satisfied he was right. In his opinion delivered in deciding the case he said:

"In my opinion this contract does not provide for the *doing of work for the city and county*, within the meaning of this provision, but simply for the furnishing of certain finished articles of merchandise, which the contractor may have printed anywhere that he chooses. * * * These articles are the property of the contractor until delivered to the city, and do not seem to come within this provision. No *work* is done for the city. It is rather like the case of furnishing structural steel for the erection of a building. The contractor simply furnishes a certain chattel for the city in a completed state, and it is not work done for the city. In this instance it is the making and delivering to the city of this material. It is merely a chattel or merchandise delivered to the city." (The italics are ours.)

It is probably unnecessary to add anything to this. The proposed agreement was simply one for the sale and delivery of printed forms and blanks. A contractor undertaking to sell and deliver to a city completed chattels or merchandise does not there-

by undertake to perform "work" for the city. The distinction, in this respect, between a contract or agreement for sale to a city and a contract for the doing of work therefor is so clear as hardly to require statement. In the one case, if any work on his part is done in the way of manufacture or preparing the chattels or merchandise necessary to be sold and delivered, either personally or through employes, it is work done solely for himself, and in no proper sense for the city. His contract with the city is simply for the sale and delivery of the finished article, and until the delivery the city has no interest whatever in the property. In the other case he contracts to furnish labor or personal service *directly to the city*, as where he agrees to construct a building for the city for a stipulated sum, or where he agrees to grade or otherwise improve a street belonging to the city, or to perform any other work for the city. Such contracts include the performance of work *for the city*, and the contractor must agree that "the minimum wages of laborers employed by" him in the execution of his contract shall be \$3 a day, and that eight hours shall be the maximum hours of labor on any calendar day. No distinction material to the question under consideration can be made between a contract or agreement for the sale of such articles as are already in existence, ready for delivery, and one for the sale of articles that must be manufactured or created to meet the demands of the contract. In neither case is there undertaken any "work to be performed for the city and county." The work done is not public work.

In this connection the case of *United States v. Olinger*, 55 Fed. 959, a case decided in the United States District Court for the Southern District of Alabama, the defendant being charged with violating the act of Congress making it unlawful for any contractor to employ, upon any public work of the United States or the District of Columbia, laborers or mechanics for more than eight hours of any calendar day, is directly in point, as the following quotation will show:

"In my opinion, a statement of the facts is alone sufficient to show that the act of Congress, under which this prosecution is sought to be maintained, has no application to the case. * * * If a contractor, he was a contractor to furnish to the government of the United States two barges, to be delivered within 40 days from the making of the contract, which, if built according to certain specifications furnished him, were to be purchased by the government from him. The barges were his, and were to be his until the government purchased them. They might or might not become the property of the government. The transfer of title to them depended upon conditions which could not be determined until the barges were completed. It is clear to me that the building of the barges was in no sense a part of the public works; no more so than the mining of coal contracted to be furnished to the navy and marine service of the United States, according to specifications as to quantity and quality, or the furnishing under contract with the government of the United

States of lumber and brick to be used in building quarters at Mt. Vernon barracks for officers or soldiers or any other public use, according to specifications as to kind, quantity, and quality. It would hardly be contended that the mining of such coal, the sawing of the lumber, or making the bricks, would be public works in contemplation of the act of Congress, or that the laborers engaged in the work of mining and in making the lumber and bricks were the laborers whose services and employment Congress has undertaken to regulate and limit. I fail to see any difference in principle in the cases mentioned and that under consideration."

A reading of the whole of the section of the charter in which the provision under consideration is contained makes it manifest that the provision is applicable only to contracts for work to be performed directly for the city and county, and that it was not intended to apply to any contract or agreement for the sale or furnishing of completed chattels.

[2] The other objection is based upon resolution No. 2458 (fourth series) of the board of supervisors, passed in the year 1899, before the going into effect of the present charter. It is as follows:

"Resolved, by the board of supervisors of the city and county of San Francisco, that as the city and county is required to pay full price for all printing, the heads of departments be instructed to patronize only printing establishments that pay full wages, and, as a guaranty thereof, all city and county printing hereafter shall bear the label or be done in offices entitled to the use of the label of the Allied Printing Trades Council of the city and county of San Francisco, as registered with the Secretary of the State of California.

"Resolved, that the printing committee be instructed to award all jobs for printing to union offices.

"Resolved, that all jobs for printing for this department and all jobs coming within the province of the printing committee shall be referred to at least two members of said committee before being awarded."

As to this resolution the learned judge of the trial court held that, so far as any action of the mayor here invoked is concerned, he is not the head of a department patronizing any printing establishment, but an officer who has simply approved an award made by the board of supervisors, and who is asked here to simply perform a ministerial duty not involving the exercise of any discretion whatever; that the resolution does not in terms apply to any action by the board of supervisors and is not binding on the board of supervisors, but was manifestly addressed only to heads of departments and to the printing committee; that the board of supervisors themselves, without actually formally repealing this resolution, can award any contract within their jurisdiction, regardless thereof. Without discussing the question whether the resolution was superseded by the charter, because inconsistent with the provision thereof in reference to letting such contracts to the lowest bidder, he concluded that the objection was not good, because the resolution is not applicable; the board of supervisors having itself awarded the contract.

We are of the opinion that the learned judge was right in his construction of the resolution. Manifestly, if we are to construe it according to its terms, it was simply a direction to heads of departments and the printing committee, and in no way binding on the board itself in awarding contracts. The single provision therein on which appellant relies, viz., "and as a guaranty thereof, all city and county printing shall hereafter bear the label," etc., is simply incidental to the specific instruction to heads of departments immediately preceding and, as it says, "a guaranty" of the observance of such instruction. It certainly cannot have the effect of invalidating an award of contract made by the board.

[3] But regardless of this, and construing the resolution as purporting to apply to the board of supervisors, it is clearly inconsistent with provisions of the charter of San Francisco, and must be held to be without force. It is needless to say that the provisions of the charter are paramount. Only ordinances, orders, and resolutions that were not inconsistent with the present charter were continued in force at the time of its adoption, so that if the resolution was valid under the old consolidation act, which is not at all clear, it died with the adoption of the new charter, if inconsistent therewith. The matter of stationery and supplies in the way of printed blanks is regulated by the provisions of sections 1 and 3 of chapter 3 of article 2 of the charter. A method of competitive bidding for contracts to furnish such supplies is provided, and the board of supervisors has no power to purchase or pay for the same, unless the provisions in regard thereto are strictly followed. Advertisement for bids for at least ten days, requiring the bidder to state the prices at which each article will be furnished as the same may be required, must be made, and as to printed blanks "the contract or contracts must be made with the lowest bidder offering adequate security; quantity and quality being considered." The only condition imposed by the charter is that no article furnished shall have been made in any prison. Subject only to the right of the supervisors, provided for by section 5 of the same charter, when they "believe that the prices bid are too high, or that bidders have combined to prevent competition, or that the public interest will be subserved thereby" to "reject any and all bids," they *must* award the contract to the lowest bidder offering adequate security; "quantity and quality being considered." They cannot impose additional conditions, and any ordinance or resolution purporting to do so is ineffectual. The inconsistency of the resolution relied on with these provisions of the charter is obvious. A feeble attempt is made in the briefs to show that the words "quantity and quality being considered" in the charter provision justify such a resolution, but we are utterly at a loss to see how they affect the question.

They mean simply that, *in determining what is the lowest bid made*, the board may take into consideration the "quantity and quality" of the supplies proposed to be furnished by the respective bidders.

The only authority cited by appellant in support of this resolution is the case of *Stanley-Taylor Co. v. Supervisors*, 135 Cal. 480, 67 Pac. 783, and it is most earnestly contended that this decision upholds the very resolution here involved, as a valid resolution. An examination of the opinion and of the record and briefs in that case shows that there is no basis for this claim. Even if we concede, as argued by learned counsel for appellant, that, in view of the pleadings in that proceeding, the matter could not *logically* be decided against the plaintiff therein without upholding the resolution, it nevertheless remains that neither the trial court, nor this court, which adopted the opinion of the trial court, said a word about such resolution, or decided the case upon the theory that it was valid. Even the learned city attorney, in seeking to uphold the decision of the trial court in that case, did not suggest the existence of any such resolution in his brief, but placed his claims for affirmance on entirely different grounds. The plaintiff there, claiming to have been the lowest bidder, sought a writ of mandate to compel the awarding to it by the board of supervisors of the contract. A demurrer to the petition was sustained. It appeared that the board had rejected all bids "for the reason that public policy demands such action be taken." It is true that it was further alleged in the petition that no ground of public interest or public policy existed that would warrant such a conclusion, and that the real reason for the rejection was that plaintiff had not been authorized to use the label of the Allied Printing Trades Council. It was held both by the trial court and by this court that in view of the provision of the charter that, when the supervisors "believe that the public interest will be subserved thereby, they may reject any and all bids and cause the notice for proposals to be readvertised," the supervisors were vested with absolute discretion to determine that matter; that it was intended that their discretion should be final, and that they were the final arbiters in the matter and their judgment conclusive; and that, where such is the case, a writ of mandate will not lie to direct or mold or otherwise interfere with such discretion. It was further said:

"In this instance, as appears from the resolution adopted and set out in the petition, the board of supervisors exercised its discretion. It determined a fact it was empowered by the charter to determine. That its determination was erroneous or its reasons bad is immaterial. It had jurisdiction to decide the matter, and, having such jurisdiction, its judgment cannot be controlled by the courts. How the public interest was subserved by rejecting the bid of plaintiff does not appear. Plaintiff was the lowest

bidder, and had complied fully with the requirements of the charter, but that the board believed public policy would be subserved appears from the petition, and, under the law, action upon such belief is an exercise of discretion. The Legislature has committed the power of deciding to the defendant. 'When the supervisors believe,' is the language of the charter, 'that public interest will be subserved,' they may reject 'any and all bids.' Were the court to interfere, it might substitute its belief and its judgment for the belief and judgment of the board—a result that our system does not contemplate. The writ of mandate will lie to correct illegal but not capricious acts."

It is to be borne in mind that in the case at bar the board of supervisors did not reject the bid of plaintiff, but awarded the contract to it, and that the resolution of award was approved by the mayor. We think it is manifest from all this that there is nothing in either the opinion or record in that case to warrant the claim made for it by learned counsel for appellant, and we have given it this somewhat extended notice only because of the apparent earnestness of counsel in making such claim.

Our conclusion is that neither of the objections to the proposed contract made by the defendant is good.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.; MELVIN, J.; HENSHAW, J.

(169 Cal. 234)

CITY OF LOS ANGELES v. DEHY, Judge.
(L. A. 3795.)

(Supreme Court of California. Feb. 9, 1915.)

1. JUDGES ⇨42—DISQUALIFICATION—INTEREST.

A corporation was the owner of riparian rights on a lake fed by a river. A city, to obtain water therefrom, built an aqueduct running to the river above the lake. At a point about 30 miles above the aqueduct intake the city had obtained water rights, and it claimed the right to allow the water to flow on at that point and divert it lower down through its aqueduct. The water to which the city was entitled was diverted through a ditch, the intake of which was located on the land of the trial judge. The river flowed through his land below the intake of the ditch, and such land was riparian to the river. Held that, though a decree in an action between the corporation and the city would not be binding on him, the judge was disqualified to sit in a suit brought by the corporation to enjoin the city from diverting water through its aqueduct; for it was to the interest of the judge to diminish the amount of water the city was allowed to take.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 190-200; Dec. Dig. ⇨42.]

2. JUDGMENT ⇨707—CONCLUSIVENESS—PERSONS CONCLUDED.

A judgment adjudicating water rights is conclusive only upon the parties thereto.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1230; Dec. Dig. ⇨707.]

3. JUDGES ⇨55—DISQUALIFICATION—INTEREST.

Where a judge was disqualified to hear a suit involving the conflicting rights of riparian

owners because he was also a riparian proprietor, and it was to his interest that petitioner be allowed to take little water, his disclaimer of any interest in the amount of water actually diverted by the petitioner or in the manner of its diversion, where the amount remained to be determined, did not remove the disqualification.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 234; Dec. Dig. ¶55.]

In Bank. Application by the City of Los Angeles, a municipal corporation, for a writ of prohibition against Hon. William D. Dehy, as Judge of the Superior Court of Inyo County, instituted in the District Court of Appeal, where the writ was denied. On application of the petitioner the decision was vacated, and hearing ordered in the Supreme Court. Writ issued.

Albert Lee Stephens, W. B. Mathews, and S. B. Robinson, all of Los Angeles, for petitioner. Edward R. Eliassen and John S. Partridge, both of San Francisco, A. H. Swallow, of Bishop, and Olin Wellborn, Jr., and Alfred H. McAdoo, both of Los Angeles, for respondent.

ANGELLOTTI, C. J. This is a proceeding in prohibition originally instituted in the District Court of Appeal of the Second District, where an alternative writ of prohibition was issued at the inception of the proceeding. A hearing being had, the petition for prohibition was denied. Within the time fixed by law, upon the application of petitioner, this decision was vacated and a hearing ordered in this court.

It is sought by this proceeding to obtain a writ prohibiting Judge Dehy from in any wise hearing, considering, or adjudicating any question of law or fact in or about an action pending in his court, wherein the Natural Soda Products Company, a corporation, is plaintiff, and petitioner here is defendant. The application is grounded on a claim of a disqualifying interest held by the respondent judge in the issues of the suit.

There is no dispute as to the material facts essential to a determination of the question presented to us for decision. Those facts sufficiently appear in the opinion of the District Court of Appeal, as follows:

"The city of Los Angeles, the petitioner, has been for more than 8 years last past engaged in the construction of an aqueduct from a point on the Owens river, in the county of Inyo, to the city of Los Angeles, for the purpose of obtaining water for domestic and other uses. It has acquired the ownership of certain waters flowing in Owens river, which it has and is taking from said Owens river by means of canals and ditches. About 40 miles below the place of the aqueduct intake on the Owens river is Owens Lake. The Natural Soda Products Company claims to be the owner of lands riparian to the waters of the lake, and claims the right to use such waters for the purpose of extracting by evaporation the soda contained therein. In December, 1912, it brought suit in the superior court of Inyo county against petitioner, alleging that petitioner threatened to divert by means of its aqueduct, at points above Owens Lake,

all of the waters of the river, and so prevent any of said waters from reaching the lake, in violation of the riparian rights of that plaintiff. It appears that at a distance of about 30 miles above the aqueduct intake the petitioner has obtained rights in water there being diverted from the river, and which is now used upon lands owned by petitioner some distance below the point of such diversion. The intake of this ditch, called the 'Collins Ditch,' is located on land owned by the respondent judge, and the ditch for more than 1,000 feet traverses his said land. The Owens river also flows through the land of respondent below the intake of the Collins ditch, and said land is riparian to the river. In the action brought by the Natural Soda Products Company, under the issues there made, the court would be called upon to determine what quantity of water the city of Los Angeles is entitled to divert from the Owens river. Involved in this determination necessarily would be the question as to the quantity of water acquired by the city under its Collins ditch rights. The water diverted through the Collins ditch at present does not flow back into the river (unless some part of it reaches that stream by percolation), but is used for irrigating purposes on land owned by the city. However, the petitioner city claims the right to cease to take water through the ditch mentioned, to restore it to the river, and take it out below the lands of respondent and at the point of the intake of the aqueduct, or other points on the river. As the matter of the total quantity of water entitled to be diverted by petitioner from the river, as before mentioned, is an issue in the suit pending before respondent judge, and as the lands of said judge are riparian to the river for some distance below the intake of the Collins ditch, the claim is made that respondent judge would be directly interested in determining the issues in that suit; that is, that the smaller the interest ascertained to be possessed by petitioner in the stream by reason of its Collins ditch rights, the greater remaining water there would be in the river to which riparian rights might be asserted by respondent. * * * It is essential that the stipulation of the parties as to the further facts be considered: In the written stipulation as filed it is recited, among other things, that all of the matters contained in paragraph one of the separate and further answer of the respondent judge 'are, and shall be, deemed to be admitted by the petitioner to be true.' That paragraph of said answer is here quoted, and it reads as follows: 'That respondent is the owner of a tract of land described in the petition herein; that said Owens river flows through said tract of land for a distance of more than one-quarter of a mile; that the intake of the said A. O. Collins ditch referred to in the petition herein, from said Owens river, is on said tract of land; that a large quantity of water has been diverted from said Owens river by means of said intake and ditch, and said water so diverted, for more than 25 years last past, has been conveyed through and by means of said ditch to lands below and distant from respondent's said tract of land; that none of the waters diverted from said Owens river through or by means of said A. O. Collins ditch are now, or ever have been, used on respondent's said tract of land; that respondent has not asserted or claimed, and does not assert or claim, any right or interest in or to said A. O. Collins ditch or to the waters diverted from said Owens river thereby; that respondent's said tract of land is about 30 miles above the intake of the aqueduct referred to in said petition, and is about 60 miles above the lands of the said Natural Soda Products Company, referred to in the complaint and answer in said action mentioned in said petition; that none of the waters diverted and used from said Owens river through or by means of said A. O. Collins ditch return

to said Owens river on or above respondent's said tract of land; that respondent is informed and believes, and upon such information and belief alleges, that whether or not the owner or owners of said A. O. Collins ditch continue to divert and convey the waters to which such owner or owners is or are entitled through or by means of said A. O. Collins ditch, as heretofore, or permit and allow said waters to flow past the intake of said ditch down through said Owens river through and past respondent's said tract of land, and thence through said aqueduct, will not and cannot affect or change the use or value of said tract of land, or any portion thereof, nor affect respondent's interest in or to said tract of land."

[1, 2] We are clearly of the opinion that the facts stated show the disqualification of the learned trial judge to act in the case referred to. While doubtless he does not consider the outcome of that case of any great concern to himself or his property, and is satisfied that he could and would determine all the issues with absolute impartiality, it seems clear to us that he has a direct and immediate interest in at least one of the matters involved, an interest that is of pecuniary concern to him. The complaint in the action brought by the Natural Soda Products Company clearly puts the defendant city of Los Angeles to its proofs as to all of its water rights in the Owens river above the land of such company, including, of course, its alleged right of diversion now being exercised by means of the Collins ditch. As said by the District Court of Appeal:

"Under the issues there made the court would be called upon to determine what quantity of water the city of Los Angeles is entitled to divert from the Owens river. Involved in this determination necessarily would be the question as to the quantity of water acquired by the city under the Collins ditch rights."

It is obvious that it is to the interest of respondent as a riparian owner below the intake of the Collins ditch that the quantity of water to be awarded the city by virtue of its Collins ditch rights be as small as possible. The smaller the amount so awarded the greater will be the amount left to flow over his land, subject to his rights as a riparian owner. We think there can be no doubt that this shows an interest that should be held to disqualify him from acting. It is true that he is not a party to the action, and also that, not being a party, any judgment given therein would not be binding upon him in any subsequent litigation to which he may be a party. But, of course, under all the authorities, he may nevertheless have a disqualifying interest. We cannot but see that his interest in this question involved in the case of *Natural Soda Products Company v. City of Los Angeles* has all the requisites included in the definition of a disqualifying interest given by Chief Justice Shaw in *Northampton v. Smith*, 11 Metc. (Mass.) 390, quoted approvingly in *Meyer v. San Diego*, 121 Cal. 102, 108, 53 Pac. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22. The case of *North Bloomfield G. M. Co. v. Keyser*, 58 Cal. 315, is directly in point and controlling here, not-

withstanding the difference in the facts. As a riparian owner below the intake of the Collins ditch, respondent is directly concerned in the judgment to be rendered in this case. Applying what is said in the case just cited to the facts here: In so far as it is based on a determination of the question of the amount of water the city of Los Angeles is entitled to take by reason of its Collins ditch rights, the same judgment that limits the quantity that may be diverted by the city by virtue of those rights, for the benefit of the Natural Soda Products Company as a lower riparian owner, practically limits it also for his benefit as a riparian owner. In so far as it is based on such a determination, the very judgment that will protect the Natural Soda Products Company will protect him, as a riparian owner. It will be borne in mind that it is not suggested that he has parted with, or is estopped to assert, his rights as such owner. It appears to be conceded that his riparian rights are subject to whatever rights the city actually has by reason of the Collins ditch diversion. It is admitted by him that "a large quantity" of water has been diverted by means of said Collins ditch, but the amount remains to be determined in this action. As said in *North Bloomfield G. M. Co. v. Keyser*, supra:

"His interest, therefore, is not merely in the questions of law involved in the controversy, nor is it uncertain or remote; but it is a direct and immediate interest in the result of the action."

We find nothing in any of the subsequent decisions to detract from the weight to be accorded to that decision. The case of *Lassen Irrigation Co. v. Superior Court and Frank A. Kelly*, Judge, 151 Cal. 357, 90 Pac. 709, involved the question of the disqualification of the judge in an action for damages to which the judge was not a party, and in which the judgment could not directly or indirectly affect him or his property. It is clearly distinguishable.

[3] The opinion of the District Court of Appeal indicates that it would have concluded that the respondent was disqualified to act in this case, were it not for that portion of his answer which is admitted to be true, which we have heretofore quoted. We see nothing therein to affect the view we have already stated. What the quantity of water is that the city is entitled to by reason of the Collins ditch, or that has been diverted by means of said ditch, is a question that is in no way touched upon therein. It is stated that the respondent claims no right or interest in or to such water as has actually been diverted by means of said ditch, but what the quantity of that water was is a question to be determined in the action referred to. It is also stated that whether or not the owner or owners of the Collins ditch rights divert and convey the waters "to which he or they is or are entitled," through or by means of the ditch, as heretofore, or allow them to flow past the

intake of such ditch through the river, through and past respondent's land, and thence through the aqueduct, will not and cannot affect or change the use or value of said land or any portion thereof, nor affect respondent's interest in or to said land. Regardless of the question of its correctness as matter of law, this statement means no more than that the respondent is not interested in the question how the water to which the city may be found to be entitled by reason of its Collins ditch rights shall be conveyed. We are satisfied that it must be held that petitioner is entitled to the relief sought herein.

Let a peremptory writ of prohibition issue as prayed in the petition.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.

169 Cal. 301

MARTIN v. BECKER et al. CAREAGA v. SAME. HUBBARD v. BRINKER et al.
(S. F. 6122, 6106, 6300.)

(Supreme Court of California. Feb. 11, 1915.)

1. MECHANICS' LIENS $\hookrightarrow$ 213—TAKING MORTGAGE SECURITY—EFFECT.

Under Code Civ. Proc. § 726, providing that there can be but one action for the recovery of any debt secured by a mortgage, a materialman, taking a mortgage on real property of the contractor in terms covering the contractor's debts for the material, may retain and resort to the security of the mortgage lien, and at the same time claim and foreclose a materialman's lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 398; Dec. Dig. $\hookrightarrow$ 213.]

2. MORTGAGES $\hookrightarrow$ 218—LIEN—WAIVER.

The provision of Code Civ. Proc. § 726, that there can be but one action for the recovery of any debt secured by a mortgage, being intended for the benefit of the primary debtor, is one which, under the express provision of Civ. Code, § 3513, he may waive.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 568-585; Dec. Dig. $\hookrightarrow$ 218.]

3. MORTGAGES $\hookrightarrow$ 218—LIEN—ADDITIONAL SECURITY.

A mortgagee may take security other than and in addition to his mortgage security, and, if the contract with the giver of such security permits, may enforce his debt from such third party, without reference to the mortgagor and his security.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 568-585; Dec. Dig. $\hookrightarrow$ 218.]

4. MECHANICS' LIENS $\hookrightarrow$ 263—ENFORCEMENT—PARTIES—MORTGAGOR.

Where a materialman took a mortgage on the contractor's real property in terms covering the debts of the contractor for the material so furnished him, the mortgagor was not a necessary party to an action to foreclose the materialman's lien, since the action was not against the primary debtor, the mortgagor, and had no bearing upon the mortgage contract.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 471-481; Dec. Dig. $\hookrightarrow$ 263.]

5. LIENS $\hookrightarrow$ 16—NEW OR ADDITIONAL SECURITY—DESTRUCTION OF EXISTING LIEN—INSTANCES.

The taking of a new or additional security operates to destroy an existing lien, where the

destruction is worked by virtue of a positive declaration of law, by the contract of the parties, by necessary intendment growing out of the agreement of the parties, in that the taking of the later security is inconsistent with the continued existence of the lien, and by the nature of the earlier or later security, as that it is concealed or undisclosed, giving rise to a situation where it would be fraudulent upon other claimants to permit the earlier lien to be held valid, whereupon equity interposes, and declares it to have been waived or lost by the taking of the later security, or in effect erects a bar to its enforcement.

[Ed. Note.—For other cases, see Liens, Cent. Dig. §§ 7-16; Dec. Dig. $\hookrightarrow$ 16.]

6. MECHANICS' LIENS $\hookrightarrow$ 209—ENFORCEMENT OF LIEN—INCONSISTENT AGREEMENT.

Where a contract between the owner and the contractor requires the conclusion that they intended to waive the mechanic's lien, or where a contract is taken upon the same property, or where the payment to the lien claimant was to be made by a deed of part of the property, the contract is inconsistent with the right to a mechanic's lien, which will be denied.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 383; Dec. Dig. $\hookrightarrow$ 209.]

7. VENDOR AND PURCHASER $\hookrightarrow$ 246—"VENDOR'S LIEN"—NATURE.

In English and American law a vendor's lien is exceptional in character, and is an importation from the civil law, which found its recognition through courts of chancery, on the equitable principle that the person who had secured the estate of another ought not in conscience to be allowed to keep it and not pay full consideration money, and that to enforce that payment it was just that the vendor should have a lien upon the property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 615; Dec. Dig. $\hookrightarrow$ 246.]

For other definitions, see Words and Phrases, First and Second Series, Vendor's Lien.]

8. MECHANICS' LIENS $\hookrightarrow$ 212—VALIDITY—CONSTITUTIONAL AND STATUTORY PROVISIONS.

In view of Const. art. 20, § 15, declaring a mechanic's lien in favor of parties furnishing labor or material, and the law requiring notice thereof by record, the mere circumstance that a mechanic or materialman has taken additional security for his debt should not destroy his lien; nor should the conclusion that the additional security was meant to be a substituted security for the right to the lien be reached, unless it plainly appears from the nature of the contract that the security was in fact substituted, and not cumulative; and no argument for the destruction of a mechanic's lien can be based on the theory of its secrecy.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 393-397, 399; Dec. Dig. $\hookrightarrow$ 212.]

9. MECHANICS' LIENS $\hookrightarrow$ 215—LOSS OF LIEN—ATTACHMENT.

The right to enforce a mechanic's lien is not lost by the fact that the lienor, by levying an attachment upon other property, thereby obtains additional security.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 386; Dec. Dig. $\hookrightarrow$ 215.]

10. MECHANICS' LIENS $\hookrightarrow$ 290—PROCEEDINGS TO ENFORCE—CONSTRUCTION OF FINDING.

In a proceeding to enforce a materialman's lien against a bankrupt contractor and the owners, a finding that the contractor paid \$1,000 to a materialman on his general account, and not on account of material for a building for a certain owner, was a finding that the account

for material furnished for that building was not reduced by any specific payment.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 591-597; Dec. Dig. ⚡ 290.]

11. MECHANICS' LIENS ⚡ 310—PROCEEDINGS TO ENFORCE—COSTS.

In a materialman's suit to enforce his lien, consolidated with suit of another lien claimant, in which a party defendant, having no notice of the setting of the case for trial, and not appearing thereat, after adverse judgment moved for a new trial, the denial thereof, on the ground that the total amount due it had been deposited in court by one of the plaintiffs in full satisfaction of its claim, was irregular, in that such party, entitled to prevail in the action, was not allowed to file a cost bill, and to establish the amount to which it was entitled in addition to its claim.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 651-654; Dec. Dig. ⚡ 310.]

12. APPEAL AND ERROR ⚡ 411—ALTERNATIVE METHOD OF APPEAL—NOTICE.

Under Code Civ. Proc. § 941b, providing that, as an alternative method of appeal, the appellant may file with the clerk of the court below a notice stating that he appeals, identifying the judgment with reasonable certainty, and requiring notice of appeal to be filed within 60 days from notice of entry of judgment, and where no notice of entry is given, within 6 months after entry of judgment, a notice filed with the clerk 31 days after judgment was sufficient.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2100; Dec. Dig. ⚡ 411.]

In Bank. Appeals from Superior Court, Santa Clara County; John E. Richards, Judge.

Interpleader by C. J. Martin against A. Becker, T. B. Hubbard, and others. Judgment for interpleader, and defendant Hubbard appeals. Reversed and remanded.

Interpleader by Mollie A. Careaga against A. Becker, T. B. Hubbard, and others. Judgment for interpleader, and defendant Hubbard appeals. Reversed and remanded.

Action by T. B. Hubbard and Henry Hart against L. M. Brinker and others, and against the Home Union, with cross-complaint by the Home Union. Judgment for plaintiff Hart, and for defendants Brinker and others, and plaintiff Hubbard and defendant Home Union appeal. Reversed and remanded.

S. F. 6122:

Will M. Beggs and R. C. McCormich, both of San Jose, for appellant and for respondents Becker and others. C. M. Lorigan, Owen D. Richardson, John W. Sullivan, and H. E. Wilcox & D. M. Burnett, all of San Jose, and Edwin H. Williams, of San Francisco, for other respondent.

S. F. 6106:

Will M. Beggs and R. C. McCormich, both of San Jose, for appellant. John W. Sullivan, of San Jose, A. H. Jarman, of San Francisco, H. E. Wilcox & D. M. Burnett, of San Jose, and Edwin H. Williams, of San Francisco, for respondents.

S. F. 6300:

Will M. Beggs and R. C. McCormich, both of San Jose, for appellant Hubbard. A. H. Jarman, of San Francisco, for appellant Home Union. Edwin H. Williams, of San Francisco, for respondent Hart. Rogers, Bloomingdale & Free, of San Jose, for respondent Brinker.

HENSHAW, J. The defendant Becker was a building contractor who became bankrupt. At the time of his bankruptcy he had completed for Mrs. Careaga and for Mr. Martin each a separate dwelling house under a valid statutory contract. The final payments becoming due, Mrs. Careaga and Mr. Martin deposited the amounts of their payments in court with appropriate averments, asking the court to call in the lien claimants to the funds, apportion the money, and dismiss plaintiffs, respectively, without further costs or charge. In the case of Hubbard v. Brinker, Becker, because of his bankruptcy, abandoned the incomplete building which he was constructing for Brinker, and Hubbard and Hart sued Brinker to establish liens for materials furnished. Their cases were consolidated. Hubbard admittedly had furnished material to Becker, which material had been used in the construction of the buildings. No question arises over this, nor over the validity of his lien claims, in the matter of form or substantive proof to sustain them. But Hubbard had taken a mortgage upon real property owned by Becker, the contractor, which mortgage by its terms covered the debts of Becker growing out of these materials so furnished him. Because of the existence of this mortgage security the trial court decided against the validity of his lien claims for materials furnished, and decreed that he could not participate in the funds admittedly due to the holders of valid liens. Hubbard's appeals in all three of the above-entitled cases present this as the principal question for determination. What is here said upon it is therefore applicable to all the cases. Certain points of minor significance, arising separately in the different cases, will receive their separate consideration.

The principal inquiry has been thus stated: "May the defendant Hubbard, as the creditor of the defendant Becker, retain and resort to the security of a mortgage lien, and at the same time claim and foreclose a materialman's lien for the satisfaction of an indebtedness which is found to be clearly covered by both liens?"

The trial court and the Court of Appeal made answer: (1) That by virtue of section 726 of the Code of Civil Procedure this could not be done. That section declares that "There can be but one action for the recovery of any debt * * * secured by mortgage upon real or personal property." (2) That, aside from the consideration of section 726, the fact that Hubbard had taken security from Becker for the latter's debt, even though

that security was in the form of a mortgage upon real property of Becker, operated to annul the former's right to his materialman's liens.

[1, 2] 1. At the outset it is important to note what changes the Legislature made in the common-law rule, and therefore what it sought to accomplish in the declaration contained in section 726 of the Code of Civil Procedure. At common law a mortgage was a conveyance of title upon condition subsequent. That title became absolute and indefeasible upon breach of the condition. No right of redemption existed. The sole recourse was a resort to equity for relief against the forfeiture. Moreover, the mortgagee had his right to go to law to recover the amount of the mortgage debt and to enforce his recovery by imprisonment of the debtor. Nor did the doing of any of these acts impair his mortgage security. Under our statutory system the first radical change was to declare that a mortgage conveyed no title, but gave only the security of a lien upon the property. Civ. Code, §§ 2888, 2920, 2923. This radical change having been established, section 726 became the expression of a natural corollary to that change. To simplify procedure and to relieve the mortgagor (who was usually thought not always the primary debtor), it was declared that but one action should be brought to enforce the mortgage debt. The mortgaged property thus became the primary fund, which must first be exhausted before any other remedy or relief could be had against the primary debtor. If this primary fund should prove insufficient to extinguish the debt, then in the same action a deficiency judgment could be docketed against the primary debtor. No longer could the primary debtor be pursued in an action which did not take into recognition the existence of the mortgage security. Otherwise it would be true to-day that if the primary debtor had given a mortgage upon his own property, and subsequently had sold it subject to the mortgage, the mortgagee could enforce the debt against the primary debtor without recourse to the mortgaged property, leaving the primary debtor to his chance of recovery over against his vendee. Or, again, the mortgage might have been given as security by one other than the primary debtor and with the understanding between the mortgagor and the primary debtor that the mortgaged property should first be exhausted in payment of the debt. If our existing rule did not obtain, the mortgagee could in like manner pursue the primary debtor without reference to the security.

Every reason for the existence of the rule discloses and declares that it was designed for the benefit of the primary debtor, and, indeed, it is so decided. *Ould v. Stoddard*, 54 Cal. 613; *Toby v. Oregon Pac. R. R. Co.*, 98 Cal. 494, 33 Pac. 550; *Hibernia Sav. & Loan Soc. v. Thornton*, 109 Cal. 427, 42 Pac. 447,

50 Am. St. Rep. 52; *Commercial Bank of Santa Ana v. Kershner*, 120 Cal. 495, 52 Pac. 848; *Otto v. Long*, 127 Cal. 471, 59 Pac. 895; *Hellyer v. Baldwin*, 53 N. J. Law, 141, 20 Atl. 1080. This provision, then, being thus clearly designed for the protection of the primary debtor, is one which he not only can waive (Civ. Code, § 3513; *Hibernia Sav. & Loan Soc. v. Thornton*, supra; *Hellyer v. Baldwin*, supra), but, still further, is one which has no applicability whatsoever unless the action which is brought directly affects his rights under the mortgage contract. And by that we mean this: That the law never contemplated that because a man had taken a mortgage he could not take other independent security for his debt, and, if the contract for such security permitted it, enforce such contract without reference to the mortgage debt. Indeed, our books are full of cases where the doing of this precise thing has been uniformly countenanced and upheld, notwithstanding the fact that plaintiff's success in the action has resulted in the payment of his debt secured by mortgage, without recourse or reference to the mortgage security. Thus in *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047, the action was brought against the stockholders for a liability of the corporation, which corporate liability was evidenced by its note secured by mortgage. It was urged that the mortgagee must first exhaust the mortgage security in the "one action" contemplated by section 726. This court said:

"The note was due, but the mortgage had not been foreclosed. This fact constitutes no defense for defendants. They are not affected by the fact that because of the mortgage only an action to foreclose could be brought against the corporation. The mortgage only affects the remedy against the mortgagor—the corporation. The liability of the stockholder, as has already been said, is primary in the sense that he is not a surety. He is not injured nor is he benefited by the fact that the corporation has given security. *Sonoma Valley Bank v. Hill*, 59 Cal. 107."

We have quoted this language because it succinctly declares the principle vital to this consideration. "The mortgage only affects the remedy against the mortgagor" or primary debtor. Again, in *Adams v. Wallace*, 119 Cal. 67, 51 Pac. 14, the action was against an independent guarantor of a debt secured by mortgage, and it was held that the action could be maintained and the payment of the debt enforced without regard to the existence of the mortgage, because the action was upon an independent contract to pay the debt upon default of the principal debtor. Identically the same proposition was decided in *Carver v. Steele*, 116 Cal. 116, 47 Pac. 1007, 58 Am. St. Rep. 156, and *Kinsel v. Ballou*, 151 Cal. 754, 91 Pac. 620, where action was brought against the guarantors by indorsement of a promissory note secured by mortgage. Yet it is to be noted that in each one of these cases the result was the payment of the debt secured by mortgage without recourse to the mortgage security.

[3] Why was this permitted to be done? The answer is found in what has already been said: That these other actions, not being directed against the primary debtor entitled to rely on the mortgage security, but being based upon independent contracts, were not within the spirit or meaning of section 726. The primary debtor or mortgagor alone, or he holding under or in privity with him, may invoke section 726 for his own protection. It never has been, nor has it ever been declared to be, the law in this state that a mortgagee may not take security other and in addition to his mortgage security, and, if the contract with the giver of such security permits, may not enforce his debt from this third party, without reference to the mortgagor and his security. Indeed, in *Commercial Bank of Santa Ana v. Kershner*, supra, one of the cases upon which respondents rely, it is said that:

"A debt may be secured by pledge, mechanic's lien, judgment lien, attachment, or otherwise, and yet the security may be reinforced by a mortgage on the same or other property."

We may now with propriety turn to the cases which respondents cite as supporting their contention, for the purpose of determining whether any of the previous utterances of this court conflict with the views here expressed.

The first of these is *Ould v. Stoddard*, 54 Cal. 613. Defendant had given to plaintiff a note secured by mortgage. In a foreign jurisdiction—the state of Ohio—plaintiff had brought a personal action upon the note and had secured a personal judgment against him. No part of the amount of the judgment so recovered had been paid. Thereafter in this state the plaintiff brought his action to foreclose the mortgage. This court, quoting section 726 of the Code of Civil Procedure, declared that the plaintiff had brought his "one action," that in that one action he had not sought to enforce his security, and that he had therefore waived it. Certainly nothing in this case militates against the propositions which we have enunciated, but to the contrary it pronounces, in accordance with what we have said, that the section was framed for the benefit of the mortgagor to relieve him from harassment in repeated litigations.

The next case is *Bartlett v. Cottle*, 63 Cal. 366. Here a promissory note was given, secured by mortgage. The payee of the note, the mortgagee, brought his action against the maker; the complaint being silent as to the mortgage. The existence of the mortgage was set forth as matter in abatement. The trial court held the security to be valueless, and therefore the holder of the note to be entitled to prosecute his action without reference to the mortgage, upon the theory, now well settled, that if the mortgage is valueless there is no security to be enforced. *Otto v. Long*, 127 Cal. 471, 59 Pac. 895. The court held that "on an examination of the

testimony we are of opinion that the security was not without value," and therefore reversed the judgment, in effect telling the plaintiff that he must exhaust the security of the mortgage before obtaining a personal judgment against the mortgagor.

Hall v. Arnott, 80 Cal. 348, 22 Pac. 200, was an effort to foreclose a mortgage in the form of a deed absolute. The action was between the successors in interest of the original parties. It was held that through laches, by virtue of their failure to include or to have included this mortgage debt in an earlier action in foreclosure, the holders of the security had lost their right to the lien, and that, the mortgage being in form a deed absolute, the owners of the property were in turn entitled to a decree removing the apparent cloud upon their title. This does not amount to a declaration that the parties may not have more than one form and kind of security, but merely to a declaration that through their own neglect, growing out of the peculiar circumstances of the case, they had lost their right to enforce one of their securities.

The next case is *Stockton Savings & Loan Society v. Harrold et al.*, 127 Cal. 612, 60 Pac. 165. This case is substantially the converse of the one last discussed. Defendant McKee held security by way of mortgages. He, a cross-complainant, set up these mortgages. The trial court struck out a portion of his cross-complaint, preventing the foreclosure in the action before it of a lien upon a large tract of land. This court held that the action of the trial court was improper, that if the defendant were to sue in his own independent action of foreclosure he would lose the lien of that particular mortgage if it were omitted from the foreclosure, and by virtue of the fact that he is brought in as a defendant and a cross-complainant he cannot be compelled to lose part of his security when thus forced to foreclose his mortgage.

Commercial Bank of Santa Ana v. Kershner, 120 Cal. 495, 52 Pac. 848, presented the following facts: Defendants were indebted to plaintiff upon their promissory notes. Plaintiff began its action, and attached certain real property of defendants. Defendants then gave a mortgage upon the property. This mortgage covered property not under attachment, as well as the property under attachment. Plaintiff proceeded to judgment in its attachment suit, and sold out the interest of the defendants in the property under attachment. There remained a deficiency judgment. Plaintiff then commenced its action in foreclosure, and, all these matters having been set up in the complaint, defendants' demurrer to that complaint was sustained. This court held that the taking of the mortgage under these circumstances was the creation of a new contract between the parties, that the debt did not become

due under the terms of the mortgage until one year after its creation, that by reason of this novation plaintiff had no right to prosecute its attachment suit to judgment, but that the mere fact that the defendants in the attachment suit interposed no objection to plaintiff so doing did not estop them from subsequently raising the objection that plaintiff's conduct, under the authority of *Ould v. Stoddard*, supra, amounted to a waiver of the mortgage security.

It is important to note that these actions were between the principals to the mortgage contract, and that the parties objecting were the mortgagors themselves, who had suffered one action for the collection of their debt.

[4] This concludes the review of the authorities cited by respondents, and it is manifest that in them there is no decision, and indeed no utterance, in contrariety to the propositions we have enunciated, for here the action is not against the primary debtor—the mortgagor—and has no relation to nor bearing upon the mortgage contract. The mortgagor in this case was not even a necessary party to the action seeking to foreclose the materialman's lien. *Russ, etc., Co. v. Garrettson*, 87 Cal. 589, 25 Pac. 747; *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111.

[5] 2. It is sometimes, but not always, nor even usually, true that the taking of new or additional security operates to destroy an existing lien. It so operates only in four classes of cases: (1) Where the destruction is worked by virtue of a positive declaration of law; (2) where it is worked by the agreement and contract of the parties; (3) where it is worked by necessary intentment growing out of the agreement of the parties, in that the taking of the later security is inconsistent with the continued existence thereafter of the lien; and, finally, (4) where the nature of the earlier or later security, as that it is concealed or undisclosed, gives rise to a situation where it would partake of fraud upon other claimants to permit the earlier lien to be held valid, whereupon equity interposes and declares it to have been waived or lost by the taking of the later security, or—what is in effect the same—erects a bar to its enforcement. To one or another of these classes all cases decreeing the destruction of an earlier lien by virtue of the taking of later security are referable. Thus in *Barrows v. Baughman*, 9 Mich. 213, the builder's agreement with the owner was that he should take a mortgage upon the property in payment of his debt. The Supreme Court of Michigan held that under their lien law, by virtue of his acceptance of the mortgage upon the property, the builder had waived his right to a mechanic's lien, and also "that the statute creates no lien where the parties by their contract provide for a different security upon the same land for the same debt which the lien

would otherwise secure." In this case the court declared for the nonexistence of the mechanic's lien law upon two of the grounds above enunciated—one, that by operation of law a lien was denied in such cases; the other, that by the intentment of the parties the existence of the lien was inconsistent with the taking of the mortgage upon the same land for the same debt, or, in other words, that the mortgage was substituted for the lien. To the same effect is *Gorman v. Sagner*, 22 Mo. 137. There the plaintiff, who had a mechanic's lien upon certain property, accepted from the owner promissory notes payable months after date and a deed of trust to the property impressed with the mechanic's lien. The Supreme Court of Missouri discussed and analyzed this later contract of mortgage, and held that by its very terms it was inconsistent with the continued existence of the mechanic's lien, which must therefore be considered to have been waived by the intentment of the parties. In *Willison v. Douglas*, 66 Md. 99, 6 Atl. 530, the mechanic's lien law of that state provided that the lien should not be considered as waived "by * * * receiving notes or other securities, unless the same be received as payment, or the lien be expressly waived." It was held that the taking of a mortgage—a contract under seal—upon the same property was inconsistent with the operation of the lien, and that the lien was therefore "expressly waived by the legal effect of such express contract." *Weaver v. Demuth*, 40 N. J. Law, 238, held that the agreement by the builder to accept a mortgage upon the property was inconsistent with the theory of the existence of a statutory mechanic's lien, basing the decision squarely upon *Barrows v. Baughman*, supra. And, indeed, it may be here added that none of the cases pretends to deny the equitable principle first declared in *Crawshaw v. Homfray*, 4 Barn. & All. 53, to the effect that "unless the special agreement be inconsistent with the right of lien it will not destroy it."

The same principle is enunciated in *Peyroux v. Howard*, 7 Pet. 324, 8 L. Ed. 700, and announced and affirmed by every court which has been called upon to consider the question. *Grant v. Strong*, 18 Wall. 623, 21 L. Ed. 859, was a case in which Strong had filed his bill in equity against Grant to establish a mechanic's lien. Strong was to do the brickwork upon certain houses which Grant was building, and by agreement was to take one of the houses in payment for his work. A conveyance was made by Grant of the lot which Strong was to have, and placed in escrow, to be delivered to Strong when his work was completed. Differences arose between the parties during the progress of the work, and a new agreement was entered into. The new agreement provided that the work was to be paid for by Grant's negotiable note, payable within three months

from the date of the completion of the work, and when so paid for the escrow conveyance by Grant to Strong should be canceled and given up. A later agreement declared that the work had been done, the promissory note given, and the escrow declared null and void. The trial court decreed Strong a lien. The Supreme Court of the United States reviewed the contracts between the parties, and declared that it was clear that under the original agreement Strong was not to be paid in money at all, but by the lot, deed to which was placed in escrow, that under these circumstances no lien could accrue, that under the second contract Strong did not give up his security, but retained it and relied on it, that all of this was inconsistent with the existence of a mechanic's lien, and saying:

"The question whether a lien is obtained, or is displaced when it once attaches, is largely a matter of intention to be inferred from the acts of the parties and all the surrounding circumstances."

It concludes as follows:

"In short, we are of opinion that these agreements show an acceptance and reliance by Strong on another and very different security for the payment for his work, inconsistent with the idea of a mechanic's lien, and that no such lien ever attached in the case."

McMurray v. Brown, 91 U. S. 257, 23 L. Ed. 321, was an action to enforce a mechanic's lien given under the provisions of the federal statute. The trial court decreed the lien. The contract between the parties provided that the owner, by way of payment for the work done by plaintiff, would convey to him a certain lot at a stipulated price. The owner—the defendant—failed to make the conveyance, and insisted that by virtue of the special contract plaintiff's remedy was at law for breach of the contract. The Supreme Court of the United States in the course of its discussion declared:

"Cases may arise, undoubtedly, where the rights and responsibilities of the parties are so completely defined by the contract that neither party is at liberty to claim anything beyond the terms of the contract, if the contract is in all respects fulfilled. Consequently lien laws do not in general create a lien in favor of a materialman who has accepted in full a different security at the time the contract or agreement was made. Examples of the kind, such as a trust deed or mortgage, may be mentioned, which are regarded as a species of security inconsistent with the idea of a mechanic's lien upon the same land for the same debt. *Grant v. Strong*, 18 Wall. 623 [21 L. Ed. 859]. *Phill. on Mech. Liens*, § 117. Such a security is regarded as inconsistent with the intent of the parties that a mechanic's lien should be claimed by the party furnishing building materials, as the owner may obligate himself to pay in money, land, or any specific article of property; but, if he does not fulfill his contract by paying in the manner stipulated, the mechanic is entitled to his lien. *Reiley v. Ward*, 4 G. Greene [Iowa] 22."

[6] So far as this examination of authorities has proceeded, we find that the actions are between the contractor and the owner of the property upon which the work was done, to enforce the lien upon that property,

and we find that the adjudications are merely to the effect that the courts will consider each of these contracts according to its facts, and that when the contract between the parties is such as to force the conclusion that the intent of the parties was to waive the mechanic's lien, as where a mortgage is taken upon the same property, or as where the payment to the lien claimant was to be made by a deed of part of the same property, it is held that these contracts are inconsistent with the conception of a right to a mechanic's lien. In no one of them, however, is the denial of the right to the mechanic's lien based upon the mere fact that the lien claimant has taken security other than that afforded by his lien. The decision in each case is based upon findings that the nature of the contract under which the security is taken forces the conclusion that there was a waiver of the right to the lien. Of these cases no criticism may be made, and with them no fault may be found.

We come now, however, to consider another class of cases laying down a much broader rule, to the effect that the taking of any other security by the lien claimant is a waiver of his right to his mechanic's or materialman's lien. Thus *Trullinger v. Kofoed*, 7 Or. 228, 33 Am. Rep. 708, was an action by plaintiff to enforce a materialman's lien. Defendant Runey had likewise furnished material used upon the building, and had taken the promissory note of the owner secured by mortgage on the property. He likewise sued to enforce his materialman's lien. The principal question discussed was whether the taking of the mortgage by Runey was a waiver of his right to a materialman's lien. It was held that Runey's right to a lien was waived by the taking of the mortgage upon the same property, the court saying:

"We can see no reason for taking the mortgage, unless he contemplated indulgence to Kofoed beyond the time when he would have to enforce his lien. He might have taken the note in order to have the amount of the debt fixed and interest secured; but the mortgage was no better security than the lien during the time that the lien would continue. It is a rule that where a vendor takes a mortgage on the property sold he waives his vendor's lien, and it has been so held by this court. [*Pease v. Kelly*] 3 Or. 417; 6 Ves. 752; *Lagow v. Badollet*, 1 Blackf. [Ind.] 416 [12 Am. Dec. 258]; *Gilman v. Brown*, 1 Mason, 191 [Fed. Cas. No. 5,441]; *Williams v. Roberts*, 5 Ohio, 35; 4 Kent. Com. 154; *Houck on Liens*, § 202. And there seems to be no difference in principle between vendors' liens and the liens of mechanics, and it has been so held in many cases. *Kinzev v. Thomas*, 28 Ill. 505; *Gardner v. Hall*, 29 Ill. 277; *Gorman v. Sagner*, 22 Mo. 137; *Borrows v. Baughman*, 9 Mich. 213; *Phillips on Liens*, § 280, and cases there cited. From these numerous authorities the rule seems to be well settled that where a mechanic takes a mortgage, either on the same property to which the lien attaches or on other property, he thereby waives his lien, and the reason is, as observed in many of the cases cited, that subsequent lienholders and purchasers have a right to rely on the record, and should be protected against secret liens."

Of the first ground of decision in the Oregon case no criticism can be made. It is the familiar finding of an agreement between the parties whereby a mortgage is taken as substituted security for the lien. But our review of the cases heretofore made shows that neither *Gorman v. Sagner*, supra, nor *Borrows v. Baughman*, supra, relied on by the Oregon court, supports the broad declaration that where a mechanic or materialman takes security on other property he waives his lien. *Gorman v. Sagner* and *Borrows v. Baughman* were both cases where the materialman had taken a mortgage upon the same property, and it was held, as so repeatedly declared, that both by operation of law and by the intent of the parties the contract of mortgage upon the same property was a waiver of the right to the statutory lien. But one court alone sustains this broad declaration of the Oregon case, and that is the Supreme Court of Illinois. We find that court saying (*Kankakee Coal Co. v. Crane Bros.*, 138 Ill. 207, 27 N. E. 935):

"We have held that 'taking other security, either on property or that of individuals not parties to the transaction, would have the effect to discharge the lien.' *Brady v. Anderson*, 24 Ill. 110; *Kinzey v. Thomas*, 28 Ill. 502; *Gardner v. Hall*, 29 Ill. 277; *Croskey v. Corey*, 48 Ill. 442; *Clark v. Moore*, 64 Ill. 273."

We find the following declaration in *Brady v. Anderson*, 24 Ill. 111, without the citation of any authority in its support:

"While the taking of other security, either on the property or that of individuals, not parties to the transaction, would have the effect to discharge the premises from the lien, yet the mere settlement and adjustment of accounts, * * * is in no sense a change of security, or security of any description."

This unsupported declaration seems to be founded upon an earlier discussion had in that same case, to the effect that the mechanic's lien awarded by statute is in derogation of the common law and is secret in its nature, since no notice of it is required to be filed for record, and therefore it should receive a strict construction. This case was followed by *Kinzey v. Thomas*, 28 Ill. 502, where the lien claimant had taken other security in the nature of a chattel mortgage. The Supreme Court of Illinois referred to its language above quoted in *Brady v. Anderson*, and as an additional reason for its holding declared as follows:

"The settled doctrine is that a vendor of land waives his lien wherever he takes distinct security for the payment of the purchase money, such as a deposit of stock, a pledge of goods, a mortgage on real or personal estate, or the responsibility of a third person; and we can see no difference in principle between such a lien and the lien of the materialman. Both are secret liens. *Conover v. Warren*, 1 Gilm. [Ill.] 501 [41 Am. Dec. 196], and cases there cited."

Later decisions of the Supreme Court of Illinois have reaffirmed this doctrine.

With the first reason given by the Supreme Court of Illinois in its holding that the taking of any other security destroys the right

to a mechanic's lien we need not take issue. It is based upon the fact that under the peculiar wording of the Illinois statute the lien is a secret lien, not required to be recorded, and therefore imperiling the rights of ignorant and innocent purchasers or incumbrancers of the property. This reason has no application in this state, where recordation of the lien claim is required. Some force may attach by reason of the secret nature of the mechanic's lien in the state of Illinois to the second reason assigned, by which reason an identical parallelism is found between the vendor's lien and the mechanic's lien of the Illinois statute, but this force inheres only because of the secrecy of the lien.

[7] The vendor's lien is in the English and American law exceptional in character. It was an importation from the Roman civil law, and found its recognition in the English system through its courts of chancery. The equitable principle was that the person who had secured the estate of another ought not in conscience to be allowed to keep it and not pay full consideration money, and that to enforce that payment it was just that it should be made a charge upon the estate so taken. But being from its nature a secret lien, being thus an intrusion upon and an exception to every principle of our jurisprudence, which frowns upon secret transactions of all kinds, some courts have criticized its existence, some states by statute have destroyed it, and every court has been swift to declare that the taking by the vendor of any security is a waiver of the lien. 2 *Warvelle, Vendors*, § 676; 2 *Sugden, Vendors*, c. 19. True it is that in this state the vendor's lien is expressly recognized by section 3046 of the Civil Code, but equally true it is that all other rules and doctrines governing the existence and destruction of such liens are left to the principles established by courts of equity.

[8] To the contrary, however, the lien of the mechanic in this state is a lien, world-wide notice of which is given by recordation, and it is a lien of the highest possible dignity, since it is secured, not by legislative enactment, but by the Constitution of the state. Const. Cal. art. 20, § 15. Grave reasons indeed must be shown in every case to justify a holding that such a lien is lost or destroyed. Certainly the mere circumstance that the prudent mechanic or materialman has taken additional security for his debt should not be held so to operate. Nor should any conclusion that such additional security was meant to be a substituted security for the right to the lien be found except in the clearest case. Before such a conclusion is reached, it should plainly appear from the nature of the contract between the parties that the security was in fact substituted and not cumulative. And, finally, no argument for the destruction of such a

lien can be based upon the theory of its secrecy, when in this state no secrecy at all exists.

We have so far limited this discussion to an analysis of the cases which it is contended hold the destruction of the mechanic's lien. We have endeavored to show that the principles of most of these cases have been misunderstood and accordingly misrepresented, and that in the other cases, as in the Oregon case and Illinois cases, the principles declared are wholly inapplicable to our law. We may now sum up this matter by adding that the great weight of authority supports the views here expressed, and, without unduly prolonging this discussion by quotations, we may cite 1 Jones on Liens, § 1101; Bender-Moss on Liens, § 630; Phillips on Mechanic's Liens, § 280; Roberts and Wife v. Wilcoxson and Rose, 36 Ark. 355; Maryland Brick Co. v. Spilman, 76 Md. 337, 25 Atl. 297, 17 L. R. A. 599, 35 Am. St. Rep. 431; Parberry v. Johnson & Co., 51 Miss. 291; Peck v. Bridwell, 10 Mo. App. 524; Brumme v. Herod, 38 App. Div. 558, 56 N. Y. Supp. 670; Boyle v. Robbins, 71 N. C. 130; Howe v. Kindred, 42 Minn. 433, 44 N. W. 311; Kilpatrick v. Kansas City, etc., Co., 38 Neb. 620, 57 N. W. 664, 41 Am. St. Rep. 741; Talliaferro v. Stevenson, 58 N. J. Law, 165, 33 Atl. 383; Myers v. Humphries (Tex. Civ. App.) 47 S. W. 812; Hale v. Burlington, etc., Co. (C. C.) 13 Fed. 203.

[9] And finally, it may be pointed out that in this state it has been held that the right to enforce a mechanic's lien was not lost by reason of the fact that the plaintiff, by levying an attachment upon other property, thereby obtained additional security. *Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507.

It follows herefrom that Hubbard, in taking mortgage security from Becker upon the property of Becker for the value of the material which he might sell to him, did not lose his right to a mechanic's lien, either by virtue of section 726 of the Code of Civil Procedure, or by the just application of any rule of decision holding that the taking of other security destroys the right to such lien.

[10] S. F. 6106: The evidence in this case showed that Becker had paid to Hubbard \$1,000, which he directed should be applied on certain specified accounts, none of which was the Careaga account. The court found that Becker paid the \$1,000 to Hubbard "on his general account, and not on account of material furnished for the construction of said building for said Mollie A. Careaga." This is a sufficiently explicit finding that Hubbard's account with Becker on account of material furnished to the Careaga building was not reduced by any specific payments, and appellant has no just cause for complaint over this finding.

[11] S. F. 6300: In this case the suit of

Hubbard to foreclose his lien and the suit of Hart to foreclose his lien were consolidated. The Home Union, a corporation, was a defendant and cross-complainant. It was not given notice of the setting of the case for trial and did not appear at the trial. It moved for a new trial. The amount of its lien claim was \$22.98. The court granted the motion conditionally, declaring that if the amount due the Home Union was deposited in court the motion would be denied. Subsequently the court entered its further order, reciting that the total amount due the Home Union was \$26.98, and that Henry Hart had deposited \$27 with the clerk of the court in full satisfaction of the claim and demand of the Home Union Company, and the motion for new trial was denied. This was irregular, in that the Home Union was not allowed to file a cost bill and establish the amount to which it was entitled in addition to its claim of lien. The amount involved may be trifling, but the principle is of consequence. A party under such circumstances, who by the finding of the court is entitled to prevail in the action and to have judgment accordingly, is likewise entitled to his hearing in court upon the question of the settlement of the legal costs which he has incurred.

It follows from the foregoing that Hubbard is entitled to share in the funds admittedly applicable to the payment of the liens by mechanics and materialmen, and that the Home Union is entitled to a reversal of the order denying it a new trial for the reasons indicated.

[12] The motion to dismiss this appeal is denied. The appeal was taken under the new or alternative method. The notice of appeal was filed with the clerk 31 days after judgment was filed. No other notice of appeal was required. Code Civ. Proc. § 941b; *Lang v. Lilley, etc., Co.*, 161 Cal. 295, 119 Pac. 100; *Fraser v. Sheldon*, 164 Cal. 165, 128 Pac. 33.

Wherefore the judgments and orders appealed from are reversed, and the causes remanded.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

169 Cal. 187

GOLDBERG, BOWEN & CO. v. DIMICK
et al. (S. F. 6381.)

(Supreme Court of California. Feb. 8, 1915.)

1. BILLS AND NOTES — 467 — ACTION — COMPLAINT — IDENTITY OF PLAINTIFF AND PAYEE — "INC."

A complaint in an action on notes payable to "Goldberg, Bowen & Co., Inc.," describing plaintiff as "Goldberg, Bowen & Co. (a Corporation)," not alleging their identity or any assignment of the notes to the plaintiff, but alleging that the notes were "made and delivered to the plaintiffs," was not demurrable for failure to identify plaintiff as the payee, since

the abbreviation "Inc." means Incorporated, and the name in the note was equivalent to the name in the complaint.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1480-1488, 1490, 1491; Dec. Dig. ☞467.]

For other definitions, see Words and Phrases, Second Series, Inc.]

2. PARTIES ☞67—MISNOMER.

Even if there is a variance between the name of the promisee in a contract and the name of the plaintiff, the rule is that where the parties can be ascertained, and the action is prosecuted in the name of the real party, an error in the name of the promisee, as described in the contract, is not a basis of defense.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 109; Dec. Dig. ☞67.]

3. TRIAL ☞45—OFFER OF PROOF—"OFFERED IN EVIDENCE."

In an action on notes, where each note was read in evidence, and where the judgment recited that "oral and documentary evidence was introduced and received in behalf of the plaintiff," the notes were "offered in evidence" as effectually as if the paper upon which it was written was formally tendered and received by the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 110-114; Dec. Dig. ☞45.]

4. CORPORATIONS ☞32—EVIDENCE—CORPORATE EXISTENCE.

In an action on notes, evidence held sufficient to show that plaintiff was a corporation existing under the laws of the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 106-118, 2086, 2087; Dec. Dig. ☞32.]

Department 2. Appeal from Superior Court, City and County of San Francisco; A. I. McSorley, Judge.

Action by Goldberg, Bowen & Co., a corporation, against J. K. Dimick and H. H. Blood. Judgment for plaintiff, and defendant Blood appeals. Affirmed.

Jesse Olney, of San Francisco, for appellant. Alfred J. Fritz, of San Francisco, for respondent.

MELVIN, J. Defendant has appealed from a judgment for the aggregate sum of \$3,394.08, with interest.

The action was based upon three promissory notes, each pleaded in a separate count. Each note is fully set forth in the complaint. Each, as pleaded, is made payable to "Goldberg, Bowen & Co., Inc.," and purports to be signed by J. K. Dimick, as principal, and H. H. Blood, as surety. Each count contains the allegation that Goldberg, Bowen & Co. was, at all times mentioned therein, a corporation duly organized and existing under the laws of the state of California. It is also averred in the complaint that each note was made and delivered to the plaintiff.

Defendant Blood demurred to each count for alleged want of facts, and that it could not be determined therefrom if demand had been made upon J. K. Dimick. The demurrers were overruled, and defendant Blood

answered, basing his denials upon information and belief.

When the case was called for trial neither defendant Blood nor his counsel appeared. Testimony was taken in their absence, by which it appeared that Goldberg, Bowen & Co. was a corporation existing under the laws of the state of California, but it did not appear when the incorporation had taken place. An employé of the corporation testified that it was still the owner and holder of each note, and the witness read each note into the record, where each appears in the exact words by which it is set forth in the complaint. It does not appear from the record that the plaintiff formally offered the notes themselves in evidence.

[1] Appellant insists that "Goldberg, Bowen & Co., Inc.," specified in the notes, is not the same entity as "Goldberg, Bowen & Co. (a Corporation)," the plaintiff, and that, as the complaint contains no allegation of their identity or of any assignment of the notes to the plaintiff, his demurrer for want of facts should have been sustained. There is no merit in this contention. The abbreviation "Inc." means "Incorporated"; therefore "Goldberg, Bowen & Co., Inc.," is equivalent to "Goldberg, Bowen & Co. (a Corporation)." This practical identity of names is aided by the averment that the notes were "made and delivered to the plaintiff." The demurrer to the complaint was properly overruled.

[2] It was shown that defendant Blood signed the notes in the office of the plaintiff, and that the said notes had never been out of plaintiff's possession. It was not denied that Mr. Blood did sign the notes, and that he had paid no part of the principal and further that only a small part of the interest had been paid, but upon the supposed variance between the name of the payee in the notes and that of plaintiff the defendant bases an argument that the record is insufficient to support the judgment. This contention is also without merit. There is, as we have seen, a practical identity of the name of the payee in the notes and the title of the plaintiff, and, even if there were a variation, the rule is that where the parties to a contract can be ascertained, and an action is prosecuted in the name of the real party, an error in the name of the promisee as described in the promise is not a proper basis of defense. *Charitable Ass'n in Middle Granville v. Baldwin*, 42 Mass. (1 Metc.) 365; *Medway Cotton Manufactory v. Adams*, 10 Mass. 360; *City of Lowell v. Morse*, 42 Mass. (1 Metc.) 475; *Commercial Bank v. French*, 38 Mass. (21 Pick.) 486, 32 Am. Dec. 280. It is true that, in the second and third of the above citations, the misnomers were aided by averment, but this fact does not detract from the principle and the rule involved.

[3] Appellant also attacks the judgment on the ground that none of the three notes on

which plaintiff relies was offered in evidence. On the contrary, each note was read in evidence, and the judgment recites that "oral and documentary evidence was introduced and received in behalf of the plaintiff." There can be no sort of doubt that the court had before it the notes upon which the signature of appellant duly appeared. A note read into the record is "offered in evidence" as effectually as if the paper upon which it is written were formally tendered and taken into the custody of the court.

[4] In his closing brief appellant for the first time asserts that the corporate quality of the plaintiff was not established. He says:

"In the second paragraph of the answer filed to each of the plaintiff's alleged three causes of action * * * the defendant specifically denies that Goldberg, Bowen & Co. were a corporation at the time of the alleged execution and delivery of each note. No proof was introduced at the trial to controvert this denial."

At the trial Mr. Denvir, cashier for the plaintiff, testified that Goldberg, Bowen & Co. was a corporation "existing under the laws of the state of California." He did not state how long the corporation had existed, but he produced the three notes here in suit, and another witness swore that he saw Mr. Blood sign those instruments in which "Goldberg, Bowen & Co." is described as incorporated by the abbreviation "Inc." This is sufficient proof.

From the foregoing discussion it follows that the judgment must be and accordingly it is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(169 Cal. 217)

O'CONNOR v. MENNIE. (S. F. 6162.)
(Supreme Court of California. Feb. 8, 1915.)

1. MASTER AND SERVANT ⇨258—ACTION FOR INJURY—PLEADING—CONSTRUCTION.

A complaint, in a servant's action for injury based solely on the "improper and negligent" construction of an elevator, was to be construed as meaning an improper and negligent condition of the elevator as it was at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. ⇨258.]

2. MASTER AND SERVANT ⇨265—ACTION FOR INJURY—BURDEN OF PROOF.

In a servant's action for injury from the alleged improper and negligent construction of an elevator used by his master, it was incumbent on the servant to make a prima facie case of the negligence averred.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. ⇨265.]

3. TRIAL ⇨165—MOTION FOR NONSUIT—EVIDENCE.

A motion for a nonsuit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. ⇨165.]

4. TRIAL ⇨139—TAKING CASE FROM JURY—EVIDENCE.

To justify the submission of any question of fact to a jury, the proof must raise more than a mere conjecture, and must be such that a rational mind can reasonably draw from it the conclusion that the alleged fact exists, and, where the evidence does not justify such an inference, the court may properly refuse to submit the question to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⇨139.]

5. NEGLIGENCE ⇨121—PRESUMPTIONS—"RES IPSA LOQUITUR."

"Res ipsa loquitur" means simply "the thing, or affair, speaks for itself," and, so speaking, authorizes the inference of negligence, in the absence of a showing to the contrary. When a thing causing injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those in charge use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from a want of care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. ⇨121.]

For other definitions, see Words and Phrases, First and Second Series, Res Ipsa Loquitur.]

6. MASTER AND SERVANT ⇨265—ACTION FOR INJURY—EVIDENCE—RES IPSA LOQUITUR.

The doctrine of res ipsa loquitur applies in a servant's action for injury; but, where the evidence as to the accident is such as to leave it purely a matter of conjecture whether the injury was due to a cause for which the master was liable, the doctrine is not applicable, and, under such circumstances, the mere happening of the accident is not prima facie evidence of negligence; but, where the evidence itself fairly warrants the inference that the accident was due to a cause for which the master was liable, the doctrine makes a case sufficient to require submission of his liability to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. ⇨265.]

7. MASTER AND SERVANT ⇨285—ACTION FOR INJURY—EVIDENCE AS TO NEGLIGENCE—MASTER'S KNOWLEDGE—RES IPSA LOQUITUR.

In an action by the servant of a contractor who was operating a temporary elevator furnished the contractor by a third party, for injury from the fall of the elevator by reason of negligent construction, evidence of the condition of the appliance, in the absence of explanation, and aided by the doctrine of res ipsa loquitur, held to warrant the inference that the accident was due to its defective construction so as to take the case to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. ⇨285.]

8. MASTER AND SERVANT ⇨265—ACTION FOR INJURY—BURDEN OF PROOF—MASTER'S KNOWLEDGE.

Plaintiff, to make defendant's alleged negligence a question for the jury, was not required to do anything more than show that the defect in the elevator was actually known to defendant or could have been discovered by reasonable care, where there was nothing in the evidence showing that the defect might not have been discovered by a reasonable examination.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. ⇨265.]

9. MASTER AND SERVANT 106—ACTION FOR INJURY — PLACES AND APPLIANCES FOR WORK.

In a servant's action for injury from the fall of a temporary elevator used in repair work, it was immaterial that the master did not construct it, but hired it and furnished it to his employés for their use, as he was in the control of it while it was being so used and was required to use reasonable care to see that it was not a defective or dangerous appliance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 193-198; Dec. Dig. 106.]

In Bank. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Michael O'Connor against Alexander Mennie. Judgment for defendant, and plaintiff appeals. Reversed.

Olney, Pringle & Mannon and J. R. Pringle, all of San Francisco, for appellants. Jesse W. Lillenthal, Albert Raymond, and Lillenthal, McKinstry & Raymond, all of San Francisco, for respondent.

ANGELLOTTI, C. J. Hearing granted in this court after decision by the District Court of Appeal for the first district.

This is an action brought to recover damages for personal injuries sustained by the plaintiff from the fall of an elevator which occurred during the making of certain repairs upon the City of Paris building in San Francisco.

The defendant was a contractor engaged in doing certain cement and plaster work in the course of said repairs, and while doing such work was using and operating an elevator which had been temporarily placed in said building by the Clinton Fireproofing Company in order to facilitate the work of making the repairs. Defendant was using this elevator in his own work under an arrangement with the fireproofing company, paying such company a stipulated sum per day for the use of the car and the engineer's time. This elevator was operated by means of a donkey engine in the basement, the engineer of which engine was directed by the defendant while he and his employés were making use of the elevator. The plaintiff was a hod carrier who had been in the employ of the defendant for a day or two before the accident occurred. On the day of the accident one Richard Downing was acting as foreman for the defendant and was directing the services of his employés in the prosecution of said work. A short while before the accident, Downing directed the plaintiff to go with him upon said elevator to the upper floor of the building, there to procure some barrels of cement which were to be placed upon the elevator and transported to a lower floor. The cement was placed upon the elevator. The plaintiff also got upon it with Downing and by his direction, and the latter gave the engineer the

signal to descend. While so descending, Downing signaled the engineer to stop at the required floor. In descending, whether without stopping or just upon stopping at the second floor, the evidence being in conflict on this point, the elevator fell to the basement. The plaintiff received the injuries complained of, was carried unconscious from the building, and was for several months confined in a hospital or at his home, and was thereby precluded from conducting any personal investigation as to the cause of the accident. When he so far recovered as to be able to make such investigation, both the elevator and all external evidences of the way the accident had occurred had disappeared.

Upon the trial plaintiff introduced evidence showing the facts hereinbefore stated. There was also evidence tending to show as follows: The elevator was an ordinary hoisting elevator for use in building purposes, placed temporarily in any building where its use was deemed expedient by its owners, the Clinton Fireproofing Company. The top of this appliance was a head-piece or cat-head, consisting of "a timber carrying two sheaves," over which the cable attached to the car ran. Apparently, the appliance was put in place in a building by attaching this head-piece in some way to the building itself. A very short time before the accident the engineer of the fireproofing company, who was still in their employ at the time of the trial, testified that "it may have been one day, or it may have been three or four, a very short time before," this head-piece had been lowered from a former position to the place where it was at the time the elevator fell. Almost immediately after the accident, and before anything had been done to change the conditions, both the engineer and one Nelson made an examination as to the situation. The engineer testified that he found that "the head-piece was scattered pretty much all over the building," and, again, "that was scattered all over the building, that part of it." Asked as to whether he found any portion of the head-piece broken, he said that he "found it all broken apart, it was all separated, and there was a cap of one of the boxes broken." He said that he could not say that he found any of the pieces of wood that composed the head-piece broken in two or cracked, but that there were timbers broken that were used in holding the head-piece in place. He found "a bunch of broken timbers." Again, he testified that at the top he found "some timbers there that were broken in two, or cut in two by the line." Nelson testified:

"I found the pieces that carried the two wheels or pulleys that the cable ran over were broken. There were some of them broken, and some of the boxes where the ex gones were pulled out of the sockets, and * * * two of the iron boxes came down into the basement.

The whole business was pulled apart and broken, some of it loose."

There was also evidence to the effect that once or twice previously the same load had been carried on the elevator, but it does not affirmatively appear that this was prior to the lowering of the head-piece.

In his complaint herein plaintiff averred:

"That the breaking and falling of said elevator was due to the improper and negligent construction thereof, and that said defendant had knowledge of said negligent and improper construction and that the plaintiff had no knowledge thereof."

There was no other proof than that above stated as to the cause of the falling of the elevator, or in support of the averment that the breaking and falling of the elevator was due to the improper and negligent construction thereof, or that defendant had knowledge of said negligent and improper construction, or should have had such knowledge. Upon the grounds, among others, that there was not sufficient evidence to make a prima facie case in these regards, defendant moved for a nonsuit, and the lower court granted such motion. Judgment was thereupon given that plaintiff take nothing, and we have here an appeal by plaintiff from such judgment.

[1, 2] It is to be borne in mind that the cause of action stated in the complaint is based solely on the alleged "improper and negligent construction" of the elevator, and that no other negligence on the part of defendant, if any, such for instance as negligence in the operation of the elevator, is available to plaintiff in this action, as the pleadings now are. We have no doubt, however, but that the specification of improper and negligent construction must be construed as meaning an improper and negligent condition of the elevator as it was at the time of the accident—its unfitness at that time for the purposes for which it was intended and was being used. It was incumbent on plaintiff to make a prima facie case of negligence in the respect averred, and, if he did not present evidence from which the jury could legitimately infer negligence on defendant's part in this respect, the motion for a nonsuit was properly granted.

[3] Of course, as was said in *Hoff v. Los Angeles, etc., Co.*, 158 Cal. 596, 599, 112 Pac. 53, 54:

"The motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant."

[4] It is also true, however, as said in *Janin v. London & S. F. Bank*, 92 Cal. 14, 27, 27 Pac. 1100, 1102 (14 L. R. A. 320, 27 Am. St. Rep. 82):

"In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and, when the evidence

is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury."

In the absence of further affirmative proof as to the cause of the accident and the negligence of the defendant, plaintiff relies upon the application to his case of the doctrine of *res ipsa loquitur*, claiming that applying this doctrine the evidence was sufficient to create a presumption of defendant's negligence in the respect averred—to make a prima facie case in such respect, and thus to put defendant to his proof.

[5] As was said by the District Court of Appeal, the maxim *res ipsa loquitur* translated means simply "the thing, or affair, speaks for itself," and, so speaking, authorizes the inference of negligence in the absence of a showing to the contrary. As applied to cases of alleged negligence, the rule, as stated in *Judson v. Giant Powder Co.*, 107 Cal. 549, 556, 40 Pac. 1020, 1021 (29 L. R. A. 718, 48 Am. St. Rep. 146), quoting from *Shearman & Redfield on Negligence*, is:

"When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

See, also, *Kahn v. Triest-Rosenburg Cap Co.*, 139 Cal. 341, 344, 73 Pac. 164.

[6] There can be no doubt, in view of the decisions in this state, as to the applicability of this doctrine in actions for negligence wherever the circumstances shown justify its application, whether the action be one by a passenger against a common carrier, by a person bearing no relation to the one managing the thing causing the accident, or by an employé against an employer. See *Judson v. Giant Powder Co.*, supra. Of course, to justify its application in any case, the circumstances of the accident must be such as, unexplained, afford reasonable evidence of want of care in a respect for which the defendant is liable in the particular action. For this reason the rule that the accident speaks for itself and prima facie shows negligence has been held inapplicable in many actions by an employé against his employer to recover damages for injuries sustained by the employé in the course of his employment. Under the law generally applicable to the relation of employer and employé, there were certain cases in which the employer was not liable for injuries received by the employé in the course of his employment, such as, for instance, where the injury was produced by a cause as to which the employé had assumed the risk or was caused by the negligence of a fellow servant. It may safely be said that the authorities generally support the conclusion that, where the evidence as to the accident was such as to leave it purely a matter of mere surmise or conjecture whether the injury was due to

a cause for which the employer was liable, the doctrine is not applicable. The burden of proof is on the employé to show actionable negligence, and under such circumstances the mere happening of the accident is not prima facie evidence of such negligence. On this point it is sufficient to cite such California cases as *Madden v. Occidental, etc., S. S. Co.*, 86 Cal. 445, 25 Pac. 5; *Sappenfield v. Main St., etc., Co.*, 91 Cal. 48, 27 Pac. 590; *Thompson v. California Construction Co.*, 148 Cal. 35, 82 Pac. 367; and *Campbell v. Southern Pacific Co.*, 21 Cal. App. 175, 131 Pac. 80. But where the evidence is of such a nature as to fairly warrant the inference as a fact, in the absence of explanation, that the accident was due to a cause for which the employer is liable to his employé, the doctrine is applicable, and a sufficient case is made to require submission of the question of the employer's liability to the jury.

[7] So here, if the evidence was of such a nature as, in the absence of explanation, to fairly warrant the inference that the accident to this elevator was due to the improper and defective construction, construing the allegation of the complaint in this behalf as we have construed it, and was such an accident as in the ordinary course of things does not happen if those who have the management use proper care, plaintiff made a sufficient case to preclude the granting of a nonsuit.

It seems to us very clear that this was the condition of the evidence when plaintiff rested his case. The evidence as to the condition of things at the top of the shaft and of the head-piece immediately after the accident, in connection with the evidence as to the lowering of the head-piece only a day or so before, renders it an entirely reasonable inference that the sudden fall of the elevator was due to the giving way, under the strain of the load, of the supports of the head-piece. The evidence of the engineer, whose interest, if any, would naturally be with the defendant, tended to show that, while attachments of the head-piece had given way in the accident and that the thing was "all broken apart," "separated," none of the pieces of wood that composed the head-piece had been broken in two or cracked, but that timbers holding the head-piece in place were broken in two. The head-piece itself had apparently been wrenched away from its supports, and had fallen to the floor. At least, the evidence was such as to make this a reasonable conclusion. It would be entirely reasonable to conclude, upon this evidence, in view of the established fact that the appliance had always previously proved sufficient for the purposes for which it was used, that the defect was in the supports at the place to which it had been recently lowered, or the manner of its attachment to those supports. The conditions were not such, in our judg-

ment, as to indicate that the falling of the elevator was due to any negligence on the part of the engineer. We do not well see how the falling of the elevator could have produced the conditions existing at the top of the shaft immediately after the accident. In view of the use that had previously been made of the elevator, it is not fair to assume that there was any negligence in placing on it as large a load as that with which it started from the fourth floor. Really, in view of the circumstances shown, no adequate cause for the accident appeared other than the giving or yielding of the supports of the head-piece. Such a thing does not happen in the ordinary course of things if those who have the management use proper care.

[8] We are of the opinion that, in order to make a sufficient case for the jury, it was not incumbent on plaintiff, under the circumstances appearing, to do anything further in the way of showing that the defect in the appliance was actually known to the defendant, or would have been discovered upon the exercise of reasonable care to ascertain as to its condition. There was nothing in the evidence showing that the defect was such that it would not have been discovered, had such an examination of the structure been made by defendant as reasonable care for the safety of his employés demanded. The evidence indicates that the plaintiff could have known nothing before the accident about the condition of the elevator in so far as its safety was concerned, and shows that by reason of his injuries he was unable to make any investigation as to the cause of the accident until the elevator and all external evidence of the way the accident had occurred had disappeared. It is reasonable to assume that the defendant could have ascertained and probably did ascertain the cause of the accident, and certainly it was within his knowledge whether or not he had used due care for the observance of defects in the appliance furnished for the use of his employés. There are numerous authorities to the effect that under such circumstances it is enough for the employé to show that the accident was due to a defect in the appliance furnished the employé, without showing the precise nature of the defect, in this respect, and that such a showing warrants the inference that, if the defendant does not choose to give an explanation, the real cause was negligence on his part. This conclusion does not violate the well-settled rule that the party who alleged negligence must prove it, but simply means that such proof, under the circumstances stated, fairly warrants an inference of negligence, in the absence of explanation or evidence of reasonable care on the part of a defendant having superior knowledge as to the facts. In the case of *Penson v. Island Empire, etc., Co.*, 73 Wash. 338, 132 Pac. 39, this question was discussed. In that case a scaffold on which the

plaintiff was standing while painting a roof fell, the fall being due to the breaking of a 2x4 support, and it did not appear whether the defect in the timber was a patent or a latent defect. The same contention was there made as here, and the court, after a full discussion, concluded as follows:

"The prima facie case made by the character of the accident itself was not met in any way. The unexplained facts speak negligence."

The theory of the decisions in accord with this view is simply that the circumstances appearing are such that the jury may reasonably infer therefrom, in the absence of explanation, that the employer was guilty of negligence in the matter. There is ample authority for the view thus expressed, and it appears to us to be in accord with reason. While there are undoubtedly cases apparently opposed to this view, we know of no decision in this state that is clearly to the contrary. In *Madden v. Occidental, etc., Co.*, supra, where the cause of the death of the employé was the breaking of a rope sling, it was said that it might be conceded that negligence of the employer might be inferred if it had been shown that the sling was being properly used by the coemployés of the deceased, and in the ordinary way. In *Sappenfield v. Main St., etc., Co.*, supra, the court was discussing an instruction given to the jury, as to the duty of the employer, which was erroneous in declaring that the obligation upon the employer requires him to furnish such appliances "as combine the greatest safety with practical use." Incidentally it was said in the course of the discussion that:

"The mere fact of the injury or accident does not raise a presumption of negligence, and * * * it must be shown that the master knew or had notice that the appliance was defective."

This, however, should not be taken as meaning that the circumstances of the accident, unexplained, may not be sufficient to reasonably warrant an inference that the employer knew or should have known of the defect. In *Thompson v. California Construction Co.*, supra, it was held that, under the circumstances of that case, "the mere happening of the accident is not prima facie evidence of neglect" on the part of the employer, and that "that rule applies only in cases where, in the ordinary course of things, due care being used, such accidents do not happen." There the plaintiff was employed in a quarry, in which the conditions of danger constantly changed as the work progressed, and was injured by the sliding of a rock upon him. A single expression in the opinion of the department deciding the case of *Brymer v. Southern Pacific Co.*, 90 Cal. 496, 27 Pac. 371, probably comes nearer to supporting a contrary view than any other California case. It was said:

"That the mere fact that the chain broke would not authorize the inference that the defendant had failed to exercise reasonable care in the selection of the appliances used."

The question presented on that appeal was one simply of the correctness of an instruction that "the mere fact that an accident occurred by which the plaintiff was injured does not fix the liability, or even raise a presumption that the defendant was at fault in providing machinery," etc., on account of the refusal to give which a new trial had been granted by the trial court. As an abstract proposition of the law applicable to the relation of employer and employé, this instruction was admittedly correct, and it may be conceded that the facts of that case justified even the expression of the court above set forth. In *Higgins v. Williams*, 114 Cal. 176, 45 Pac. 1041, the same department, distinguishing the case, said that in the *Brymer Case* the defect "was latent and concealed." In the case at bar we have a very different situation from that presented by the mere breaking of a chain. We have a case where it may fairly be inferred that the supports and attachments by which the head-piece was to be kept in place were insufficient—that when the head-piece was lowered shortly before the accident, it was not attached in such a place and in such a manner as would render it a safe appliance for the purposes for which it was intended. There is nothing to show precisely what the defect was. While it may be easy for the defendant to meet and rebut the case made by plaintiff, we think that, in view of what we have said, the showing in this respect was sufficient to preclude the granting of a nonsuit.

[9] We have no doubt that it is entirely immaterial that defendant did not "construct" the elevator, or put the head-piece in the place where it was at the time of the accident. We have already referred to the matter of the proper construction to be given to the allegation of the complaint as to the cause of the accident, viz., "the negligent and improper construction" of the elevator. Defendant had procured from the owner the use of the elevator for the purposes of his own work, and furnished it to his employés for their use in such work. He was in the management and control of the same while it was being so used. It was incumbent on him, so far as his employés were concerned, to use reasonable care to see that it was not a defective and dangerous appliance for them to use in his work. It is entirely sufficient, in so far as plaintiff's case is concerned, that defendant was using this appliance as he did. See *Higgins v. Williams*, 114 Cal. 183, 45 Pac. 1041. The claim of learned counsel for defendant is based on too narrow a construction of the allegations in the complaint.

We see no other matter in the briefs that requires notice. We are of the opinion that the lower court erred in granting the motion for a nonsuit.

The judgment is reversed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

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RAY v. BORGFELDT et al. (S. F. 6008.)
(Supreme Court of California. Feb. 10, 1915.)

1. PRINCIPAL AND SURETY ⇨33—SURETIES—
CONSIDERATION.

A loan of money to the maker of a note is adequate consideration for an agreement of his sureties, signing as comakers, that the note shall be paid.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 65, 66; Dec. Dig. ⇨33.]

2. PAYMENT ⇨38 — APPLICATION OF PAYMENTS—STATUTORY PROVISIONS.

Civ. Code, § 1479, providing that, where a debtor under several obligations does an act equally applicable to two or more of the obligations, the performance may be applied to the extinction of any particular obligation, as manifested by him to the creditor, or, when no such application is made, the creditor may apply it toward the extinction of any obligation, contemplates that a creditor at the time of a payment must have knowledge, obtained from the debtor, of the intention of the debtor that the payment shall be applied to a particular obligation, and that the time as to date of payment at which knowledge is so obtained is immaterial, and, where an appropriation of a payment by a debtor has once been made known to the creditor, the intention of the debtor is manifest to the creditor, who, when payments are made, must apply them accordingly.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 99-103, 128; Dec. Dig. ⇨38.]

3. PAYMENT ⇨38 — APPLICATION OF PAYMENTS—AGREEMENTS.

A debtor liable under several obligations to the same creditor may at the time of making a payment direct an application different from his original direction, but the original direction governs in the absence of a new direction.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 99-103, 128; Dec. Dig. ⇨38.]

4. PAYMENT ⇨38 — APPLICATION OF PAYMENTS—AGREEMENTS.

A debtor's intention that a payment shall be credited on a particular obligation need not be expressed to the creditor in writing or in any technical or formal words, but it is sufficient that the intention is manifest, and that the creditor learns thereof, and notice of application may be shown by parol, whether made at the time of payment or at the time of the creation of the obligation.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 99-103, 128; Dec. Dig. ⇨38.]

5. PAYMENT ⇨38 — APPLICATION OF PAYMENTS—AGREEMENTS.

An agreement made contemporaneously with the execution of notes not indicating order of payment as to other debts due from the maker, that payments shall be applied to the extinguishment of the notes, and not in satisfaction of the other obligations, may be proved by parol, and a failure of the payee to apply payments according to the oral agreement, is a violation of the rights of the sureties on the note given by Civ. Code, § 1479, defining the right of application of payments.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 99-103, 128; Dec. Dig. ⇨38.]

6. PAYMENT ⇨75 — APPLICATION OF PAYMENTS—PAROL AGREEMENTS—EVIDENCE.

In an action on a note, evidence held to show that a contemporaneous parol agreement for the application of any payment by the principal maker was made between the payee and the principal maker and his sureties signing as comakers.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 239; Dec. Dig. ⇨75.]

7. CORPORATIONS ⇨411—OFFICERS—POWERS

The president and manager of a corporation, who attended to and managed its affairs before and after it became financially embarrassed, has authority to act for and bind it by an oral agreement governing the application of payments by the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1650-1653; Dec. Dig. ⇨411.]

8. WITNESSES ⇨237 — EXAMINATION — ASSUMPTION OF FACT.

A question put to a witness which assumes the truth of the fact to the proof of which the question is addressed is for that reason improper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 829-832; Dec. Dig. ⇨237.]

9. APPEAL AND ERROR ⇨882 — HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.

A party who, on the cross-examination of a witness, brings out a fact, or who without objection permits a juror to bring out the fact, cannot complain of questions erroneously assuming the truth of the fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. ⇨882.]

10. APPEAL AND ERROR ⇨854—QUESTIONS REVIEWABLE—RULINGS ON EVIDENCE.

Where the court, admitting proper evidence, gave an erroneous reason for its ruling, the party objecting to the evidence could not complain on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. ⇨854.]

11. PAYMENT ⇨77 — APPLICATION — AGREEMENTS—EVIDENCE—INSTRUCTIONS.

Where, in an action on a note defended by sureties signing as comakers, it was admitted that the payee had loaned money to the principal maker, that the sureties signed as comakers, and that enough money had been collected from the principal maker to pay the note if applied according to the wishes of the sureties, and the sole issue was whether there had been a direction for the payments so as to satisfy the note, an instruction that, if at the time of the execution of the note, "and as the sole consideration therefor," there was an oral agreement that moneys coming from the principal maker should be applied first to the note, and there subsequently came into the hands of the payee a sum to pay the note if so applied, the verdict should be for the sureties, was not objectionable because confining the jury to the oral agreement as the sole consideration for the obligation of the sureties, and, by eliminating the quoted words, the instruction properly submitted the issue.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 249; Dec. Dig. ⇨77.]

12. PAYMENT ⇨77 — APPLICATION — AGREEMENTS—EVIDENCE—INSTRUCTIONS.

Where, in an action on a note defended by sureties signing as makers on the theory of the payee's failure to apply payments made by the principal maker in satisfaction of the note as required by a contemporaneous parol agreement, all of the proof of an agreement was directed to an agreement between the payee and all the other parties to the note as to the order of payment, and there was no evidence of any agreement between the payee and the sureties alone, an instruction referring to an agreement between the payee and "defendants," the sureties, was not misleading because of the use of the word "defendants."

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 249; Dec. Dig. ⇨77.]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by George R. Ray against Christian J. Borgfeldt and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Charles W. Slack, of San Francisco, for appellant. E. A. O'Brien, of San Francisco, for respondents.

MELVIN, J. This case was originally decided on appeal by the District Court of Appeal of the Third District and the following opinion, prepared by Mr. Justice Hart, was filed:

"This action, brought to recover on two promissory notes, was tried before a jury, and a verdict returned in favor of the defendants. The plaintiff has appealed from the judgment thereupon entered in favor of the defendants and from the order denying his motion for a new trial.

"The notes in suit were made in favor of the Banca Svizzera Americana of Locarno (commonly called and known as the Swiss-American Bank), by F. Cavagnaro Company, C. J. Borgfeldt & Co., and Hilbert Mercantile Company, and were assigned by said bank to the plaintiff. One of the notes was for the sum of \$500, is dated January 15, 1906, and made payable four months after its date. The other is for the sum of \$4,884.18, is dated January 30, 1906, and payable four months after its date. The notes were in the ordinary form and the makers thereof bound themselves thereon both jointly and severally.

"The notes in controversy were executed under the following circumstances, quoting from an admittedly correct statement of the facts in the opening brief of counsel for the plaintiff:

"The F. Cavagnaro Company, one of the makers of the notes, in the month of January, 1906, and before the execution of the notes, was insolvent. An agreement was entered into by and between the F. Cavagnaro Company and its creditors, among whom was the Banca Svizzera Americana of Locarno, commonly called the Swiss-American Bank, by the terms of which the creditors agreed to accept 35 per cent. of their respective claims in cash in full satisfaction. The F. Cavagnaro Company, however, lacked \$5,384.18 of having enough money to carry out the agreement. Application was made to the Swiss-American Bank for a loan of that sum, the F. Cavagnaro Company offering its notes in return. The bank, however, refused to loan the money on the notes of the F. Cavagnaro Company alone, but demanded that financially reliable persons be procured to go on the notes with the F. Cavagnaro Company. Thereupon the F. Cavagnaro Company, the Hilbert Mercantile Company, and the defendants executed, as makers, and delivered to the bank, the notes, and the bank paid \$5,384.18 in cash to the F. Cavagnaro Company, which the latter applied in settling the claims of its creditors in accordance with its agreement. The defendants at the time the notes were given were partners doing business under the firm name of 'C. J. Borgfeldt & Co.'

"The complaint contains allegations showing the making and delivering of the notes by the defendants and the other makers to the bank and the assignment of the notes to the plaintiff. After deducting all part payments made by various makers at various times, the amount still due is alleged to be \$3,891.86, and interest."

"The defendants admit the due execution of the notes, but claim that they were paid in full. This claim is based upon an alleged oral agreement had between the parties contemporaneously with the execution of the notes, whereby, so

it is insisted, the bank agreed to apply to the payment of said notes, after first satisfying a certain note for \$4,780.94, mentioned in the answer, all moneys received by it from Cavagnaro & Co. in preference to the satisfaction, by means of the moneys so received, of other indebtedness due said bank from said Cavagnaro & Co. The oral agreement thus referred to was pleaded in the answer as a special defense, and, as thus the facts relative to said agreement are fully and clearly stated, and as said agreement constitutes the only ground upon which the defendants seek to avoid the force of the obligations of the notes, it is conceived that a clearer apprehension and understanding of the point thus presented may be obtained by a reproduction here in its entirety of the special defense as thus set up: 'And for a further and separate defense to the first count in plaintiff's complaint contained, defendants allege that at the time of the execution and delivery of the note sued upon in the first count of plaintiff's complaint herein, the plaintiff's assignor agreed that any and all money coming into their hands from F. Cavagnaro Company would be applied to the satisfaction of the said note sued upon in the first count of plaintiff's complaint herein, and the said note sued upon in the second count of plaintiff's complaint herein, after the satisfaction and payment of a certain note in the sum of \$4,780.94, which was then due and owing from the said F. Cavagnaro Company to the said plaintiff's assignor, and the said plaintiff's assignor at that time agreed that the payment of a certain note in the sum of \$8,750 due and owing then from the said F. Cavagnaro Company would be postponed until the payment of the said note sued upon in the first count of plaintiff's complaint, and the said note sued upon in the second count of plaintiff's complaint herein; that subsequent to the execution of the said note sued upon in the first count of plaintiff's complaint herein, and prior to the commencement of this suit, the F. Cavagnaro Company deposited with and delivered over to the plaintiff's assignor certain insurance policies covering the property of the said F. Cavagnaro Company, aggregating in amount, the plaintiff is informed and believes, and therefore alleges, the sum of \$16,000; that subsequently, to wit, on or about the 18th day of April, 1906, the property covered by the said insurance policies delivered to plaintiff's assignor as aforesaid was destroyed by fire, and defendants are informed and believe, and therefore allege, that the plaintiff's assignor collected and received from the various insurance companies represented by said policies, in payment of the losses sustained upon the property covered by said insurance policies, an amount aggregating the sum of \$14,000; that the amount thus obtained by the plaintiff's assignor as aforesaid, if applied to the payment of the indebtedness of the said F. Cavagnaro Company to the said plaintiff's assignor in accordance with the agreement as aforesaid to apply all money received from F. Cavagnaro Company to the payment of the notes sued upon in counts 1 and 2 of plaintiff's complaint, after the payment of the one \$4,780.94 note then due plaintiff's assignor, was ample and sufficient to satisfy the indebtedness due on the note sued upon in the first count of plaintiff's complaint herein.'

"It was admitted by the plaintiff that the bank realized from the sale of certain goods belonging to Cavagnaro & Co. the sum of \$408.75, and received from the insurance policies referred to in the answer the sum of \$12,425. The undisputed evidence shows that the money so received was applied by the bank to the satisfaction of two notes of the F. Cavagnaro Company which are not involved in this action, and that, consequently, no part of said money was applied to the payment of either of the notes in controversy.

"The evidence as to the making of the oral agreement discloses that the parties making said

agreement were a representative of the defendants, a representative of the Hilbert Mercantile Company, Elwin W. Gates, president and manager of the Cavagnaro Company, and the plaintiff's assignor, the latter having been represented by Mr. Tognazzi, its manager. Thereafter, Mr. Gates had several conversations with a Mr. Brunner, also an official of the bank, having authority to bind it, and to the latter Gates stated that it was the understanding of all the parties and the desire of the makers of the notes that all moneys received by the bank from Cavagnaro & Co. should be applied to the liquidation of the notes in suit, after first so paying the note mentioned in the answer as evidencing an indebtedness to the bank of \$4,780.94, which note, as seen, is not involved in this action, so far as the purpose of it is concerned. The evidence shows that the defendants, before signing the notes, declared to the manager of the bank, on the occasion of the making of the oral agreement, that they would refuse to become sureties on the notes unless the proposition there suggested as to the order of the payment of the notes in dispute was assented to by the bank, and that thereupon the manager of the latter agreed to said proposition. It is in evidence, and, indeed, admitted, that the money received by the bank on account of the insurance policies was first applied to the payment of the \$4,780.94 note, and the balance remaining applied to the extinction of obligations due the bank from Cavagnaro & Co. other than those evidenced by the notes declared upon.

"The plaintiff produced proof to sustain his claim that no such oral agreement as the one upon which the defendants wholly rest their resistance to recovery upon the notes in controversy was made or entered into; but, manifestly, the result of this denial of the oral agreement is only to create a conflict in the evidence upon that question, and it follows, therefore, that, as to the fact of the making of the agreement, the conclusion of the jury is conclusive.

"The defendants, in confirmation of the special defense set up and relied upon by them, contend that, agreeably to the terms of the oral agreement, so much of the money paid to the bank on the insurance policies as was remaining after the satisfaction therewith of the \$4,780.94 note ought to have been credited upon the notes in suit or applied in payment thereof. The contention is, obviously, the offspring of the theory that the oral agreement referred to amounted, within the contemplation of section 1479 of the Civil Code, to the manifestation to the bank of an intention or desire of the makers of the notes that the money so received should be applied to the extinction of those particular obligations. It is further contended by the defendants that, since they became sureties upon the notes upon the agreement with the bank that the latter would apply the money received by it from Cavagnaro & Co. to the payment of said notes in preference to the settlement with such money of any other indebtedness of Cavagnaro & Co. to it, excepting the note for \$4,780.94, there was, by reason of the violation of said agreement by the bank, a failure of consideration for the notes in suit.

"The plaintiff, on the other hand, insists that, to have entitled the makers of the notes in dispute to the benefit of the application of said money to the payment of said notes, by virtue of the provisions of section 1479, supra, it was the duty of the makers of the notes, under the terms of said section, to have made known to the bank, at the very time the money was received by or paid to, the bank, their intention or desire in that respect, and that there is no evidence of any such intention or desire having been manifested to the bank by the debtors at that time. It is therefore, argued that the effect of the oral agreement, if enforced, will be to vary or modify the terms of a contract in writing. The further point is made by the plaintiff that the oral agreement referred to,

if made at all, was not between the principal debtor, Cavagnaro & Co., and the creditor, the bank, but between the sureties and the bank, and that such an agreement so made could not in any event, within the meaning of section 1479, supra, be treated as a manifestation by the debtor to the bank of an intention or desire that the money received by the bank from the insurance companies should be applied to any particular obligation Cavagnaro & Co. were under to the bank.

"The points thus stated and urged here are tested by exceptions reserved at the trial to the rulings of the court admitting evidence of the parol agreement referred to.

[1] "The argument by counsel for the defendants that the failure of the bank to apply the money received by it on the insurance policies to the payment of the notes in suit constitutes a failure of the consideration moving the defendants to become sureties upon said notes has made no impression upon us. The defendants and the Hilbert Mercantile Company appear upon the face of the instrument as joint makers with Cavagnaro & Co. The evidence, however, shows them to be indorsers or sureties. In any event, the loan of the money was a valuable and adequate consideration for the agreement by the sureties that the notes would be paid. *Lompoc Valley Bank v. Stephenson*, 156 Cal. 350, 104 Pac. 449. * * *

[2] "We are of the opinion, however, that the testimony received by the court in proof of the oral agreement was properly admitted as in proof of the direction by the makers of the notes in suit to apply any moneys received by the bank from Cavagnaro & Co. to the extinction of their obligations to the bank as evidenced by said notes.

"Section 1479 of the Civil Code reads, in part, as follows:

"Where a debtor, under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:

"1. If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, be manifested to the creditor, it must be so applied.

"2. If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion; and an application once made by the creditor cannot be rescinded without the consent of (the) debtor."

"We are not inclined to accept the view that, in order to comply with and thus receive the benefit of the provisions of the foregoing section, the debtor, under several obligations to the creditor, must necessarily, at the precise time of performance, direct the application of any payments made by him toward the extinction of a particular obligation. We are of the opinion, rather, that, in sound reason, all that the statute requires or contemplates is that the creditor, at the time of performance or payment, must be in possession of knowledge, obtained from the debtor, of the intention or desire of the latter that the payment shall be applied to the satisfaction of a particular obligation, and that the time, in respect of the date of performance or payment, at which such knowledge is so obtained—that is to say, whether it be at the precise time of performance or at some prior time—is wholly immaterial. In other words, where the appropriation of payments by the debtor has once been made known to the cred-

itor, the intention or desire of the former as to such appropriation is thus manifested to the creditor when the payments are actually made, and a repetition of such manifestation is not necessary.

[3] "It is, no doubt, true that the debtor, at the time of performance, may make a different direction as to the application of payments, but, unless he does so, the original direction must govern the creditor in the application of the moneys paid. This view of the section under consideration harmonizes with the expressions of our Supreme Court upon the subject in some early cases.

"In *Wendt v. Ross*, 33 Cal. 650, 657, the court, dealing with a statute whose provisions were substantially the same as those of section 1479, said: 'The debtor may, at or before the time of payment, direct the application of the payment, and, if the creditor receives the money, he is bound by the direction. If the debtor omits to do so, the creditor may, generally, apply it to any debt he chooses; and, when the application is made, he is bound by it, and cannot, without the consent of the other party, change the application to another debt'—citing 1 Am. Lead. Cases, 268; notes to *Mayor*, etc., v. *Patton* and *Field v. Holland*.

"In *Clarke v. Scott*, 45 Cal. 86, 88, the trial court refused to receive evidence in proof of an oral agreement, made concurrently with the execution of the notes upon which the action was brought, whereby it was agreed or understood between the sureties on the notes in suit and the payee that any payments made to the creditor by the principal obligor should be applied to the payment of said notes. On appeal the Supreme Court held that the evidence was admissible, saying: 'If it be a fact that at the time the defendants J. M. Scott & Co., as sureties of the other defendant, S. W. Scott, signed the note in suit, it was then agreed or understood between all the parties that such payment as the defendant S. W. Scott might thereafter make should be applied toward the satisfaction of that particular note, it would be a circumstance tending, in some degree at least, to establish by presumption that the payments, when they were subsequently actually made by the defendant S. W. Scott, without any intermediate change of his first intention, were to be so applied; and in this view we think that the proffered evidence ought to have been admitted.' See *Eppinger v. Kendrick*, 114 Cal. 620, 625, 46 Pac. 613; 2 Am. & Eng. Ency. of Law, p. 444.

[4] "Nor need the communication to the creditor by the debtor of the latter's intention or desire to apply the payments toward the extinction of a particular obligation be expressed in writing, or in any technical or formal words, or delivered in any particular manner. 'It will be sufficient that the intention is manifest, and that it comes to the knowledge of the other party.' Am. & Eng. Ency. of Law, p. 448. It therefore necessarily follows that the communication may be shown by parol, whether made at the time of performance or at the time when the obligation as to which the direction was intended to operate was created and its terms committed to writing, or at any time between the date of the making of the obligation and that of payments to the payee.

[5] "It is very true, as counsel for the appellant declares, that the terms of a written instrument cannot be altered or varied by a parol agreement. This is, of course, an elementary rule. But, obviously, the effect of testimony disclosing a direction by a debtor to his creditor to apply payments to the extinction of a particular obligation of several the former is under to the latter is not to modify or vary in the slightest degree the terms of the writing. In the case at bar the defendants do not deny the due execution of the notes in suit or challenge the legal stability thereof in any respect. In-

deed, they expressly admit the due execution of the notes; that they signed the same, and thus became legally bound to the obligations thereof. In legal effect, their resistance to recovery upon the notes is wholly founded upon the claim that sufficient payments of money had been made by Cavagnaro & Co. to the bank to satisfy the notes, and that the bank had wrongfully refused and failed to credit the notes with such payments. Their position is, in other words, no different in principle from the case where the maker of a promissory note has made payments on such note, thereby reducing the amount due thereon, which payments, however, had not been credited on the note by the payee. In such case, of course, no one will dispute the maker's right to resist payment of the original amount of the note, or his right to show such payments by parol testimony, nor will it be claimed that the effect of thus showing such payments would be to alter or vary the terms of the note. At any rate, our conclusion is that, if the evidence discloses that, contemporaneously with the execution of the notes, the makers thereof manifested or communicated to the bank their desire that the moneys received by the bank from Cavagnaro & Co. should be applied as indicated, it was the duty of the bank to so apply such moneys; that its failure to do so under the stated circumstances involved a violation of the rights of the defendants under the terms of section 1479 of the Civil Code; and that, since the notes themselves do not indicate the order of their payment with respect to other like obligations which Cavagnaro & Co. were under to the bank, it was competent to show such direction or communication by parol testimony. *Hagood v. Swords*, 2 Bailey (S. C.) 305; *Grogan et al. v. Valley Trading Co.*, 30 Mont. 229, 76 Pac. 211, 213; *Safer v. Lambert*, 111 Ill. App. 410, 412; *Frutig v. Trafton*, 2 Cal. App. 47, 48, 83 Pac. 70.

"That the so-called oral agreement in question must be held to have involved a direction by the debtor to the bank to apply the moneys received by it from Cavagnaro & Co. in the manner and order explained, cannot be doubted.

[6] "The contention of the plaintiff that no evidence was introduced disclosing that the principal debtor, Cavagnaro & Co., took any part in the making of the oral agreement or the direction that said moneys should be applied as stated is not borne out by the record. The witness Gates testified that he was president and manager of said corporation at the time it became insolvent, in October, 1905; that he attended to all its affairs at that time, and also in the year 1906; that he was present as a representative of Cavagnaro & Co. when the oral agreement was had with the bank's manager, Mr. Tognazzini, and participated therein; and that subsequently he apprised Mr. Brunner, an official of the bank, who, it was admitted, had authority to act for the plaintiff, of the understanding that the moneys paid by Cavagnaro & Co. should be applied upon the notes in suit, after the note for \$4,780.94 was satisfied.

[7] "It is true that it does not affirmatively appear what the precise scope or limitations of Gates' authority were as president and manager of Cavagnaro & Co., but we have a right to infer, from the fact that he was the corporation's president and manager, and from the fact that he attended to and managed all its affairs both before and after it became embarrassed from financial difficulties, that he possessed full authority to act for and bind it on the occasion of the making of the oral agreement, and that his election, manifested to the bank, at the time referred to, as to the manner and order of the application of the moneys paid by Cavagnaro & Co. to the bank, was that of the latter; it being clear that said transaction involved an act within the ordinary or usual course of business of said corporation. *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49;

Carpy v. Dowdell et al., 115 Cal. 677, 47 Pac. 695; Waterman on Corporations, § 30; Preston v. Central Cal. Irr. Co., 11 Cal. App. 190, 104 Pac. 462; Stevens v. Selma Fruit Company, 18 Cal. App. 242, 251, 123 Pac. 212.

[8, 9] "It is next claimed that certain testimony was erroneously permitted to go to the jury, and that its effect was to prejudice the jury against the plaintiff. The testimony of which complaint is thus made and which was brought out, over the objection of the plaintiff, in the examination of the defendants' witness Reynolds, who was connected with Hilbert Mercantile Company at the time of the transactions concerned here, tended to show, so it is urged, that the bank, although entering into the agreement with the other creditors of Cavagnaro & Co. to accept in full settlement of all claims against said corporation payments on the basis of 35 cents on the dollar, had in fact received payment in full of all indebtedness of Cavagnaro & Co. to it. It is manifest that such testimony could have no relevant bearing upon the issues made by the pleadings. It appears, however, that the only testimony showing or tending to show that the bank received more than 35 cents on the dollar was brought out in the cross-examination of the defendants' witness Gates, by counsel for the plaintiff himself. Having stated, on cross-examination by the plaintiff's attorney, that the bank had received in settlement of Cavagnaro & Co.'s indebtedness to it the full amount thereof, that witness, still under cross-examination, was asked by a juror: 'Was there anybody else excepting the bank who got 100 cents?' To which question the witness replied, no objection having been interposed thereto: 'Not that I know of.' The witness Reynolds was thereafter asked by the attorney for the defendants, and permitted, against the objections of the plaintiff, to answer, the following questions: 'Did you know anything about the existence of the \$8,750 note other than the \$4,700 35 per cent. note at the time these notes were being signed in the office of the Swiss-American Bank? A. I did not. I learned of that after the fire. Q. Did you know that the bank was receiving, or was to receive, anything more than 35 per cent.? A. I did not.' Thus it will be observed that Reynolds did not himself say that the bank was receiving in settlement of Cavagnaro & Co.'s indebtedness to it an amount in excess of that compounded by the creditors of the former. While the questions thus put to the witness assumed the truth or existence of the fact to the proof of which they were addressed, and were for that reason improper, even though it was true that the bank received more than it agreed to accept, since, as stated, such testimony was wholly irrelevant to the issues, yet it cannot be said, in view of the fact that counsel for the plaintiff himself brought out the fact on cross-examination or without objection permitted a juror to bring it out, that the questions to Reynolds or the form in which they were propounded could have added to or intensified the injury which the plaintiff had thus already inflicted upon himself.

"We have found no occasion for remanding the cause, and the judgment and the order are accordingly affirmed."

[10] Subsequently the case was reheard, and the learned District Court, while adhering to its original views, reversed the judgment and order upon the grounds: (1) That the lower court tried the case upon the erroneous theory that the sole consideration which moved the defendants to become parties to the notes was the oral agreement; and (2) that an instruction given by the trial court evidenced this theory and misstated the law to the injury of the plaintiff. A

hearing in this court was granted in order that we might further consider these points.

Examining the pleadings, we find that the answer does not set up the oral agreement as the sole consideration for the signing of the note by defendants. The first defense pleaded to each note is that said note, both principal and interest, had been paid. To each note there is set up in the answer a defense based upon the verbal understanding with reference to the order of payment of the obligation of the F. Cavagnaro Company and the fact that sufficient money had been received by the bank on account of said company to pay the notes in suit if the credit had been applied in the agreed manner. This part of the pleading is set forth in the opinion of the District Court of Appeal, which we have quoted above. When proof of the oral agreement was offered, however, the objection interposed by plaintiff was that the execution of a contract in writing supersedes all the negotiations which preceded or accompanied the making and signing of the instrument, and that proof of the oral agreement therefore was not admissible to vary the terms of the note. The court below held that the proffered evidence of the oral agreement was admissible on the ground that it constituted the sole consideration for the notes in suit. The ground of this ruling was admittedly erroneous, but the ruling itself was nevertheless correct. The agreement or understanding pleaded by defendants did not alter nor modify the terms of the notes. Therefore appellant's objection to its introduction in evidence was untenable. It was admissible under section 1479 of the Civil Code. But the court manifested further by an instruction the theory upon which the case was tried.

[11] The instruction was as follows:

"You are hereby instructed that, if you believe from the evidence that at the time the notes in suit were executed, and as the sole consideration therefor, there was an agreement between the defendants and the Swiss-American Bank that any moneys coming into the hands of said bank from F. Cavagnaro Company would be applied first to the note for \$4,780.94 due from the F. Cavagnaro Company to the said bank, and then the balance to the payment of the two notes in suit, and if you further believe from the evidence that there subsequently came into the hands of the said Swiss-American Bank a sufficient sum to pay the said note for \$4,780.94, and also the two notes in suit, if such application had been made, your verdict should be in favor of the defendants."

This instruction was erroneous, for the reason stated in the quoted opinion of the District Court of Appeal; namely, because it sought to confine the jury to the oral agreement as the sole consideration for the acts of the defendants in signing the notes. But defendants assert that plaintiff was not prejudiced by the instruction, which placed upon the defendants the burden of proving both the existence of the agreement, and also that it was the sole consideration for the notes in suit. But appellant says he was entitled to have submitted to the jury directly the ques-

tion whether or not the oral agreement involved a direction to the bank by the debtors for the application of the payments to the satisfaction of particular obligations. The instruction does not submit that question to the jury. There was no dispute at the trial regarding these facts: (1) The bank had loaned to the Cavagnaro Company the money represented by the notes; (2) defendants had signed the notes; (3) enough money had been collected on account of the Cavagnaro Company to pay the notes if applied according to the wishes of the defendants. The sole question pertinent to the oral arrangement which the court should have propounded to the jury was whether or not there had been a direction for the payment of the notes in the order for which defendants contended. The quoted instruction involves that very matter and more. It seems to us, therefore, that the subject of "sole consideration" may be eliminated from the instruction, and it will state correctly the law regarding application of payments.

[12] Appellant makes the further objection that the instruction refers to an agreement between the defendants and the bank, and therefore is not by its terms applicable to a direction to the bank by the debtor, the F. Cavagnaro Company, regarding the order of settlement of the latter's notes. Of course, no agreement between the plaintiff's assignor and the defendants without the concurrence of the debtor, the F. Cavagnaro Company, would bring the facts of the case under the provisions of section 1479 of the Civil Code. But we do not think the jurors were misled by the careless and inaccurate use of the word "defendants." All of the proof was directed to an agreement between the bank and all of the parties to the notes relative to the order of payment. There was no testimony regarding any agreement between the bank and the Borgfeldts without the other parties to the note, including the debtor; and the jury could not have been misled in reference to the "agreement" mentioned by the court in the instruction. Assuming that the court did adopt an erroneous theory upon the subject of the consideration for the notes (although appellant himself offered an instruction by which the court's attention was directed to section 1479, Civil Code, but which was rejected for certain erroneous statements of the law), the fact remains that the jury, considered and determined the one vital question in the case; i. e., was there the direction by the debtor to the bank that the notes of the F. Cavagnaro Company should be paid in the order specified in the answer?

For the reasons given in the original opinion of the District Court of Appeal and those which we have added, the judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.

169 Cal. 216

DAM v. SUPERIOR COURT OF ALAMEDA COUNTY. (S. F. 7136.)

(Supreme Court of California. Feb. 8, 1915.)

CERTIORARI ⇨64—SCOPE OF REVIEW—JURISDICTIONAL QUESTIONS.

In a certiorari proceeding to review an order of the superior court vacating a decree of partial distribution in the matter of the estate of a decedent, the court could determine only whether, as alleged in the petition, the superior court exceeded its jurisdiction in making the order, and not whether the order was otherwise erroneous.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 174, 175, 183, 184; Dec. Dig. ⇨64.]

In Bank. Certiorari by F. H. Dam against the Superior Court of Alameda County. Ordered that submission be vacated and matter placed on calendar.

F. H. Dam, of San Francisco, in pro. per.

PER CURIAM. A writ of certiorari was issued herein by this court upon the complaint of the petitioner that respondent had exceeded its jurisdiction in making an order vacating a decree of partial distribution theretofore made by it in the matter of the estate of George W. Mitchell, deceased. No return on the writ has been made to this court by respondent, but in lieu thereof the matter was submitted by the parties for decision upon a stipulation setting forth certain agreed facts. We find upon an examination of this stipulation that the only questions submitted thereby for decision are questions that in no way pertain to the question to consider which the writ issued, viz., that of alleged excess of jurisdiction in the making of the order complained of. We are, in effect, asked simply to determine whether the original decree of partial distribution attempted to be vacated by the order complained of was erroneous in certain respects. Such questions are not within the proper scope of a proceeding of this character, and we cannot consider them. The only question to be determined by this court in this proceeding is whether in making the order complained of the superior court exceeded its jurisdiction.

It is ordered that the submission herein be vacated, and the matter placed upon the calendar for Monday, March 1, 1915.

169 Cal. 229

MARSHALL & STEARNS CO. v. DENEEN BLDG. CO. (PAUSON et al., Interveners.) (S. F. 6269.)

(Supreme Court of California. Feb. 8, 1915.)

1. NEW TRIAL ⇨122—MOTION—NOTICE—NECESSITY—ADVERSE PARTIES—APPEAL.

Where, in an action against a corporation and individuals to foreclose a materialman's lien, wherein certain persons intervened, judgment was rendered against the corporation alone and for the interveners for costs, and foreclosure of the lien was denied, and it appeared that the granting of a new trial might

make it necessary to relitigate matters pertaining to the rights of the individual defendants who were not served with notice of intention to move for a new trial, such defendants were adverse parties to the motion, and, since the trial court for want of such service was without jurisdiction to grant a new trial, the Supreme Court could not disturb the order denying same.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 232; Dec. Dig. ¶ 122.]

2. APPEAL AND ERROR ¶ 222 — PRESENTATION BELOW—NECESSITY—JURISDICTIONAL DEFECT.

Since failure to serve a motion for new trial on necessary parties involved a jurisdictional defect, it was available at any time and was not waived by the failure of such parties to present the point in the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1156, 1333-1336; Dec. Dig. ¶ 222.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Marshall & Stearns Company, a corporation, against J. A. Deneen and others, wherein J. W. Pauson and others intervene. Judgment denying certain relief to plaintiff, and for interveners for costs, and, from denial of new trial, plaintiff appeals. Affirmed.

Joseph E. Bien, of San Francisco, for appellant. A. L. Weil, of San Francisco, for respondents.

MELVIN, J. Plaintiff appeals from an order denying its motion for a new trial.

The action was one brought to foreclose a lien for materials furnished and used in the construction of a certain building in the city and county of San Francisco known as the "Cornelia Hotel Apartments." The complaint alleged that J. A. Deneen and N. M. Deneen were the owners of the real property upon which the said building was constructed; that they contracted with the Deneen Building Company to erect the building; and that the agreement upon which the materials were furnished was one made by and between the plaintiff and the Deneen Building Company. The three Pausons, Lowenstein, and Seeley intervened as owners of the fee.

The court found that at all times mentioned in the complaint Morris Siminoff was the owner of the land therein described; that, prior to the making of the contract between the Deneen Building Company and the plaintiff, Morris Siminoff entered into an agreement with J. A. Deneen to sell to him the real property described in the complaint for \$52,000; that neither J. A. nor N. M. Deneen ever contracted with the Deneen Building Company to construct the building described in the complaint; that on the 16th day of October, 1906, plaintiff and the Deneen Building Company entered into the contract pleaded; that, with the exception of certain tables which were never affixed to the building, the materials described in plaintiff's claim of lien had been furnished by that corporation

to the Deneen Building Company and had been actually used in the building on the land described in the complaint; that only a part of the contract price had been paid; that plaintiff had performed all of the terms of its contract; that on January 21, 1908, J. A. and N. M. Deneen duly filed notice of completion of the building on behalf of the owners; that, within three days after he had obtained knowledge of the construction and intended construction of the building referred to in plaintiff's complaint, Morris Siminoff, as owner of the land therein described, posted a notice in a conspicuous place on said land that he would not be responsible to laborers or materialmen for any work or materials furnished on the building; that on the 1st day of October, 1907, and before plaintiff had furnished any materials for the building, J. A. Deneen and N. M. Deneen executed to the interveners a deed of trust as security for a loan of \$50,000; that on January 29, 1908, in accordance with said deed of trust and upon the same security the further sum of \$30,000 was loaned by the interveners to the Deneens; that on or about March 26, 1908, the Deneens having defaulted in the performance of the terms of the deed of trust, the property described in said deed was sold by the trustees to the interveners; that subsequently the interveners, pursuant to order of court in that behalf given, paid to the estate of Morris Siminoff, deceased, the amount due for the land under Siminoff's contract with J. A. Deneen, and took conveyance of the said land from said estate; and that the money paid to the estate of Siminoff was used by the executors to discharge the lien of a mortgage on the land which had existed from a time long prior to the making of the contract between Siminoff and the Deneens. The judgment in accordance with the findings of fact and conclusions of law was that the plaintiff take nothing by its action in so far as the foreclosure of its asserted lien was concerned; that judgment be entered in favor of plaintiff against the Deneen Building Company for \$6,541.35 with interest; and that interveners should recover their costs. It was recited in the judgment that there was no appearance at the trial for the defendants. The default of N. M. Deneen had been previously entered.

[1] The respondents assert that the order denying the motion for a new trial must be affirmed for the reason that the court below had no jurisdiction to grant a new trial. It is the contention of respondents that where, as here, the notice of intention to move for a new trial was not served upon all of the interested parties, this court is without power to disturb the order denying the motion. The record contains a notice addressed to the interveners only, and there is no showing that the other litigants were served. If they

were "adverse parties" within the meaning of the decisions, undoubtedly this case comes under the rule announced in such cases as *Niles v. Gonzalez*, 155 Cal. 362, 100 Pac. 1080; but it is contended by appellant that, since the defendants did not appear at the trial, they were neither "adverse" nor "necessary" parties, that they all disclaimed interest in the property in question, and the court found that they had no interest. The money judgment against the Deneen Building Company for the amount due on that corporation's contract with plaintiff would not be changed, say appellant's counsel, if a new trial were ordered upon the issue litigated by the intervening respondents, namely, whether or not a lien should be foreclosed upon their property. It is not questioned by respondents that failure to serve all the parties is of no moment if the questions raised by the appeal may be determined without affecting the interests of the parties unserved. This rule is announced in such cases as *Bell v. San Francisco Savings Union*, 153 Cal. 71, 94 Pac. 225, and *Bell v. Staacke*, 159 Cal. 195, 115 Pac. 221. But the respondents insist that none of the findings attacked by appellant could be modified or set aside without affecting the interests of at least two of the unserved defendants. In this behalf they quote from *Herriman v. Menzies*, 115 Cal. 26, 44 Pac. 661, 35 L. R. A. 318, 56 Am. St. Rep. 81:

"The superior court can have no jurisdiction to re-examine an issue of fact that it has tried, and change its decision thereon, unless all the parties to the issue and former decision are properly before it."

An examination of the findings convinces us that the position taken by respondents is correct.

The first finding attacked is one to the effect that:

"Neither J. A. Deneen nor N. M. Deneen entered into a contract with Deneen Building Company to erect a building on the land described in plaintiff's complaint."

If we should reverse the order of the lower court on the grounds presented by appellant—that this finding is unsupported by the evidence, but if supported that the testimony upon which it was based was erroneously admitted—we would affect the rights of the unserved Deneens and the Deneen Building Company. No judgment was entered against either of the Deneens, but a money judgment was given against Deneen Building Company. It is true that none of the defendants appeared at the trial, but this does not alter the fact that if a new trial were granted it would be necessary to relitigate matters pertaining to their rights. It might well be that on a new trial the court might find the existence of a contract between the Deneens and the Building Company by the terms of which the individuals had agreed to assume the debts of the corporation, and the money judgment might be given against the Deneens instead of against the Deneen Building Company.

Or the money judgment might be again given against the corporation but with additional costs. There is a finding that the Deneens duly filed notice of the completion of the building on behalf of the owners. Appellant insists that the court should have found the Deneens to have been the "reputed owners" of the building. It will be seen at once that, under the changed finding which appellant demands, the rights of the Deneens would be entirely different from those which they might have under the existing judgment.

Appellant asserts that there is no evidence to sustain that part of one of the findings which is that the claim of lien filed by plaintiff on February 20, 1908, did not state the name of the owner of the property. We may not review this contention for the same reason stated above—that the rights of unserved defendants are involved. In the complaint it was averred that the Deneens were at all times alleged therein the owners of the property in question. Surely a finding supporting that allegation would injuriously affect them.

It is not necessary to analyze all of the findings reviewed by appellant and specified by counsel as erroneous. We have carefully examined them and conclude that they all involve matters in respect to which unserved defendants are necessary parties. We must hold accordingly that the failure to serve notice of motion for new trial upon adverse parties necessitated the denial of that motion in the superior court and on this appeal requires this court to affirm the order denying such motion. *Johnson v. Phenix Ins. Co.*, 152 Cal. 197, 92 Pac. 182; *Estate of Young*, 149 Cal. 176, 85 Pac. 145.

[2] There is no merit in the contention that respondents waived their right to raise the question of want of service of the motion for a new trial upon necessary parties by failing to present the point in the lower court. It must be remembered that the failure to serve all parties to the issue involves a jurisdictional defect which is available at any time and in any court in which the cause may be pending.

The order denying appellant's motion for a new trial is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

169 Cal. 204

SWAYNE & HOYT v. WELLS-RUSSELL & CO. (S. F. 6835.)

(Supreme Court of California. Feb. 8, 1915.)

1. APPEAL AND ERROR — 189—OBJECTIONS IN LOWER COURT — AFFIDAVIT FOR CONTINUANCE.

Defects in an affidavit for a continuance filed for the absence of a witness, under Code Civ. Proc. § 595, which could be cured by amendment, are deemed waived where not raised by objection below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1153-1154½, 1205-1215; Dec. Dig. —189.]

2. CONTINUANCE $\hookrightarrow$ 22 — RIGHT TO — ABSENT WITNESS.

Defendant's counsel on September 12th agreed that the case should be set for trial on September 14th, provided the attendance of a certain witness could be procured. On September 14th plaintiff's counsel did not appear, and defendant's counsel requested a continuance to procure the witness' attendance. A continuance was granted until the following day, when the court refused to further continue the case according to stipulation of both counsel. Held that, while the granting of a continuance is a matter resting largely in the discretion of the trial court, its refusal to consent to a delay to procure the attendance of the witness, who lived at a distance, was error.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 58-64; Dec. Dig. $\hookrightarrow$ 22.]

In Bank. Appeal from Superior Court, Mendocino County; C. W. Norton, Judge.

Action by Swayne & Hoyt against Wells-Russell & Co. There was a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Order reversed.

Metson, Drew & Mackenzie, of San Francisco (R. G. Hudson, of San Francisco, of counsel), for appellant. Ornbaum & Fraser, of San Francisco, for respondent.

SHAW, J. The defendant has appealed from an order denying its motion for a new trial. The only point presented by the record is that the court below erred in denying the application of the defendant to postpone the trial from September 15 to September 30, 1911. The case depends upon the sufficiency of the affidavit filed in support of the application for a continuance, taken in connection with the issues and previous proceedings in the case.

The plaintiff sued the defendant for money had and received, alleging that plaintiff operated a steamer carrying passengers to and from San Francisco and Arena Cove, Mendocino county, Cal.; that the defendant operated a public wharf at Arena Cove, and also, in virtue of an agreement between plaintiff and defendant, the latter acted as ticket agent for the plaintiff to sell tickets for passage on its steamer; that from September 29, 1908, to November 30, 1909, defendant sold tickets for plaintiff for sums aggregating \$2,833, of which it paid to the plaintiff \$2,301.95, and for which it was entitled to commissions of \$141.65, leaving due to the plaintiff and unpaid \$389.40. The defendant admitted the receipt and payment of said sums of money, and that it was entitled to the commissions as stated, but it alleged as a defense that, in addition to selling tickets, it had performed various other services for the plaintiff at its request, which were of the reasonable value of \$389.40, and that it had from time to time rendered monthly accounts of the sales of tickets and of the services rendered, showing that nothing was due to the plaintiff, which accounts were acquiesced in by the plaintiff, so that the same became an account stated.

After the case was at issue and had been placed on the calendar to be set for trial, difficulty was encountered in finding a time when it could be tried by the regular judges of San Francisco county, whereupon it was transferred to an "extra session" held by a judge of another county. On September 12, 1911, the counsel for plaintiff and defendant agreed that the case should be set down for trial on September 14, 1911, but counsel for defendant agreed thereto upon the express condition that the trial should not proceed at that time if defendant was unable to procure the attendance of its wharfinger at Arena Cove as a witness. The next day, ascertaining that the attendance of said witness could not be procured defendant's counsel informed the plaintiff's counsel of that fact, and they thereupon agreed that the case might be continued until a later date, but did not obtain the approval of the court to that agreement. On September 14th, at the time set for the trial, defendant's counsel appeared, but counsel for the plaintiff was absent. Thereupon defendant's counsel stated the foregoing circumstances, and requested a continuance, upon which the court continued the trial until 10 o'clock of September 15, 1911. On September 15th counsel for both parties appeared and joined in a request for a continuance. The court denied the same, and set the cause for trial at 1:30 p. m. of that day, and announced that the cause would not be continued, except upon a "legal showing." At the time fixed the defendant's counsel presented the affidavit upon which the continuance was asked. After stating the foregoing facts the affidavit proceeded to say that, by reason of the distance which must be traveled and the means of travel from San Francisco to Arena Cove, and because of his business engagements, it was impossible to obtain the presence of said witness at that time; that the witness was the agent of defendant in sole charge of its business at Arena Cove, and could not leave said place without first procuring some person to take charge of the business during his absence; that the defendant must rely upon his testimony to show the conditions and terms of business dealings between plaintiff and defendant, and to show the actual business conducted and carried on between plaintiff and defendant under the contract alleged in the complaint; that on behalf of defendant affiant had used diligence in attempting to secure the witness' presence, but it had been impossible to do so because of the inaccessibility of Arena Cove and the impossibility of arranging, in the 4 days' time, for a person to take the place of said witness and to get the witness to San Francisco at the time last set for trial. Prior to the filing of this affidavit a written stipulation between the parties for a continuance of the case from September 15th to September 30th was filed.

The plaintiff had no witnesses present, and had to send for them when the application was denied. Evidently it had expected that the postponement would be granted.

[1, 2] Upon this showing and under the conditions at the time existing, we think it was the duty of the court to have granted the continuance applied for. In determining this question it is necessary to consider both the nature of the issues joined and the prior negotiations between the parties relating to the time of trial, as well as the facts stated in the affidavit. On September 12th defendant's attorney agreed to the trial in the very short time of two days, upon the express condition that it should not proceed unless he was able to procure the witness, and to this the plaintiff had agreed. It appears from the affidavit filed in support of the motion for a new trial on the ground of irregularity in the proceedings of the court that the plaintiff's attorney had relied upon the agreement between them, and did not attend on the 14th at the time set for trial. When the court refused to make the continuance for a longer time than 24 hours, the defendant's counsel, as soon as he could do so, informed plaintiff's counsel of that fact, and it was then agreed between them that a continuance should be had for 15 days. Defendant had a right to rely upon this understanding and to refrain from further efforts in the meantime to secure the attendance of the witness. The affidavit shows that it was impossible to get the witness to San Francisco within the short time intervening between that hour and the time of trial, or within the 2 days between the 12th and 14th of the month. It states in perhaps too general terms the evidence expected from the absent witness. The defense was that statements of account had been rendered monthly by the witness as agent of the defendant at Arena Cove, and that these had become an account stated showing nothing due to the plaintiff. The affidavit states that the witness was in sole charge of the business. It would necessarily follow that he alone could have a first-hand knowledge of the material facts alleged in the defense. No objection to the form or sufficiency of the affidavit in this respect was made below. If it had been made the defect could have been immediately cured if the court below had so required. Code Civ. Proc. § 595. Under these circumstances it must be deemed to have been waived.

While it is true that the matter of a continuance is largely in the discretion of the trial court, and that postponements of trials are not favored, we think the facts of this case disclose a clear abuse of discretion. If the period intervening between the time of the setting for trial and the time set for trial had been longer, perhaps a greater degree of diligence would have been necessary on the part of the defendant, but the time was ex-

tremely short, and it was fixed upon a condition, for the benefit of the defendant, which had failed. In view of all these circumstances we think it was clearly entitled to a continuance as applied for.

The order denying a new trial is reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.

(169 Cal. 273)

BOND v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 6325.)

(Supreme Court of California. Feb. 11, 1915.)

1. NEW TRIAL $\S$ 116—**TIME TO MOVE.**

Plaintiff obtained a verdict for \$4,500, but, on defendant's motion, judgment was entered for plaintiff for only \$405. This was reversed on appeal, and judgment was ordered to be entered on the verdict. *Held*, that defendant's time to move for new trial began to run on notice of entry of the second judgment.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238, 238½, 240, 241; Dec. Dig. $\S$ 116.]

2. APPEAL AND ERROR $\S$ 1202—**EFFECT OF AFFIRMANCE—GRANT OF NEW TRIAL—INSUFFICIENCY OF EVIDENCE.**

An affirmance of a judgment will not preclude the trial court from subsequently granting a new trial for insufficiency of the evidence, though such point was presented on the appeal; the trial court having discretionary power to vacate a verdict on that ground which is beyond attack on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4669; Dec. Dig. $\S$ 1202.]

In Bank. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Annie Bond against the United Railroads of San Francisco, a corporation. From an order striking from the files defendant's notice of intention to move for a new trial, it appeals. Reversed.

See, also, 24 Cal. App. 157, 140 Pac. 982.

William M. Abbott and William M. Cannon, both of San Francisco (Kingsley W. Cannon, of San Francisco, of counsel), for appellant. Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

SLOSS, J. The defendant appeals from an order striking from the files its notice of intention to move for a new trial.

The action was one to recover damages for the death of the plaintiff's son. At the trial the jury returned a general verdict in favor of plaintiff for \$4,500. It also returned its verdict on certain special issues. The defendant moved the court, among other things, to direct entry of judgment in favor of the plaintiff for \$405, and the court granted the motion. Judgment was entered accordingly on December 17, 1908. From this judgment the plaintiff appealed to this court, which, on January 11, 1911, made its order

reversing the judgment appealed from and directing the superior court to enter judgment upon the verdict in favor of the plaintiff for \$4,500. *Bond v. United Railroads*, 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. The remittitur going down, the lower court, on February 16, 1911, entered judgment in favor of plaintiff for \$4,500. Thereafter the defendant served and filed its notice of intention to move for a new trial, and it is this notice which was, on motion of the plaintiff, ordered stricken from the files.

[1] The motion was based on the ground that the notice was not served or filed within the time allowed by law. The sole question is whether defendant's time to give notice of intention to move for a new trial began to run when it had notice of the entry of the first judgment (for \$405), or when it had such notice of the entry of the \$4,500 judgment. If the former, the notice was served and filed too late; if the latter, it was in time.

Section 659 of the Code of Civil Procedure, as amended in 1907, provides that:

"The party intending to move for a new trial must, within ten days after receiving notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention. * * *

Where, as here, there have been two judgments, the latter superseding the earlier, which of the two is "the judgment" referred to in this section? It may aid in the solution of this question to suppose that the first judgment had been in favor of the defendant absolutely. Would such defendant be required to move for a new trial of a case which had been determined in his favor, or could he wait to assail the verdict or decision until there was a judgment which affected him injuriously? The more reasonable and sensible construction of the statute, we think, is to permit a party to withhold his application for a new trial until there has been a judgment against him. The respondent cites *Brady v. Feisil*, 54 Cal. 180, as holding the contrary. But when that case was decided section 659 required the notice of intention to be served and filed "within ten days after the verdict of the jury, or after notice of the decision of the court or referee, if the action were tried without a jury." The time for serving and filing the notice had no reference to the entry of the judgment, which is made the starting point of the time under the section as it now stands. Furthermore, whether or not *Brady v. Feisil* can properly be regarded as overruled or discredited as stated in the opinion (subsequently vacated by an order for rehearing) in *Tuffree v. Stearns Ranchos Co.*, 54 Pac. 826, we think the view that the time runs from notice of entry of the second judgment finds adequate support in the decision of *Klauber v. San Diego Street Car Co.*, 98 Cal. 105, 32 Pac. 876. There a judgment had been

entered on the findings in favor of the defendant. The plaintiff had appealed, and this court had reversed the judgment and directed the entry of a judgment in favor of the plaintiff, and such judgment had been entered. The defendant thereupon presented a bill of exceptions, and the same was settled. Upon the hearing of an appeal taken by defendant from the second judgment, it was held that the bill of exceptions was properly settled and could be considered. "Section 650 of the Code of Civil Procedure," says the court, "provides that a party who desires to have the exceptions taken at a trial settled in a bill may, within ten days after receiving notice of the judgment, prepare a draft thereof, and have the same settled by the judge. A judgment is the final determination of the rights of the parties to an action or proceeding, and, as there can be only one final judgment in an action, if for any reason a judgment that has been entered is vacated, and another judgment entered in lieu thereof, this last judgment becomes the only one in the case, and the notice of its entry is the point of time from which the right to have a bill of exceptions settled begins to run." See, also, *Sala v. City of Pasadena*, 162 Cal. 714, 722, 124 Pac. 539. Section 650 has been amended since the decision in the *Klauber Case*, but not in such manner as to affect the question under consideration. The words of that section are the same, in substance, as those now used in section 659 to define the time within which the acts authorized by the respective sections may be done, and we see no reason why those words should not be given a like meaning in the two instances. Under section 650, the bill is to be prepared by the party who "desires to have exceptions settled." This will, of course, be the party seeking to attack the judgment or order. Section 659 imposes the duty of giving notice of intention upon "the party intending to move for a new trial." Why should a party who has had judgment in his favor desire or intend to move for a new trial? While the proceeding for new trial attacks the verdict or findings rather than the judgment, and is, in a sense, collateral to the judgment (*Spanagel v. Dellinger*, 38 Cal. 284; *Union Coll. Co. v. Oliver*, 162 Cal. 755, 124 Pac. 435), it will, if successful, vacate the judgment, and that is, in fact, its ultimate purpose.

The fact that the first judgment, like the second, was in favor of the plaintiff, although for a smaller sum, does not, in our view, alter the situation. The judgment for \$405 was entered upon the motion of the defendant. We need not consider whether this circumstance would have deprived such defendant of the right to attack the judgment. Assuming that it might have moved for a new trial, it had the right to accept the existing situation as satisfactory to it, and this it did. When that judgment was vacated,

and a new one, much more burdensome to the defendant, was entered, an entirely different condition was presented. An additional liability, amounting to over \$4,000, was imposed upon the defendant, which was, for the first time, confronted with the necessity of determining whether it desired to assail the verdict upon which the existence of this liability had been adjudicated. Upon receipt of the notice of the entry of the new judgment, the defendant had the right to determine whether it intended to move for a new trial, and its time for serving notice of such intention then began to run.

[2] The respondent suggested upon the oral argument that a motion for new trial could not serve any effective purpose, for these reasons: The second judgment has now become final by affirmance upon appeal. *Bond v. United Railroads*, 24 Cal. App. 157, 140 Pac. 982. The parties have stipulated that the bill of exceptions used on said appeal from the judgment may be used on the motion for new trial, if this court should reverse the order here under review. On such motion the moving party could, it is argued, raise only the points that have already been conclusively determined against it. But one of the grounds of motion for new trial is the insufficiency of the evidence. It is true that this point was made on the appeal from the judgment, and was held to be without merit. It is, however, thoroughly settled that the trial court has a much greater power than the appellate court to set aside verdicts for insufficiency. A verdict that would be beyond the reach of attack on appeal might be vacated in the discretion of the trial court. This discretion the losing party has a right to invoke, even though the evidence be such that an appellate court would not be justified in upsetting the verdict as unsupported.

The order is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

26 Cal. App. 258

Ex parte LAPIQUE. (Cr. 377.)

(District Court of Appeal, Second District, California. Jan. 6, 1915.)

1. CONTEMPT ⚡77—PUNISHMENT—EXTENT.

Under Code Civ. Proc. § 1218, providing that if one is guilty of a contempt, a fine not exceeding \$500 or imprisonment not exceeding five days, or both, may be imposed, one fined \$500 for contempt, with the alternative of imprisonment for a period in the proportion of one day for each \$2 of such fine, was not, after having served five days' imprisonment, entitled to his discharge.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 268; Dec. Dig. ⚡77.]

2. CONTEMPT ⚡54—PROCEDURE—AFFIDAVIT.

Citation may be issued against one guilty of contempt in making a scurrilous attack on the judges in an affidavit for change of venue,

though no affidavit is presented to the judge ordering the citation.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143-149; Dec. Dig. ⚡54.]

3. CONTEMPT ⚡8—WHAT CONSTITUTES.

Under Code Civ. Proc. § 170, subd. 4, providing that, on the filing of an affidavit that a party cannot secure a fair trial before any judge about to try the case because of prejudice or bias, such judge shall secure the services of some other judge to preside at the trial, a party seeking a change of venue from one department of the superior court is guilty of "contempt" in including in his affidavit scurrilous attacks upon other judges of the same court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 14; Dec. Dig. ⚡8.]

For other definitions, see Words and Phrases, First and Second Series, Contempt.]

In the matter of the application of John Lapique for a writ of habeas corpus. Writ denied.

John Lapique, of Orange, in pro. per. W. I. Foley and M. F. Shannon, both of Los Angeles, for respondent.

PER CURIAM. Petitioner was heretofore adjudged to be guilty of a contempt of court and ordered to pay a fine in the sum of \$500, or in default thereof that he be imprisoned in the county jail of Los Angeles county for a period in the proportion of one day for each \$2 of such fine, or until said fine be otherwise satisfied. He presents an application to be discharged from custody on writ of habeas corpus.

It appears from the order of commitment that in a certain proceeding heretofore pending in the superior court petitioner filed an affidavit in support of a motion for change of venue, the effect of which was to impute a lack of integrity, not only in the judge then sitting in the department in which said matter was to be heard, but attacking 11 other judges of the superior court. Many of the allegations contained in the affidavit were phrased as "upon information and belief." After this affidavit had been filed, an order to show cause was issued by the judge of the department, requiring petitioner to appear in another department of the same court and show reason why he should not be punished for contempt. Of the several objections urged to the sufficiency of the commitment but two seem to have any serious foundation, and both of these are completely answered by the decisions of our Supreme Court adversely to the claim of petitioner.

[1] The contention is: First, that the whole proceeding is void because no affidavit was presented to the judge who ordered the citation to be issued prior to the issuance thereof; and, second, that in no event could the imprisonment of petitioner extend beyond the period of five days, which is the maximum period where imprisonment alone is prescribed as the form of punishment under section 1218 of the Code of Civil Procedure.

In the case of *Ex parte Karlson*, 160 Cal. 378, 117 Pac. 447, Ann. Cas. 1912D, 1334, this latter contention was advanced, and the Supreme Court there held that a judgment in substantially the same form as was contained in the commitment under which petitioner is here held was regular, and that petitioner there was not entitled to be discharged, after having endured imprisonment for a period of five days.

[2] The other contention, to wit, that it was necessary, before the court was empowered to issue its citation against petitioner, that the facts constituting the alleged contempt be made to appear by affidavit is not well founded. The decision in the case of *Lamberson v. Superior Court*, 151 Cal. 458, 91 Pac. 100, 11 L. R. A. (N. S.) 619, deals extensively with that subject and a reading of it leaves no room for question that the law is well established to the contrary of this objection urged by petitioner to the sufficiency of the commitment.

[3] The right of the petitioner to have asked for a change of venue upon the grounds relied upon by him was a statutory right which is both granted and limited by the terms of subdivision 4 of section 170 of the Code of Civil Procedure. Those provisions do not authorize the moving party to include with his statements concerning the judge who is about to try the case, an attack upon other judges of the court. The statements made with reference to the other judges were immaterial to the motion, and were a scurrilous and wanton attack, wholly beyond the right or privilege of the petitioner.

No sufficient cause appears entitling petitioner to be released from custody.

The writ is discharged, and petitioner remanded to the custody of the sheriff.

26 Cal. App. 227

TOMASINI v. SMITH et al. (Civ. 1407.)

(District Court of Appeal, First District, California. Dec. 24, 1914.)

1. PRINCIPAL AND AGENT ⇨173—RATIFICATION—SUFFICIENCY OF EVIDENCE.

In an action for the purchase price of machines bought by defendant's agent, evidence held sufficient to sustain a finding of the trial court that defendant had ratified previously unauthorized acts of her agent in buying the machines.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 659-661; Dec. Dig. ⇨173.]

2. APPEAL AND ERROR ⇨1002—REVIEW—FINDINGS OF FACT—CONFLICTING EVIDENCE.

Where there is sufficient evidence to sustain a finding either for or against a ratification of the unauthorized acts of an agent, a finding by the trial court that there was a ratification cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇨1002.]

Appeal from Superior Court, City and County of San Francisco; Henry C. Gesford, Judge.

Action by A. F. Tomasini against Mabel Burdell Smith and her husband. Judgment for the plaintiff, and defendant Mabel Burdell Smith appeals. Affirmed.

Frank K. Lippitt, of Petaluma, for appellant. F. A. Meyer, of Petaluma, and Jas. P. Sweeney, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of plaintiff and against defendant in an action to recover the sum of \$509.35, the balance alleged to be due upon the purchase price of goods, wares, and merchandise sold by plaintiff to defendant Mabel Burdell Smith.

[1] Said defendant was engaged in operating as her separate property a dairy ranch in the county of Marin, consisting principally of grazing land and about 120 cows. Early in the year 1908, while she was absent from California, her foreman, one D. A. Walker, without her knowledge, changed the method of operating the ranch by the introduction of milking machines, purchased from the plaintiff; the milking up to that time having been performed by hand. In support of her appeal she contends, first, that it appears from the evidence that her agent Walker had no authority, express or implied, to purchase the machines; and in this contention we are inclined to agree. It is true that Walker previous to the transaction here involved, had purchased on her account a great many small articles, sometimes with express authority and sometimes without; but whenever this was done without authorization his action, by implication at least, was ratified. There is, however, nothing substantial in the record to warrant the conclusion that he was her actual agent in such matters, or that she had ever permitted anything to be done which would make him her ostensible agent, with power to change the method of operating the dairy in an essential respect, and to incur an indebtedness in one transaction of over \$500, which, considering the small extent of the business, would be very large.

We do think, however, that there is sufficient in the evidence to sustain the finding that Mrs. Smith ratified the transaction, and so is bound by it. It appears from the evidence that, prior to the installation of these machines, Walker was having trouble to get men to milk the cows; and it is inferable from the record that the use of these machines in a measure, if not wholly, obviated this difficulty, of which Mrs. Smith could not fail to be aware. Moreover, on her return after the absence mentioned, she did not repudiate the transaction, but permitted the machines to be operated for a while, and did not return them nor offer to return them to the plaintiff until 18 months after their purchase.

The record further discloses that in fact she paid \$30 on account of their purchase price; that on one occasion she attempted to sell them; and that her first serious objection to them was not until she was pressed for payment.

[2] There is, it is true, evidence in the record which would sustain a contrary view; but, the trial court having accepted plaintiff's version of the facts, we are not at liberty to disregard its action and to say that a different conclusion should have been reached.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

26 Cal. App. 246

MERCANTILE TRUST CO. OF SAN FRANCISCO v. DOE. (Civ. 1309.)

(District Court of Appeal, Third District, California. Dec. 31, 1914. Rehearing Denied by Supreme Court March 1, 1915.)

1. PLEADING ⚡362—STRIKING OUT—OPEN ACCOUNT—PAYMENTS.

Where a complaint alleged that the coal, for the price of which recovery was sought, was furnished upon an open account between the parties, and that the defendant had paid on the account two sums, which exactly equaled the charges for coal furnished during the first two months of the account, that fact does not establish, as a matter of law, that the payments were made in discharge of those two items, so that the allegations respecting them should be stricken from the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147-1155; Dec. Dig. ⚡362.]

2. PAYMENT ⚡38—APPLICATION—OPEN ACCOUNT.

Under Civ. Code, § 1479, the creditor on an open account can apply payments to the account generally, in the absence of a direction from the debtor for application to particular items.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 99-103, 128; Dec. Dig. ⚡38.]

3. PLEADING ⚡49—COMPLAINT—"ACCOUNT STATED"—OPEN ACCOUNT.

A complaint which alleged that coal was furnished on an open book account, which account, on a certain date, was closed, and the balance struck, and the total sum thereof became due and payable on that date, does not allege an "account stated," which requires an agreement, express or implied, that the balance is correct, an action on which would be barred in two years by Code Civ. Proc. § 339, subd. 3, but states an action upon an open book account, which, under Code Civ. Proc. § 337, subd. 2, is not barred for four years.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 107-111; Dec. Dig. ⚡49.]

For other definitions, see Words and Phrases, First and Second Series, Account Stated.]

4. ACCOUNT, ACTION ON ⚡7—EVIDENCE—SUFFICIENCY.

In an action for the price of coal delivered to defendant at intervals, evidence held to establish that the coal was furnished, not in several separate transactions, but upon an open book account.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 13-17; Dec. Dig. ⚡7.]

5. ACCOUNT, ACTION ON ⚡2—"OPEN BOOK ACCOUNT."

An "open book account" is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise, and it need not be proved that the defendant expressly agreed that the account should be an open one, if the circumstances attending the dealings between the parties show that it was.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 1, 2; Dec. Dig. ⚡2.]

6. ACCOUNT STATED ⚡6—MONTHLY STATEMENTS.

The fact that each transaction in a long series of sales was a separate sale and delivery, and that an account thereof was rendered to defendant each month, did not change the account from an open account to an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 30-39; Dec. Dig. ⚡6.]

7. APPEAL AND ERROR ⚡197—PRESENTING QUESTIONS IN LOWER COURT—VARIANCE.

Where plaintiff, in an action on an open account, offered evidence of statements rendered to the defendant, to show delivery and nonpayment, for which they were admissible, defendant cannot on appeal object for the first time that the evidence showed an account stated, and was therefore a variance from the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⚡197; Pleading, Cent. Dig. §§ 1428-1441.]

8. SALES ⚡360—ACTION FOR PRICE—VERDICT—AMOUNT.

Where a complaint sought recovery for the agreed purchase price of certain quantities of coal, specifying the number of tons delivered each month, but omitting fractions of a ton therefrom, and the total amount due for the coal delivered, and the evidence showed the price of the coal per ton, which amounted to the sum claimed in the complaint, which was computed on the amount of the coal furnished, including the fractions of tons, a verdict for that amount was not excessive to the extent of the price of the fractions of tons not mentioned in the complaint.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1060-1062; Dec. Dig. ⚡360.]

9. ACCOUNT, ACTION ON ⚡7—EVIDENCE—ADMISSIBILITY—PRIOR DEALINGS.

In an action on an open account, which the defendant contended was an account stated, evidence as to the course of business between the parties prior to the first item on the account was admissible to show the existence of the open account.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 13-17; Dec. Dig. ⚡7.]

10. EVIDENCE ⚡354—ACCOUNT BOOKS—DAY BOOK.

Where it was testified that entries as to sales of coal were made in the scale book at the time the coal was weighed, and on the same day transferred to the day book by the witness, and then checked with the tags given to the teamsters and returned by them after delivery, which tags were thereafter destroyed, the books were admissible to show the account.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. ⚡354.]

11. APPEAL AND ERROR ⚡930—PRESUMPTIONS—CONSIDERATION OF EVIDENCE.

Where the record shows that account books were received in evidence over defendant's objection, and they formed part of defendant's bill of exceptions, it must be presumed, in the absence of a record showing to the contrary, that

the books were read to or by the jury and considered by them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. 693.]

Appeal from Superior Court, City and County of San Francisco; J. E. Prewett, Judge.

Action by the Mercantile Trust Company of San Francisco, trustee under the last will and testament of Richard D. Chandler, deceased, against Charles P. Doe. Judgment for the plaintiff, and defendant appeals. Affirmed.

Hl. W. Glensor, of San Francisco, for appellant. Morrison, Dunne & Brobeck, of San Francisco, for respondent.

CHIPMAN, P. J. The cause of action is stated in two counts, in the first of which it is alleged, in the amended complaint, that Richard D. Chandler, at the instance and request of defendant, sold to defendant and delivered to the steamer Eureka, of which he was the managing owner, certain coal, to wit: Between December 4, 1907, and December 30, 1907, 203 tons, at the agreed price of \$1,423.20; between the dates of January 4, 1908, and January 29, 1908, 212 tons, at the agreed price of \$1,490.40; between February 3, 1908, and February 28, 1908, 197 tons, at the agreed price of \$1,381.20; and between March 4, 1908, and March 28, 1908, he sold and delivered to defendant 184 tons for which defendant agreed to pay the sum of \$1,292.15. It is alleged:

"That the total sum, so agreed to be paid by defendant on account of said coal bargained, sold, and delivered as aforesaid, is the sum of \$5,586.95; that on or about the 28th day of March, 1908, said open book account was closed and a balance upon said open book account was struck and ascertained and the total sum due, owing, and unpaid on account of said balance was the sum of \$5,586.95, and said last-named sum became due and payable on or about said last-named date;" that defendant paid on account of said balance the sum of \$1,423.20 on July 20, 1908, and the further sum of \$1,490.40 on November 13, 1908, and there remains due and unpaid the sum of \$2,673.35.

The second count differs from the first count principally in alleging that the coal was of the reasonable value of the amount as in the first count stated. It is further alleged:

"That on or about the 28th day of March, 1908, the balance upon said open book account was struck, and the total sum due, owing, and unpaid on account of said balance was the sum of \$5,586.95, and said last-named sum became due and payable on or about said last-named date."

The amended complaint is verified and was filed February 16, 1913. A special demurrer to the amended complaint, alleging uncertainty and ambiguity, and also pleading subdivision 1, § 339, Code of Civil Procedure, in bar of the action, was overruled. A motion to strike out certain parts of the amended complaint was denied, and defendant answered,

making specific denials to most of its averments, denied that the amounts therein claimed were carried on the books of account of said Chandler "as an open book account, and defendant denies that said sum of \$2,673.35 is and constitutes, or is, or constitutes the unpaid portion of a balance due on an open book account." As a separate defense alleges:

"That for many years prior to the death of said Richard D. Chandler defendant purchased certain goods, wares, and merchandise from said Chandler, to wit, coal; that each and every item of coal so purchased * * * was and constituted a separate and distinct transaction; and that, long prior to the commencement of this action, this defendant paid, or caused to be paid, to said Chandler, the purchase price in full for all coal sold and delivered by said Chandler prior to his death."

Defendant also pleaded that the action is barred by subdivision 1 of section 339, Code of Civil Procedure.

The cause was tried before a jury, and plaintiff had a verdict for the amount prayed for. Defendant appeals from the judgment and from the order denying his motion for a new trial.

It was admitted at the trial that, if there is any claim against defendant, plaintiff is the holder thereof.

Appellant's points are: That his motion to strike out should have been granted and his demurrer sustained; that the evidence does not sustain the verdict; that the judgment is excessive; and that the court erred in giving certain instructions and in certain rulings on the admission of testimony.

[1] The motion was to strike out the averments "respecting the delivery of coal alleged to have been made in December, 1907, and January, 1908, upon the ground that they were sham, irrelevant, and redundant matter, and further that the said amended complaint showed upon its face that the amounts therein sued for had been in fact paid." The argument is that "no other inference can be drawn from the pleading than that these were each separate items"; that "the items became due as the coal was delivered," and, as "the payments corresponded to the exact amount of the two items, it follows as matter of law they discharged the oldest obligation in point of time." Civ. Code, § 1479, par. 3, subd. 3.

The sufficient answer to these contentions, it seems to us, is found in the amended complaint which distinctly claims that the account was a continuing one and constituted an open account, and, whether or not this was true, plaintiff had the right to establish the fact by the evidence, and this right was not taken from him by the circumstance that payments, made long after all the coal was furnished, corresponded exactly with the value of coal furnished in a given month. Such coincidence would not necessarily change the account from an open to a closed account.

[2] If the account was an open one, as plaintiff alleged it was, it would be immaterial whether payments were applied to the earliest items or not. Plaintiff had the right to apply the payments to the account generally, under the section of the Code cited, unless the defendant, at the time of payment, indicated an intention that it should be applied to the extinction of a particular obligation, and defendant makes no contention that he gave any such directions. The evidence was that he gave none. It was not error to deny the motion.

[3] The demurrer is urged upon somewhat similar grounds. The contention is that "the complaint shows that the alleged account had become an account stated and is barred by the statute of limitations." Subdivision 1, § 339, Code Civ. Proc. It is argued that the averment of the amended complaint that on March 28, 1908, "the balance upon said open book account was struck and the total sum due, owing, and unpaid on account of said balance was the sum of \$5,586.95, and said last-named sum became due and payable on or about said last-named date," can only be taken "to mean that the account was stated by the parties on that date"; that the "account could not be *open* and *closed* at the same time." If the case were here on the special demurrer alone, there might be some ground for invoking the rule that, where there is doubt or uncertainty as to the meaning of the complaint, it is construed most strongly against the pleader. But the case is here on this very issue alleged by plaintiff and denied by defendant, and evidence was taken on that issue. We do not think, however, that the amended complaint is open to the objection urged. A fair construction of the language used in stating what was done is entirely consistent with the account remaining an open book account on the day the balance was struck. The sufficiency of the complaint to state a cause of action on an open account is not challenged otherwise than as to its uncertainty.

It appears, from defendant's answer, that defendant had been purchasing coal from Chandler for many years, and the evidence was that the account had been carried along on Chandler's books sometimes for months; defendant paying from time to time, not always, an amount equaling deliveries for any given month or months. When the averment referred to is given full consideration, it means that the parties had ended their dealings with each other on March 28, 1908, and naturally a balance was struck, but it cannot fairly be said that, in doing so, what had been an open book account was, by so doing, changed to a stated account. Nor can we see how by any reasonable meaning given to the pleading that either count states a cause of action on an account stated. An account stated requires that there be an agreement, express or implied, that the balance is correct, and this agreement constitutes a new

contract which takes the place of the original contract, whether open or closed. 1 Am. & Eng. Ency. of Law, p. 437. The action was on an open book account and was commenced within four years and was not barred by the statute of limitations. Code Civ. Proc. § 337, subd. 2.

[4] There was sufficient evidence, in our opinion, to justify the verdict that the quantity of coal of the value charged was delivered to defendant by Chandler at the times alleged, and that no payment, other than as alleged in the amended complaint, has been made. The only question about which there can exist any controversy is whether the account was, as alleged by plaintiff, an open book account, or whether, as defendant claimed in his answer, "each and every item of coal so purchased by defendant from said Chandler was and constituted a separate and distinct transaction," from which, as is contended, the inference necessarily followed (though it is not so alleged) that the account was a stated account and hence barred by the statute.

Defendant offered no evidence. What we know of the transaction comes entirely from the testimony of persons in the employment of Chandler at the time and from entries in his books of account. While defendant did not plead a stated account and alleged only that each item "constituted a separate and distinct transaction," it is perhaps immaterial whether, from defendant's standpoint, the account was stated or not, if in fact it was shown to be something other than an open book account, upon which latter character of the account plaintiff relied for recovery.

[5] There is no disagreement among the authorities as to what constitutes an open book account. In Anderson's Law Dictionary an open account is thus briefly defined:

"An account with one or more items unsettled; also an account with dealings still continuing."

Among the cases cited is *Tucker v. Quimby*, 37 Iowa, 17, to the effect that:

"An account to be 'continuous' must be without break or interruption. * * * 'Open' means 'not closed; 'current,' * * * 'running,' 'passing,' a 'connected' series. * * * A 'continuous, open, current account' is an account which is not interrupted or broken, not closed by settlement or otherwise, * * * a running, connected series of transactions."

In 1 Ruling Case Law, p. 207, it is said: "The expression 'outstanding and open account' has a well-defined and well-understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment. It is usually disclosed by the account books of the owner of the demand, and does not include express contracts or obligations which have been reduced to writing, such as bonds, bills of exchange, or promissory notes."

In 1 Ency. L. & P. p. 363, it is stated:

"An open account is one which is continuous or current, uninterrupted or unclosed by settle-

ment or otherwise, consisting of a series of transactions; also one in which some item in the contract is left open and undetermined by the parties, in which sense it may exist whether there be but one item or many."

It is stated in 1 Am. & Eng. Ency. of L. 435:

"An account is also open whenever there have been current dealings between the parties, which are kept unclosed with the expectation of further transactions between them."

Appellant contends that an open account cannot exist without the mutual agreement of the parties that the account between them shall be so treated, and that, as there is no direct evidence that defendant ever so agreed, there is no open account established. To constitute an account stated there must be an agreement, express or implied, between the parties as to the correctness of the items of the account and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance. Id. p. 437. But herein lies the chief distinguishing characteristic differentiating a stated account from an open, current account. An open account does not necessarily arise from the agreement of the parties. One definition is that "an open account is an account not stated or agreed upon between the parties." Id. p. 435. It was not necessary that plaintiff should prove an express agreement by defendant that the account should be treated as an open account. As stated in Ruling Case Law, supra, "it is usually disclosed by the account books of the owner of the demand," and may be shown by the circumstances attending the dealings between the parties.

The evidence showed that the general course of business between the parties, which had been followed for a long time before December, 1907, and was continuous thereafter up to March 28, 1908, when coal was no longer delivered to the steamer Eureka, was that coal was furnished to defendant from time to time during each month on credit and indicating a continuous credit account on which defendant paid for previous deliveries more or less of the balance due from time to time.

[6] It is not reasonable to hold, as defendant contends should be held, that the account was a stated account because each separate delivery in this long series of sales constituted a separate transaction; there having been each month many separate sales and deliveries. As we have already suggested, the rendering of account each month did not change the character of the items from an open book account into a stated account or account rendered. The evidence was that the deliveries continued right along whether the monthly deliveries were paid for or not, and there was evidence tending to show that the parties did not contemplate that their dealings were to be closed at the end of each month. It appeared that no part of the claim now made was paid until

in July, 1908, although the balance was struck in March. The method of deliveries was shown to have been as follows: The coal was run over the scales in delivery wagons. Tags in duplicate of the weight were taken and given to the teamster who delivered one to defendant and returned the other to Chandler. The weights were entered in a scale book at the time the weights were taken, and on the return of the tags they were checked up with the scale book. The weights and price were entered in the day book shortly after being entered in the scale book. These facts were testified to by the clerks who did the weighing and made the entries in the books of account and by the teamsters who delivered the coal to the steamer. The day book of original entries was introduced in which were entered the sales and deliveries commencing December 7, 1907, and ending March 30, 1908. These entries show several different deliveries each month. In December, January, and February, for example, there were six and in March five. The weight is given in each instance and the price \$7 per ton, and the amount due carried out, being the same as stated in the complaint.

[7] Evidence was given of the rendition of the items of account, and appellant contends that this circumstance shows the account became an account stated and that the variance is fatal. No objection was made to the evidence, when offered, on this latter ground. The evidence was offered by plaintiff as tending to show delivery and non-payment and was admissible for that purpose, though not admissible to show an account stated, because it would for that purpose have been outside the issues. The rule generally is that, where a variance is claimed, it should be claimed at the trial. *Stover v. Stevens*, 21 Cal. App. 261, 263, 131 Pac. 332. Furthermore, the rendering of the account is only a circumstance which with others may or may not establish an account stated. We have already pointed out that, to turn an account into an account stated, it must have been rendered with a view of ascertaining the balance and making a final adjudication of the matter involved in the account, or, in other words, to bring about a meeting of the minds of the parties. We think the evidence fairly established an open book account.

[8] It is further contended that the verdict is excessive in the sum of \$14.95. This result is arrived at by taking the gross tons stated in the complaint and multiplying by \$7, the value per ton. The day book showed the exact tons and fractions of tons carried out at \$7 per ton, as delivered to defendant, and amounted to the sum claimed in the complaint. The value is fully shown, although in alleging the tons some fractions were omitted. The evidence supported the verdict.

[9] A witness, Chandler's bookkeeper, over defendant's objection, was permitted to state the amount of balance shown by Chandler's ledger to be due. The witness stated merely what appeared from the day book subsequently introduced. This witness was also permitted to state the course of the business between the parties prior and up to December, 1907. As tending to show the existence of an open account, the evidence was admissible.

[10] We think the books of account were properly admitted. The testimony of witness Robert Chandler was that the entries made in the scale book were made by him and very soon thereafter and on the same day transferred to the day book and were all in his handwriting, and the coal was either weighed by him or by witness Wright. These entries were checked up and compared with the tags which had been given to the teamsters, who reported back that the coal had been delivered and returned the tags signed by defendant to show delivery. These tags, it was shown, had been destroyed. Appellant cites San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 104 Pac. 999, in support of his objection. In that case, said the court:

"The witness clearly showed that the facts were obtained first by the oral statements of the various teamsters, then transferred by him to a memorandum or temporary paper, and then afterward entered by him in a work book, which was the book offered and received in evidence."

Commenting upon the objection, the court said:

"The first entry or memorandum made by the witness on paper was but the oral statement of the teamsters," and that the evidence "was purely hearsay."

Respondent takes issue with some statements made in the opinion which need not concern us. The facts in that case were so unlike the facts in the present case that it furnishes no guide for us here.

[11] Defendant urges that the pages of the day book which constituted the account "were not read to or by the jury, nor was the reading admitted or waived. They, therefore, cannot be considered as in evidence." The record shows that these pages, as testified to by Mr. Chandler, were offered and were admitted, over defendant's objection. They form a part of the bill of exceptions stipulated by defendant as "settled, allowed, and certified as and for defendant's bill of exceptions on its (his) motion for a new trial and on its (his) appeal from the judgment herein." There is nothing in the record to show that the jury did not consider this evidence and we must presume that they did.

The court gave the following instruction, at the request of the plaintiff:

"If you shall find that the various deliveries of coal to the steamer Eureka, as charged upon the books of Richard D. Chandler, were entered upon the books as parts and items of running and continuous dealings between Richard D. Chand-

ler and the defendant, and that the account was kept unclosed prior to the date of the last entry on March 28, 1908, with the anticipation of further transactions on the part of Mr. Chandler and the defendant, then I instruct you that the book account which contains these charges is an open book account."

At the request of the defendant the court gave the following instruction:

"You are instructed that the mere entry of items in books does not constitute an open book account, but there must be either an express agreement between the parties to maintain an open book account or some acts from which such an agreement may be reasonably inferred."

Of the first of these instructions it is claimed that it is ambiguous and misleading inasmuch as "it may be interpreted to mean that, if Chandler made the entries in the books because he anticipated future business transactions with Mr. Doe, that act of itself made it an open book account."

We think the instruction is a correct statement of the law. The contention was that an open book account could not be established without showing that defendant had agreed that the account should be so treated. We have already said that the nature of the account was not necessarily the subject of previous agreement, but was to be determined from all the facts and circumstances which, in our opinion, were sufficient to show that the account was an open book account.

Of the second of these instructions it may be true "that the mere entry of items in books does not constitute an open book account," but, where we have these entries and an explanation as to how and when they were made, they may constitute a strong circumstance tending to show the true character of the account, and in the present case there were other circumstances pointing in the same direction and sufficient to show that the account was an open book account.

We discover no just ground for ordering a new trial. The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

26 Cal. App. 229
RALEIGH et al. v. LEE. (Civ. 1306.)
(District Court of Appeal, Third District, California. Dec. 24, 1914. Modification of Opinion Jan. 23, 1915.)

1. HUSBAND AND WIFE — 25 — AGENCY — SUFFICIENCY OF EVIDENCE.

A contract by a wife for the purchase of lots had its origin in a memorandum signed in her name by her husband, who paid a deposit on account of a contract to be given upon a further payment. The husband represented that he was acting for the wife and by his direction the contract was drawn in her name in duplicate. He took a copy and procured her signature thereto and returned it to the vendor. The copy signed by the vendor was witnessed by him and delivered to him, and he later made affidavit to the genuineness of defendant's signature, caused the instrument to be acknowledged, and had it recorded. He subsequently made monthly or bimonthly payments on the

contract. The wife never appeared personally in the transaction. *Held*, that the facts justified a finding that in making the contract and the payments the husband was acting as his wife's agent.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 148-151, 153, 154, 525; Dec. Dig. ⚡25.]

2. HUSBAND AND WIFE ⚡25 — AGENCY — SUFFICIENCY OF EVIDENCE.

In a suit for specific performance of a contract for the sale of land, evidence *held* insufficient to support a finding that plaintiff's husband, who made the contract and made payments thereon as her agent, was authorized to agree subsequent to the execution of the contract that money loaned to him by the vendor should be added to the purchase price of the land.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 148-151, 153, 154, 525; Dec. Dig. ⚡25.]

3. PRINCIPAL AND AGENT ⚡21, 22 — EVIDENCE OF AGENCY—DECLARATIONS OF AGENT.

When the fact of agency rests in parol, it may be established by the testimony of the alleged agent, but not by his extrajudicial statements or declarations.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 39, 40; Dec. Dig. ⚡21, 22.]

4. HUSBAND AND WIFE ⚡25—AGENCY—NOTICE TO AGENT—IMPUTING TO PRINCIPAL.

Where, though a husband acted as his wife's agent in making a contract for the purchase of lots and in making payments thereon, he was not authorized to agree that money borrowed by him from the vendor should be added to the purchase price of the lots, his knowledge that he had done so could not be imputed to the wife, under Civ. Code, § 2332, providing that, as against a principal, both principal and agent are deemed to have notice of whatever either has notice of and ought in good faith and the exercise of ordinary care and diligence to communicate to the other.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 148-151, 153, 154, 525; Dec. Dig. ⚡25.]

5. HUSBAND AND WIFE ⚡25—CONTRACTS—PARTIES BOUND.

Where a husband had no authority, actual or ostensible, to agree that money loaned him by a vendor of lots which the wife had contracted to purchase should be added to the purchase price thereof, such agreement was not binding on the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 148-151, 153, 154, 525; Dec. Dig. ⚡25.]

6. APPEAL AND ERROR ⚡1177—REVERSAL—DIRECTING JUDGMENT.

In a suit for specific performance of a contract for the sale of lots for \$400 payable in monthly installments with interest, the trial court erroneously found that \$550.12 loaned the purchaser's husband by the vendor had by agreement been added to the purchase price, and further found that \$548.70 had been paid on the contract as changed, and that there was still due \$728.84. *Held*, that it was not within the province of an appellate court to determine the interest for a period of six years, or to determine that the payments found by the trial court to have been made on the contract as changed should be treated as made on the original contract, and hence, though the interest added to the principal apparently would not amount to \$548.70, the cause would be remanded for a determination as to whether plaintiff had paid in full the original contract price, in-

stead of directing a judgment for specific performance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. ⚡1177.]

Modification of Opinion.

7. APPEAL AND ERROR ⚡1172—REVERSAL IN PART.

A judgment may be affirmed as to one cause of action and reversed as to another.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4555-4561; Dec. Dig. ⚡1172.]

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Action by Florence I. Raleigh and husband against George H. Lee. From a judgment for defendant and an order denying a new trial, plaintiffs appeal. Affirmed in part, and reversed in part.

Austin Lewis, of San Francisco, and R. M. Royce, of Oakland, for appellants. Clinton G. Dodge, of San Francisco, for respondent.

CHIPMAN, P. J. The complaint embraces two counts: First, for the specific performance of a contract to convey certain real property, lots 2 and 3, Fruitvale Boulevard Tract, Alameda county, "Exhibit 1"; second, for damages for breach of a contract to convey lots 73 and 74, in above tract, "Exhibit 2." Concerning the lots 2 and 3, it is alleged that plaintiff Florence I. Raleigh, on May 3, 1906, entered into a contract with defendant whereby he agreed to sell and transfer to plaintiff Florence or her assigns, and she agreed to purchase, said lots for the sum of \$400, payable in monthly installments, together with interest; that said plaintiff, Florence, has complied with the terms of said contract on her part, and has paid thereon the sum of \$548.90, and on April 24, 1912, demanded of defendant to comply with said contract on his part, which he refused to do; and that on said last-named day the said lots were of the value of \$1,800. In the second count it is alleged that on January 18, 1907, one Frances A. Raleigh entered into a contract, similar in its terms to that above mentioned, for the purchase of said lots 73 and 74, for which she agreed to pay to defendant the sum of \$500, payable in monthly installments; that on February 7, 1907, she assigned her interest in said contract to said L. A. Raleigh, and said L. A. Raleigh, on April 18, 1912, assigned his interest therein to plaintiff Florence I. Raleigh, all with the knowledge of defendant; that plaintiff Florence and her assignors have complied with all the terms of said contract; that on April 24, 1912, plaintiff Florence tendered to defendant the sum of \$300, being more than the balance then due on said contract, and demanded a deed which defendant refused to execute; that, at the time of said demand, the value of said lots was the

sum of \$1,500; that plaintiff Florence and her assignors have paid the sum of \$355 on said contract. Defendant denies that plaintiff has complied with all the terms of said contract, "Exhibit 1," and on this behalf alleges "that on or about December 14, 1910, plaintiffs borrowed from defendant, and defendant loaned to plaintiffs, the sum of \$550.12, and that, as a condition of said loan and as security for the payment of the same, it was then and there agreed by and between plaintiffs and defendant that said sum of \$550.12 should be added to and become a part of the contract price for the real property described on page 2 of said complaint ('Exhibit 1'), and it was then and there further agreed by and between plaintiffs and defendant that plaintiffs should pay to defendant the sum of 8 per cent. per annum interest upon said \$550.12 and upon the unpaid purchase price of said lots (describing them), and that said sum of \$550.12 and interest thereon should become payable according to the terms as set forth in said contract' (plaintiffs' 'Exhibit 1'); that on April 17, 1912, there was due and owing on account of said contract the sum of \$728.94, principal and interest, no part of which has been paid; that on said last-named date defendant demanded of plaintiffs payment of said sum and tendered a deed to said lots, upon the payment of said sum; and that to pay the same or any part thereof plaintiffs and each of them refused. Defendant admits the payment to him of \$548.70 on said contract as changed as hereinbefore stated, but there remains due the said sum of \$728.94; denies that the value of said lots is \$1,800, or of any greater sum than \$800. For answer to the second count defendant denies that he is the owner of lot 74 mentioned in "Exhibit 2," and as to said lot alleges that, by direction of the then owner, he conveyed said lot to one T. B. Draper, on or about March 24, 1909, who now owns said lot, and that on said date there had been paid on said contract the sum of \$306.99; denies that plaintiff and her alleged assignors have complied with all or any of the terms of said contract, attached to plaintiffs' complaint ("Exhibit 2"); and alleges that there is now due on said contract the sum of \$306.99, and that defendant is ready and willing to convey said lot 73 upon payment thereof; denies the alleged tender; and denies that the value of said lots is \$1,500, or of any sum greater than \$800. The court found that plaintiff Florence has not complied with the terms of the contract, "Exhibit 1"; that said contract was changed, on or about December 10, 1910, as alleged in the answer; and that the sum of \$548.70 was paid thereon as changed; and that on April 24, 1912, there was unpaid and still due the sum of \$728.84, for which payment was then demanded and deed tendered, but payment was refused; that defendant has been at all times and now is able, ready, and willing to comply with

the said contract as the same has been changed; that said lots mentioned in "Exhibit 1" were not, on said date, of the value of \$1,800, or of any value greater than \$800. As to the lots mentioned in the second count of the complaint, the court found: That defendant is not the owner of lot 74, but that ever since March 24, 1909, T. B. Draper has been and now is the owner thereof; that on February 7, 1907, Frances A. Raleigh, named in said contract, assigned her interest to said L. A. Raleigh, and on April 18, 1912, said L. A. Raleigh assigned all his interest therein to said Florence I. Raleigh; that neither of said persons has complied with the terms of said contract, "Exhibit 2"; that neither of said persons, on April 24, 1912, nor at any other time, tendered to defendant \$300 or any money for a deed from defendant to said Florence; that about March 24, 1909, there had been paid on said contract \$355, and said L. A. Raleigh was then the owner thereof, and while such owner he directed defendant to convey lot 74 to said Draper, and thereupon defendant did convey said lot to said Draper, who paid \$150 on account of said contract, "Exhibit 2," making a total of \$505 paid on account thereof, and there is now unpaid thereon the sum of \$132.51; that said lots mentioned in "Exhibit 2" were not, on April 24, 1912, nor at any time, of the value of \$1,500, or of any value greater than \$800. As conclusion of law the court found that plaintiffs are not entitled to recover anything from defendant nor to any relief prayed for, and that defendant is entitled to recover his costs.

The contention of appellants upon the first count of the complaint is: That plaintiff Florence I. Raleigh paid all the money she had agreed to pay under the contract, "Exhibit 1"; that her husband, L. A. Raleigh, was not a party to it, and no written or other authorization to him by her to change said contract was shown; that she was not present at any of the interviews between her husband and defendant or his attorney in fact and son, George F. Lee, who attended to much of the business of defendant; that the change made in this contract, or novation claimed by defendant, was without her knowledge or consent and was signed by L. A. Raleigh acknowledging the loan to him of \$550.12; that the writing was admitted over plaintiffs' objections; and that any declarations he may have made in the matter were not in the presence of the plaintiff, his wife, and were incompetent and were insufficient to sustain the findings.

Respondent's reply is: That there is ample evidence to establish an ostensible agency on the part of plaintiff L. A. Raleigh to bind his wife Florence, the other plaintiff, in changing the contract so as to add \$550.12 thereto "and to show that such change was fully executed according to the law of this state."

The findings and judgment hinge upon the

agency of plaintiff L. A. Raleigh. "An agency is either actual or ostensible." Civ. Code, § 2298. "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Id. § 2300. Within the scope of his ostensible authority, the agent represents the principal and all liabilities which would accrue to the agent within such limits accrue to the principal (Id. § 2330); and, as against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought in good faith and the exercise of ordinary care and diligence, to communicate to the other (Id., § 2332). "A principal is bound by the acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof." Id., § 2334.

[1, 2] It seems to us that, in view of the foregoing principles, the facts fully justified the court in its findings that in making the contract, "Exhibit 1," and the payments for the lots indorsed thereon, L. A. Raleigh was acting as his wife's agent. There was evidence that this contract had its origin in a memorandum to which plaintiff L. A. Raleigh signed the name of plaintiff Florence I. Raleigh and his own name as a witness, and he paid a deposit to defendant on account of a contract to be given upon a further payment. Plaintiff Florence was not present, but her husband represented that he was acting for his wife, and by his direction the contract was subsequently drawn in her name as the purchaser. This contract was in duplicate. Raleigh took a copy and got his wife to sign it and returned it to defendant. The copy signed by defendant was witnessed by Raleigh and was delivered to him, and he later made affidavit to the genuineness of the signature of defendant and caused the instrument to be acknowledged, and he himself had it recorded. His wife never appeared personally in the transaction. Neither defendant nor his attorney in fact knew Mrs. Raleigh personally, and they testified that they had no recollection of ever having seen her; that they dealt with her husband in good faith, fully believing that he was her agent and authorized to represent her in all the transactions concerning the contract. The payments were made monthly or bimonthly by Raleigh, personally, from its date, May 3, 1906, to February 9, 1912.

The more serious question relates to the \$550.12 which defendant loaned to L. A. Raleigh and which defendant claims was secured by the contract, "Exhibit 1." Witness Chas. F. Lee, defendant's attorney in fact, testified for defendant as follows:

"Mr. Raleigh came into my office. Mr. Nead was either there or came in—and asked me if

I would loan him \$550; that he wanted to give Mr. Nead \$200. He wanted to get \$350 more. I rather demurred to it; didn't want to do it. Finally, through the persuasion of Mr. Nead, or Mr. Raleigh, Mr. Nead seemed to be quite angry, and Raleigh seemed to be very much perturbed and Raleigh said, 'You can apply it on account of my lots 2 and 3,' and, after thinking it over for some little time, I said: 'Well, Raleigh, all right. I don't like to do it, but I will do it, but I want you to give me some little paper that will show that you have the right to get this money, so that I will have the right to apply it to the account.' I said: 'Does your wife know about this transaction? Have you the right to go to work and apply this money to her contract?' I said 'this contract,' and he says: 'I have; I am her agent, and I have the right to do it because I am her husband and am interested in the property as much as she is.' Said I, 'If those are the conditions, I will go to work and let you have the money,' which I did. The money was loaned to him with the understanding that it was to run on the contract then in existence, and bear the same rate of interest, to be repaid in the same way. * * * Q. Just finish this conversation. A. I loaned him the money on those conditions. Mr. Nead was present. I turned around to my stenographer, and I dictated this agreement here. She took it off in a stenographer's book, and then brought it on the typewriter, and brought it back, and I read it in the presence of Mr. Raleigh and Mr. Nead both, and he said, 'That is all right,' and signed it. Q. In what way did you give him the \$550? A. It is pretty hard for me to tell you that right now, Mr. Dodge, unless I look further into it. \$200 of it, I can tell by my books, I applied to the account of Mr. J. M. Nead. Q. Have you got your book here? A. Yes. Q. Which book do you want? A. The large one. On December 14th I gave Mr. Nead a receipt for \$200, of the \$550. Q. Now, state whether or not, to make this clear, whether that was done at Mr. Raleigh's request? A. Yes, sir. And Mr. Nead at that time gave me \$104 in addition, for which I gave him a separate receipt, because I didn't know anything about Mr. Nead's and Mr. Raleigh's transactions at all. Q. Did you let Mr. Raleigh have the sum of \$550.12 at that time? A. Yes, sir. Q. Now, the paper that he signed is the one that you say he gave to you? A. One that I gave to him and he gave back to me; yes, sir."

The paper referred to reads as follows:

"Fruitvale, Cal. December 14, 1910. Mr. George H. Lee. Dear Sir: Kindly apply to my account the sum of five hundred fifty and 12/100 dollars, this day received from you. In consideration of which sum, I hereby agree to pay 8 per cent. per annum upon lots Nos. 2 and 3, in block P, of the Fruitvale Boulevard Tract, to be repaid in accordance with several contracts now in existence in the Fruitvale Boulevard Tract, Fruitvale, Alameda County, California. Witness my hand and seal this 14th day of December, A. D. 1910."

The letter referred to was written by Mr. Lee, April 17, 1912, long after this money was borrowed and shortly before the complaint was filed. On Plaintiffs' Exhibit 1 is the following indorsement: "Dec. 14, 1910. \$550.12 added to this debt. L. A. R." As to which plaintiff L. A. Raleigh testified:

"Mr. Dodge: Q. There is one matter I overlooked, I think, Mr. Raleigh, in regard to this contract on lots 2 and 3. I call your attention to an indorsement on there, dated December 14, 1910: '\$550 added to this debt. L. A. R.' Who wrote that? * * * A. I think I wrote

that without my wife knowing anything about it, or without my telling Mr. Lee that my wife knew anything about it. * * * Q. That is the \$550.12 that Mr. Lee testified to about your borrowing, isn't it? A. I believe so, and the same money that I was paying, according to the agreement and up to the time I received the letter from Mr. Lee. Q. Did you have any authority, as agent for your wife, to borrow that sum of \$550.12 on that contract for lots 2 and 3, and make it a part of that contract? * * * A. I had no conversation with my wife about it whatever, and she knew nothing about it. Q. Did you have any authority? Answer 'Yes' or 'No.' A. What is the question? The Court: Q. Did you have any authority? A. No, sir. Mr. Dodge: Q. You wrote that indorsement on that, '\$550.12 added to this contract,' on that date, December 14, 1910, did you not? A. It looks like my writing."

Witness Lee testified that he paid Nead \$200 of this money by crediting him with that amount on a contract for the purchase of a lot by Nead from defendant and the balance was paid to Raleigh.

All this evidence was admitted over plaintiffs' objection that it was irrelevant, immaterial and incompetent; that no authority was shown from plaintiff Florence to borrow this money, either in writing or otherwise, nor was there any evidence that she had any knowledge of the transaction. Witness Lee testified that he told Raleigh:

"I want you to give me some little paper that will show that you have the right to get this money, so that I will have the right to apply it to the account."

It seems, however, that defendant did not insist upon Raleigh's getting authority from his wife, as defendant at first required, but acted upon Raleigh's assurance alone that he was his wife's agent and "had the right to do it." It clearly appears that the money was loaned to Raleigh individually, of which \$200 was to pay a debt Raleigh owed to Nead and by Nead to defendant. The evidence tending to show an ostensible agency related to the original contract for the purchase of lots 2 and 3 for plaintiff Florence, to whom alone the sale was made and with whom alone defendant contracted and in whose name receipts were given by defendant. There is no evidence that plaintiff Florence had any knowledge of or interest in this loan and plaintiff Raleigh testified that she had none. The evidence to the contrary rests entirely upon the declarations of Raleigh to defendant at the time the latter made the loan. It is true that Raleigh made an indorsement on the contract which tended to show that this money was to be added to the debt represented in the contract for the sale of lots 2 and 3, but no authority from his wife to enter into any such contract or knowledge to her that he had done so was shown.

[3-5] "The rule is well established," said the court in *Kast v. Miller & Lux*, 159 Cal. 723, 727, 115 Pac. 932, 933, "that the fact of agency when it rests in parol may be established on the trial by the testimony of the agent himself. His testimony is admissible

and competent to prove the agency and the nature and scope of his authority and to bind his principal thereby"—citing numerous cases. "It is equally well established that extrajudicial statements or declarations in pais of one assuming to act as agent are inadmissible and incompetent to establish the fact of agency"—citing many cases. We do not feel warranted in assuming from the facts and circumstances, which in our opinion established an ostensible agency in Raleigh to represent his wife in the purchase of the lots and to make the payments and otherwise act as her agent in respect of the purchase, that he also had authority to borrow money for his own use and pledge these lots as security for payment. The only fact shown which would seem to indicate that plaintiff Florence must have had some knowledge of these loans to her husband is the indorsement on the contract, "Exhibit A," made part of her complaint, to wit: "Dec. 14, 1910. \$550.12 added to this debt. L. A. R." But there is no evidence that Mrs. Raleigh ever saw this duplicate copy of the contract signed only by defendant, or that she had any knowledge of this indorsement at any time prior to the filing of the complaint in the action. Her husband attended to all the business relating to the making of the contract and of payments on it, and, so far as appears, kept it in his possession. It is not claimed by defendant that the husband was a party to this contract or had any interest in it. He was joined as plaintiff because he was the husband of Florence.

We do not think that notice to plaintiff Florence can be imputed under section 2332, Civil Code, supra, for the reason that there is no evidence that Raleigh was his wife's agent or authorized by her to borrow money from defendant, except the declarations of the agent, which, as we have seen, were neither admissible nor competent to prove agency. Nor can it be said that this was an executed agreement binding upon Mrs. Raleigh, for the reason that her husband had no authority, actual or ostensible, to make the agreement, and he could not bind her by executing a contract he had no authority from her to make. If Raleigh had been the general agent of his wife there would be some ground for holding that both "are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Civ. Code, § 2332; *Gallagher v. Eq. Light & Gas Co.*, 141 Cal. 699, 705, 75 Pac. 329. But we think the evidence does not warrant our holding that Raleigh was the general agent for his wife or that any agency was established to act for her beyond matters pertaining to the making and execution of the contract as signed by her.

As to lots 73 and 74 there is but little to be said. There was evidence sufficient to jus-

tify the finding that while L. A. Raleigh was the holder and owner of the contract, "Exhibit 2," and long before he assigned it to his wife, Florence, he directed defendant to convey lot 74 to Draper, and defendant credited what he received from Draper on the contract; that there remains still due defendant on this contract the sum of \$132.51. No question of agency is involved, and it is admitted by plaintiffs that:

"The last assignment (of this contract to Florence) was subject to any equitable set-off or claim of Geo. H. Lee against L. A. Raleigh existing at the time of the assignment."

[6] Plaintiff contends that:

"The judgment should be reversed, and the cause remanded, with instructions to specifically enforce the contract set forth in the first count of the complaint."

We do not see our way to do this in view of the findings. The amount found to be due on this contract is made up in part, erroneously, we think, of the money borrowed by L. A. Raleigh from defendant and interest thereon. There is a finding that plaintiff Florence paid \$548.70 on the contract, but payments after December 14, 1910, the court found were made on the contract as changed. We are not authorized to make findings that these payments should be treated as made on the contract unchanged.

By the terms of the contract plaintiff Florence was to pay \$400 for the lots, and this by installments of \$10 monthly with interest at 8 per cent. upon unpaid balances. What this interest would amount to for a period of six years it is not our province to determine. Apparently, the interest added to the principal would not amount to \$548.70. The court found that plaintiff has not paid in full, and, although this finding is erroneously based on the further finding that she is liable under the contract as changed, we think the cause must be remanded for a determination as to whether or not plaintiff has paid in full on the contract unchanged.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

Modification of Opinion.

PER CURIAM. [7] Our attention is called to the fact that in deciding this case we in effect reversed the judgment as to the second cause of action, set forth in the complaint, relating to lots 73 and 74 therein described. Respondent asks that the judgment be so modified as to affirm the judgment of the superior court on said second cause of action. We think this may be done. The judgment heretofore rendered reversing the judgment and order is modified to read as follows:

"The judgment and order are reversed as to the first cause of action stated in the complaint and are affirmed as to the second cause of action therein stated."

169 Cal. 296

RAUER'S LAW & COLLECTION CO. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 6986.)

(Supreme Court of California. Feb. 11, 1915.)

1. JUSTICES OF THE PEACE ⇨159—APPEALS—UNDERTAKING.

Where an appeal bond complied with the statute, the failure of the affidavit accompanying such bond to show, in accordance with Code Civ. Proc. § 1057, whether the sureties were householders or freeholders, did not deprive the court of jurisdiction of an appeal from justice court, for the affidavit constitutes no part of the contract of the sureties; hence, the appeal need not be dismissed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. ⇨159.]

2. JUSTICES OF THE PEACE ⇨159—APPEALS—BONDS.

Where the original undertaking for an appeal from justice court is fatally defective, the superior court obtains no jurisdiction, and cannot allow the filing of a new undertaking.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. ⇨159.]

In Bank. Application by Rauer's Law & Collection Company, a corporation, for a writ of certiorari to be directed against the Superior Court of the City and County of San Francisco and another, begun in the District Court of Appeal, and transferred to the Supreme Court. Writ denied, and order of superior court affirmed.

Wm. Tomskey, of San Francisco, for plaintiff. H. D. Newhouse, of San Francisco, for defendants.

ANGELLOTTI, C. J. This is a proceeding in certiorari, instituted originally in the District Court of Appeal for the First District. It was sought thereby to annul an order of the superior court denying a motion to dismiss an appeal attempted to be taken thereto from a judgment of the justice's court of the city and county of San Francisco. The ground of the motion to dismiss was that the undertaking on appeal filed in the justice's court did not comply with the requirements of the statute, and that the superior court consequently was without jurisdiction. The superior court, in denying the motion to dismiss, allowed the appellant to file a new bond within three days, providing that otherwise the motion would be granted.

The District Court of Appeal gave judgment vacating, annulling, and setting aside the order of the superior court. Within the time allowed an order was made by this court vacating said judgment of the District Court of Appeal, and transferring said proceeding to this court for hearing and determination.

In the justice's court judgment was given in favor of plaintiff in said action, who is also the plaintiff here, against the defendant David Salfeld. Within the time provided by law Salfeld filed his notice of appeal to the superior court, and also a purported undertaking on appeal in the sum of \$100 for the payment of the costs on appeal, and a stay of proceedings being prayed, also in a sum equal to twice the amount of the judgment, including costs. This undertaking was in all respects as required by the provisions of section 978 of the Code of Civil Procedure. The affidavit of sureties accompanying the bond, under section 1057, Code of Civil Procedure, was defective solely in omitting to show that the sureties were either householders or freeholders within the state. Said affidavit read, as to each of said sureties:

"That he is a resident of said state and city and county and is a * * * holder therein."

[1] Section 1057, Code of Civil Procedure, provides:

"In any case where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must * * * require the sureties to accompany it with an affidavit that they are each residents and householders, or freeholders, within the state, and are each worth the sum specified in the undertaking or bond," etc.

This section is based on section 650 of the old Practice Act, as amended in 1854.

The question presented, as we conceive it to be, is whether the undertaking so given, defective only in the respect aforesaid mentioned, was sufficient to confer jurisdiction of the appeal upon the superior court. Unless it was absolutely void, we are satisfied that it must be held that it was sufficient for that purpose. It has at least twice been held by this court substantially that the affidavit required by section 1057, Code of Civil Procedure, is no part of the contract of the sureties, and that the sureties may not successfully resist the enforcement of the undertaking against them on account of any defect in such affidavit, or, indeed, on account of the entire absence of the affidavit. In *People v. Shirley*, 18 Cal. 121, sureties, when sued upon their recognizance of bail for the appearance of a defendant, claimed that they were not liable for the several amounts for which they justified, because they did not equal double the sum for which the bail was fixed by the order of the court, section 1057, Code of Civil Procedure, providing that the affidavit should so show. The court said:

"The justification forms no part of the defendants' contract, and in no manner affects their liability. The insufficiency of the amounts would have been good ground for the county judge to refuse his approval of the instrument,

but it does not lie in the mouth of the sureties to object, when the approval is given."

Again, in *Carpenter v. Furrey*, 128 Cal. 665, 669, 61 Pac. 369, 370, it was said:

"The requirement of section 1057 of the Code of Civil Procedure that the sureties shall justify by affidavit accompanying the bond is intended solely for the protection of obligees; and it does not lie in the mouth of the sureties to object to the sufficiency of the bond because of their failure to comply with this provision of the law."

We think it is clear that, as is held in these cases, the affidavit required by section 1057, Code of Civil Procedure, constitutes no part of the contract of the sureties, and that the undertaking filed in the justice's court furnished ample protection to the plaintiff as to the matters specified in section 978, Code of Civil Procedure. There is nothing in the language of section 1057, Code of Civil Procedure, which can be held to fairly imply that such an affidavit as is referred to therein must accompany an undertaking on appeal in order to give the appellate court jurisdiction of the appeal. In so far as the matter of jurisdiction is concerned, the requirements, in order to make the appeal effectual, are contained in sections 978 and 978a of the Code of Civil Procedure. Section 1057, contained in another title, simply provides, generally, that the officer taking any undertaking or bond required by law "must * * * require the sureties to accompany it with an affidavit," etc. It is, of course, incumbent on any officer taking an undertaking or bond to see that the requirements of this section are complied with. Of course, as has been suggested, such an officer is not only justified in refusing to accept or approve any such bond unless the necessary affidavit is made, but it is his manifest duty to do so. As we have said, however, we do not think the imperfection in the affidavit, or, indeed, the entire absence thereof, can affect the question of the jurisdiction of an appellate court, where the undertaking is in all other respects sufficient.

The case of *Tibbet v. Tom Sue*, 122 Cal. 206, 54 Pac. 741, is relied on by plaintiff as sustaining his contention that the superior court is without jurisdiction of the appeal. In that case there was an appeal from an order refusing to discharge a writ of attachment; the motion therefor having been based on the ground that the writ of attachment was improperly and irregularly issued. The statute required that, "before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff in the sum of not less than \$200, and not exceeding the amount claimed by the plaintiff with sufficient sureties, to the effect," etc. The undertaking received by the clerk was accompanied by an affidavit that was defective in the very respect existing here; viz., it did not show the sureties to be either householders or freeholders. It was substantially held that the clerk, a ministerial officer, had no right to issue a

writ of attachment except upon the presentation of an undertaking in all respects as required by section 539, Code of Civil Procedure, and section 1057, Code of Civil Procedure, and that a writ of attachment issued without such an undertaking accompanied by such an affidavit is "irregularly and improperly issued, and should be discharged upon application." The case is plainly distinguishable from the case at bar. There is nothing therein from which it can fairly be implied that an undertaking on appeal, without the accompanying affidavit, would be insufficient to confer jurisdiction on an appellate court. In that case the clerk, a mere ministerial officer, in issuing the attachment without complying with the requirements of section 1057, Code of Civil Procedure, was doing so "irregularly and improperly," and the motion to dissolve the attachment on that ground was held to be sufficiently well based.

[2] Whether or not the superior court is authorized to allow a new undertaking to be filed on an appeal from the justice's court where the undertaking originally given is defective in some respect not going to its validity is a question that it is not necessary to discuss in this proceeding. Of course, if the original undertaking is fatally defective, "a second, could not be filed in the appellate court with jurisdictional effect." *Bennett v. Superior Court*, 113 Cal. 440, 45 Pac. 808. As we have said, we think that the undertaking filed was sufficient to give the court jurisdiction of the cause, and also to furnish the plaintiff all the protection to which it is entitled under section 978, Code of Civil Procedure, and that no second undertaking was required. If a new bond has been filed in accord with the authorization given therefor by the superior court, it still remains that the original bond is still in force, and that it furnishes plaintiff adequate protection. Plaintiff can in no way be prejudiced by that portion of the order authorizing the filing of the second bond.

The order of the superior court is affirmed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

169 Cal. 400

In re WALKER'S ESTATE.

WALKER v. NASON.

(L. A. 3814.)

(Supreme Court of California. Feb. 19, 1915.
Rehearing denied, March 18, 1915.)

EXECUTORS AND ADMINISTRATORS §17 —
RIGHT TO APPOINTMENT — RELEASE — CON-
STRUCTION OF AGREEMENT — "AGAINST THE
OTHER'S ESTATE."

An agreement between husband and wife recited that, whereas each was desirous of dividing and segregating the property rights of each, and desired that each should hold, control, and manage his or her separate property, it was agreed that the estate real and personal owned

by either or both, is hereby divided and distributed as follows, and that part of one be segregated from the part of the other, and this was followed by a list of the property each divided. Second, that the parties released each to the other all claim for support or any claim against the other's estate now or in the future. Fifth, that this agreement shall operate as and be a complete adjustment, settlement, and division of all their property rights, and that divorce should not affect the agreement which was intended as a final settlement of the property interests, whether or not the parties remained husband and wife, and that the wife thereby expressly waived any and all claims, whether in law or equity, she might now have or subsequently acquire against the husband for alimony, etc., or other claims whatsoever. *Held*, that the agreement was a valid release of the wife's right in the personal estate of the husband, operating after his death, so that under Code Civ. Proc. § 1365, granting administration to certain relatives only when entitled to succeed to the personal estate or a portion thereof, the wife was not entitled to letters of administration; the words "against the other's estate," according to common usage, clearly refers to and includes the right of inheritance, and also claims of the wife against the estate of the husband accruing upon his death in her lifetime.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. §17.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Application by Mabel A. Nason and Mabel E. Walker for letters of administration on the estate of Cornelius Walker, deceased. From an order granting letters to Mabel A. Nason, a daughter, Mabel E. Walker, the wife, appeals. Affirmed.

Schmidt & Riggins, of Los Angeles, for appellant. Geo. M. Harker, of Los Angeles, for respondent.

SHAW, J. Cornelius Walker died, intestate, on November 20, 1913. Mabel A. Nason, his daughter, applied for letters of administration upon his estate, claiming to be his sole heir. Mabel E. Walker, the widow of the deceased, also applied for letters. The two applications were heard together, and the court thereupon made an order granting letters to the daughter and denying the application of the widow. From this order the widow appeals.

Mabel A. Nason was the daughter of the decedent by a former marriage and was not the daughter of Mabel E. Walker. The case turns on the right of the widow to succeed to a part of the personal estate of the decedent, under a written agreement between her and the decedent, executed on November 8, 1911. Under section 1365, Code of Civil Procedure, if she is not entitled to succeed, by reason of that instrument, letters of administration could not, of right, be issued to her upon his estate. At the time of the execution of the agreement, the decedent and Mabel E. Walker were husband and wife. The agreement was in effect as follows: The opening clause

recited that the parties were engaged in the piano business, and that:

"Whereas, each of said parties is desirous of dividing and segregating the property rights of each, and the rights of the other, and desire that hereafter each shall hold control and manage his or her property separate from the control of the other, now, therefore, it is agreed: First. That the estate, both real and personal, now owned or controlled by either or both of said parties, is hereby divided and distributed as follows, and that the part of the one be segregated from the part of the other."

Then follows a list of the property given to each, and a release by each to the other of the property so partitioned. The second paragraph is as follows:

"Second. And the said parties hereby release each to the other, all claim for support, or any claim against the other's estate that he or she might have or assert, now or in the future, to any estate now assigned, or hereafter acquired by either, whether received by purchase, descent, inheritance or otherwise."

The only other material paragraph is the fifth, which reads as follows:

"Fifth. It is further agreed and understood that this agreement shall operate as and be a complete adjustment, settlement and division of all their property rights, relations and affairs. This agreement is not made in fact, or is it intended as an agreement for separation or for a divorce between the parties hereto, but in the event that either of said parties should hereafter institute divorce proceedings, such action shall not, in any way, affect this agreement which is intended as a final settlement of property interests, whether said parties remain husband and wife, or whether they assume some other or different relation toward each other, and said Mabel E. Walker, in consideration of this property agreement, hereby expressly waives any and all claims, whether in law or equity, she may now have or subsequently acquire against said Cornelius Walker for alimony, support, maintenance, attorneys' fees, or other claim whatsoever."

The appellant's argument is that the instrument, taken as an entirety, shows that the wife did not release or waive her right of inheritance from the husband or to his estate, but merely relinquished to him all right or interest she might have in his property during his lifetime and all claims she might have against him personally, during the marriage, growing out of such property interest or out of the marital relation. This claim is based particularly upon the language of that part of the fifth clause of the agreement wherein she waives any and all claims, whether in law or equity, "against said Cornelius Walker for alimony, support, maintenance, attorneys' fees or other claim whatsoever." This, it is contended, is a specific statement of the particular claims waived, which controls the more general statement of the second clause and confines the waiver to personal claims accruing and enforceable against Walker during his lifetime, and excludes from the operation of the waiver the right of succession to his estate.

We do not think these expressions were intended to qualify the provisions of the second clause in this manner. The second and fifth

clauses evidently relate to somewhat different subjects. In drawing the fifth clause the writer appears to have been guarding against probable or possible claims by her in a contemplated action for divorce and the language was selected with a view to bar such claims. The language of the second clause shows an intention to cover a broader subject. By its terms it not only includes claims of either against the other for support during the lifetime of the other, but also all claims by each against the estate of the other whether such estate was then held or was thereafter acquired. The phrase "against the other's estate," according to common usage, clearly refers to and includes the right of inheritance, and also claims of the wife against the estate of the husband accruing upon his death in her lifetime, such as a family allowance and the like. The instrument in this respect is stronger as a release of the right to succeed than was the contract held to be sufficient for that purpose in *Estate of Davis*, 106 Cal. 453, 39 Pac. 756. There the release by the wife was "of all claims she may have as the wife of said W. W. Davis on any property he now has or may in any manner acquire." The claim to the husband's property by inheritance does not vest until death, and is, technically, a claim as widow, or heir, not as wife. Yet the release was held to bar the right of succession to the husband's estate and the right to administer thereon. In like manner the agreement above quoted bars the right of Mabel E. Walker to administer upon the estate of the husband.

It appears that after the making of this agreement an interlocutory judgment of divorce between them was made in the superior court of Los Angeles county, but that the same had not become final at the time of Walker's death. Consequently, the marital relation had not been severed, and had it not been for the agreement aforesaid the wife would have been entitled to administration. *Estate of Dargie*, 162 Cal. 51, 121 Pac. 320. The court properly refused to grant the widow letters of administration.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.

169 Cal. 336

MAXWELL v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF
SAN FRANCISCO et al.
(S. F. 6757.)

(Supreme Court of California. Feb. 13, 1915.
Rehearing Denied March 15, 1915.)

1. MUNICIPAL CORPORATIONS—197—CIVIL SERVICE—CLASSIFICATION—EXAMINATION.

Under San Francisco charter providing for a classified civil service, and declaring that all places of employment in the departments shall constitute the classified service, and that applicants for places therein shall be subject to

examination which shall include, "when appropriate," tests of physical qualifications, the commission holding an examination for promotion in the fire department from the rank of battalion chief to the rank of assistant chief engineer may dispense with physical tests, and the court will not interfere with its discretion.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 541; Dec. Dig. ☞ 197.]

2. MUNICIPAL CORPORATIONS ☞ 197—CLASSIFIED CIVIL SERVICE—DISCRETION OF COMMISSION.

Under San Francisco charter, providing for a classified civil service and for a fire department consisting of a chief engineer and assistant chief engineers, and declaring that the first assistant shall receive a specified salary while the second assistant shall receive a less salary, the commission may, in providing for an examination to fill the offices of first and second assistant chief engineers, provide for an examination from the rank of battalion chief to the rank of assistant chief engineer without classifying the positions of assistant and second assistant.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 541; Dec. Dig. ☞ 197.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by John R. Maxwell against the Civil Service Commission of the City and County of San Francisco and others. From judgment for defendants, plaintiff appeals. Affirmed.

Herbert Choynski and John T. Williams, both of San Francisco (Allen G. Wright and Edgar D. Peixotto, both of San Francisco, of counsel), for appellant. William J. Kelly, John J. O'Toole, Sullivan & Sullivan, Theo. J. Roche, Percy V. Long, and Maurice T. Dooling, Jr., all of San Francisco, amici curiae, for respondents.

PER CURIAM. In this action a demurrer to the complaint was sustained, and judgment was thereupon entered for the defendants, from which the plaintiff appeals.

The plaintiff, as a taxpayer of San Francisco, sued to enjoin the civil service commission of the city from holding an examination for promotion in the fire department. The members of the commission are joined as defendants. It is alleged that the commission intends to hold such examination without including as part of it any tests of physical fitness or health of the persons applying to be examined. The claim is that the city charter requires such tests to be made a part of the examination, that the commission is without power or discretion to have such examination held without including these tests, and that it would needlessly and illegally expend the public funds if it did so.

In classifying the civil service of the city and in organizing the fire department, the officers of that department ranking above superintendents of engines are divided into four classes or ranks, namely: (1) Chief engineer;

(2) first assistant chief engineer; (3) second assistant chief engineer; (4) battalion chiefs. The chief engineer is not selected under the civil service rules. The officers ranking below him must be so selected.

The two offices of first assistant chief engineer and second assistant chief engineer became vacant, and notice of that fact was given to the civil service commission. The charter provides that, upon receiving notice that a place is vacant, the commission shall certify to the appointing officer the names of one or more persons, not exceeding three, standing highest on the eligible list for the office to be filled, from which persons the appointment to the place shall be made by the appointing officer. Article 13, §§ 9 and 10.

For the purpose of providing an eligible list from which to certify the names of persons to fill the said places, the commission thereupon, as provided in section 6 of article 13 of the charter, gave notice that at a time and place mentioned "an examination for promotion in the fire department from the rank of battalion chief to the rank of assistant chief engineer" would be held by the commission.

Section 2 of article 13 provides that the civil service commission shall classify "all the places of employment in or under the offices and departments of the city and county" which the charter has placed under civil service regulations, which places "shall constitute the classified civil service of the city and county, and no appointment to any place shall be made except under the rules hereinafter mentioned and the rules adopted thereunder by the civil service commission."

Section 4 of article 13 is as follows:

"All applicants for places in the classified civil service shall be subjected to examination, which shall be public, competitive and free. Such examinations shall be practical in their character, and shall relate to those matters only which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include, when appropriate, tests of physical qualifications, health, and of manual or professional skill."

[1] While it cannot be denied that physical fitness and health are prime requisites for a fireman, whatever his work in the service, it does not follow that in all examinations, those to determine the fitness of applicants for promotion, as well as those having for their object the selection of eligible men for entry into the department, there should be included tests of physical qualifications and health. Section 4 of article 13, quoted above, does not require physical tests in all cases or even in any specifically defined cases. Such tests are to be included "when appropriate." It would seem that, under this language, the decision whether physical tests are appropriate is committed to the civil service commission, and that it is difficult to say, in any particular case, that the appropriateness

is so clear and obvious that a court would be justified in controlling the determination of the board. But, if we say that physical tests are essential to an original appointment as fireman, must we not say, inasmuch as all men in active service have presumably satisfied the physical tests, the board might reasonably conclude that further or repeated physical tests were not "appropriate" when the question of promotion only was involved? Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong—but it is their question. Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere.

It was held by the learned judge of the superior court that section 4 of article 13 applies only to original applicants for places, and not to those seeking promotion. It is not necessary to determine whether or not such distinction exists. Assuming that examinations for promotion must conform to the requirements of section 4, the determination whether physical tests are appropriate rests in the sound discretion of the commission—a discretion which might fairly be exercised one way in the case of original appointments and the other way if promotion only were involved.

[2] Appellant contends that the commission was mistaken in its classification of the positions for which examinations were to be held. This question was correctly decided by the learned judge of the superior court in his written opinion as follows:

"It is further urged by the plaintiff that in providing for the examination in question the commission made an erroneous classification in this: That it provided for examination from the rank of battalion chief to the rank of assistant engineer, whereas, in fact, the first assistant engineer and the second assistant engineer are of independent grade, and the examination should be held separately for each of such positions, and cites the fact that the first assistant engineer is given by the charter a salary of \$3,000 per annum, while the salary of the second assistant engineer is \$2,400 per annum.

"Upon the matter here involved the charter is uncertain. It nowhere in express language creates the position of assistant engineers or defines their duties or prescribes their number. The first mention of such an officer is in the section providing that the board of fire commissioners shall appoint a chief engineer, in which it is recited that it shall be his duty, and that of the 'assistant chief engineers,' to see that all laws concerning the fire department are enforced. The next reference is in this language: 'The chief engineer, or in his absence the assistant chief engineers' may during a conflagration order buildings to be removed. Again, it is provided that the 'chief engineer and assistant chief engineers' shall be members of the board of fire wardens. The next and last time they are named is in the section declaring the salaries of the officers of the department, in which is found the only reference to the number of, or to any distinction between assistant chief engineers and is in these words: 'First assistant chief engineer three thousand dollars. Second

assistant chief engineer, twenty-four hundred dollars.'

"While difference in salary may be considered with other elements in determining whether two persons are of the same rank, it is not conclusive, even, I believe, where they are engaged in the same field of employment. Rank depends as well upon the duties to be performed, and upon the language creating the positions. The examinations for both places would necessarily be alike, the duties of each officer being similar. If the examination must be confined to the position of second assistant engineer, there never can be held a competitive examination for the position of first assistant engineer; for in the event of a vacancy in that place, it must be filled by promotion from the next lower rank, and that would mean necessarily the elevation of the man who held it; which would be contrary to the spirit of the charter. * * *

"At any rate, the examinations for the positions being necessarily the same, I am of the opinion that the classification as made was within the discretion of the board."

The judgment is affirmed.

169 Cal. 393

PEOPLE v. WESTON. (Cr. 1889.)

(Supreme Court of California. Feb. 17, 1915.)

1. CRIMINAL LAW —1169—HARMLESS ERROR —ERRONEOUS ADMISSION OF EVIDENCE.

Error in admitting the testimony of a witness, given on the preliminary examination, because of the failure to show that he could not with due diligence be found in the state, must, as required by Const. art. 6, § 4½, be disregarded, where the testimony, if not regarded, would not have changed the result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. —1169.]

2. HOMICIDE —166—EVIDENCE—MOTIVE.

Evidence of the relation between accused and his mistress and as to quarrels between them was admissible on the question of motive in connection with other evidence that accused believed that his mistress was being estranged from him by decedent.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. —166.]

3. CRIMINAL LAW —519—EVIDENCE—STATEMENTS BY ACCUSED—CONFESSION.

Statements by accused while in custody, denying any participation in the crime, and setting up an alibi, are not confessions, and may be proved by the prosecution without first showing that they were freely and voluntarily made without improper inducement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163-1174; Dec. Dig. —519.]

4. HOMICIDE —233—MOTIVE—EVIDENCE.

While proof of motive of accused is admissible, it is not indispensable, and where the jury are satisfied, beyond all reasonable doubt, that accused committed the homicide, they must find him guilty without finding what the motive of the homicide was, for the essential thing is that the jury are satisfied, beyond all reasonable doubt, that accused committed the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 481; Dec. Dig. —233.]

5. CRIMINAL LAW —810 — INSTRUCTIONS — CONFLICTING INSTRUCTIONS.

An instruction that, where the identity of accused as the person who killed decedent is in dispute, evidence of the motive of accused to commit the crime is material, is not inconsistent

with an instruction that, while proof of motive is admissible, it is not indispensable, and the jury, satisfied, beyond all reasonable doubt, of the guilt of accused, may find him guilty without finding the motive of the killing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1968; Dec. Dig. ¶810.]

6. CRIMINAL LAW ¶1137—INVITED ERROR—RIGHT TO COMPLAIN.

Accused may not complain of an instruction given at his own request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. ¶1137.]

7. HOMICIDE ¶174—EVIDENCE—ADMISSIBILITY.

Where there was evidence that accused was at the house of a third person before and after the homicide, and that he had opportunity, after the killing, to enter a shed near the third person's house, evidence of finding, after the killing, in the shed, a revolver with one exploded shell and five loaded shells of the same caliber as that with which decedent was shot, was competent.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. ¶174.]

In Bank. Appeal from Superior Court, Alameda County; Bradley V. Sargent, Judge.

Nat Weston was convicted of murder in the first degree, and he appeals. Affirmed.

L. Sledge and O. Hudson, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and W. H. L. Hynes, Dist. Atty., of Oakland, for the People.

ANGELLOTTI, C. J. The defendant was convicted of murder in the first degree, and appeals from the judgment pronounced on such conviction and from an order denying his motion for a new trial.

1. It is suggested that the evidence implicating defendant as the person who shot and killed the deceased, one Jerry Logan, is so uncertain as to leave the verdict without sufficient support. While no one actually witnessed the occurrence, the evidence was of such a character as, in our opinion, to leave no doubt of the guilt of the defendant.

2. Upon the trial the depositions of Alice Logan, the widow of deceased, and one N. H. Brown, taken upon the preliminary examination of defendant, were read in evidence; said witnesses not being present. It was claimed in the trial court, and is claimed here, that it was not satisfactorily shown that these witnesses could not with due diligence be found within the state (no claim being made by the people that either was dead or insane), and that therefore it was error to allow their depositions to be read in evidence. Pen. Code, § 686, subd. 3. Defendant's claim is not seriously pressed here as to the witness Alice Logan, as to whom the evidence shows satisfactorily enough to sustain the conclusion of the trial court that she could not with due diligence be found in the state, and that very shortly after the death

of her husband she left the state to go to New Orleans. As to the witness Brown, the showing was not quite as satisfactory, as the evidence disclosed that the deputy sheriff seeking the witnesses, although informed that Brown had gone to "Scotia," had failed to follow up that information with any attempt to reach such witness at Scotia, in Humboldt county, in this state. Whether this was the place to which Brown had gone does not appear, but in view of the information, reasonable diligence might well be held to have required that an effort should be made to find him at the place of that name in this state.

[1] But the testimony of Brown was, under the circumstances of this case, of very little importance, and we do not see how it could have affected the verdict. The witness did not know the defendant, and had never seen him, so far as he knew, until he saw him in the city prison after his arrest. He was on the street a short distance from Logan's home, at the time of the shooting, about 8 o'clock p. m., heard the shot, and just thereafter saw a man running very fast from Logan's place west on Eighth street toward Pine, and then across a field toward the Southern Pacific tracks. He stated quite positively that he could not say that defendant was this man. He could not say what kind of a hat the man wore, soft or stiff, but thought it was a stiff hat, while all the other evidence showed that defendant did not have such a hat that day. He did, however, say that the man he saw had light clothes, and that "in height and build and general appearance" he resembled the defendant. Such testimony of identification on the part of one observing a stranger to him running very fast along a street in the dusk of the evening is of very slight importance, and it is hardly conceivable that, under the circumstances of this case, it could have influenced the jury in arriving at a verdict. Entirely regardless of this testimony, the evidence as a whole pointed so clearly to the defendant as the guilty party that we are satisfied that the verdict would not have been other than it was, had the deposition not been admitted. Therefore, even if error was committed in receiving it, its admission should not be held to be ground for reversal, especially in view of the provisions of section 4½, art. 6, of the Constitution. It is worthy of note that defendant was represented, when Brown testified at the preliminary examination, by Mr. Sledge, who was one of his attorneys at the trial, and that Mr. Sledge cross-examined the witness at that time.

[2] 3. Certain evidence given by Nettie Dykes, Frank Dykes, and Sarah French, as to the relations existing between defendant and Sarah French and as to certain quarrels between them, was all admissible, in our opinion, on the question of motive. All of

this evidence, taken in connection with other evidence in the cause, fairly tended to show that defendant believed that Sarah French, who was living with him as his mistress, was being estranged from him by deceased, and that he would ultimately be deprived of her society and companionship, and that he greatly resented this and was determined to prevent it, if possible. It cannot be fairly held, in view of the record, that it does not appear that the defendant believed that deceased was the person who was becoming a successful rival for the affection and society of Sarah French. It is thoroughly settled, as said in *People v. Soeder*, 150 Cal. 15, 87 Pac. 1017, that:

"Evidence having a direct tendency, in view of the surrounding circumstances, to prove motive on the part of a person for a crime, and thus to solve a doubt 'either as to the identity of the slayer, the degree of the offense, * * *' is admissible against a defendant, however discreditably it may reflect on him, and even where it may show him guilty of other crimes."

We do not think that the evidence as to these matters went into detail any further than was proper.

[3] 4. The trial court did not err in refusing to strike out certain testimony of W. J. Emigh, assistant inspector of police, as to certain statements made by defendant while in custody. Defendant never made any statement in the nature of a confession or acknowledgment of guilt. In all of his statements in the presence of Officer Emigh he denied having had anything to do with the killing of deceased, and constantly insisted that he was not in Alameda county at all on the day the homicide was committed. His statements consisted of an attempt to account for all his movements on that day, all being in San Francisco, and of absolute denials of the statements of many witnesses both in Oakland and San Francisco as to his whereabouts and conduct on that day, and of denials as to any participation in the homicide. He did admit that a certain hat, which it had been testified had been left by him with one Neil in Oakland on that day, was his, but denied that he left it there, and attempted to account for its getting into Neil's possession by a statement to the effect that it must have been stolen from him. Such statements do not constitute confessions, and the law does not require a showing that they were freely and voluntarily made, without improper inducement, in order to entitle them to be admitted in evidence. There was, however, explicit testimony to the effect that at none of the conversations did any one hold out to defendant any hope of reward or immunity from punishment as an inducement for any statement, and that no force, threat, duress, menace, or coercion was used to induce or compel defendant to make a statement, and that all he said was freely and voluntarily said.

[4] 5. We find no error in the instructions of the trial court as to motive. The general

instruction as to motive, given by the court on this subject, correctly stated substantially that, while proof of motive is always admissible, it is never indispensable, and that, if the jury were satisfied beyond all reasonable doubt that defendant was guilty, they might find him guilty without finding what the motive of the killing was. The essential thing is that the jury should be satisfied beyond all reasonable doubt that the defendant committed the crime charged against him, and, if so satisfied, it is immaterial what the motive is. The presence or absence of a particular motive is only a circumstance to be considered by the jury in connection with other circumstances in the case, in determining whether the defendant is guilty. This is all the instruction given by the court could be fairly understood to mean.

[5] At the request of the defendant made at the conclusion of the charge, the court further instructed the jury that:

"Where the identity of the defendant as the person who committed the crime is a fact in dispute, evidence of the motive of the defendant to commit the crime is material."

This instruction was not at all inconsistent with what the court had previously said on the question of motive. It did not intimate that proof of motive was indispensable. It was simply an instruction as to evidence, specifically pointing out that evidence tending to show motive is material in a case of this character. The court had said substantially the same thing in its general instruction on the subject. The statement was correct.

[6] It is urged that the court erred in giving this instruction, but, even if it had done so, defendant could not complain here of an instruction given at his own request.

6. There was no error in admitting evidence to the effect that the defendant was apparently in a state of some "mental excitement" just prior to the homicide. However, the testimony on this subject was unimportant in character, and could not have affected the verdict one way or the other.

[7] 7. There was no error in admitting the evidence as to the revolver found on May 10th in the woodshed back of Neil's house. This shed was on the lot occupied by Neil. There was evidence to the effect that defendant was at Neil's house for some time before and immediately after the homicide, and that he had opportunity of access to this shed after the homicide. When found, the revolver contained one exploded shell and five loaded shells. It carried the same caliber bullet as that with which deceased was shot. All this was material and competent evidence. The objections made by defendant to all this evidence went rather to its weight than to its admissibility.

No other point for reversal is made in defendant's brief. We have carefully examined the record on appeal, and find no reason to doubt that defendant had a fair and im-

partial trial or that he was properly convicted.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; LAWLOR, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

169 Cal. 387

BELL v. KRAUSS et al.

In re BELL.

(L. A. Nos. 3826, 3879.)

(Supreme Court of California. Feb. 17, 1915.)

1. ADOPTION ⚭7—CONSENT OF PARENT.

A decree of divorce granted to a wife on the ground of failure of the husband to provide for her, which awards to her the custody of a child of the parties, and which requires the husband to make a monthly payment for the child's support, does not deprive him of the custody of the child, within Civ. Code § 224, providing that a child cannot be adopted without the consent of its parents, except that consent is not necessary from a father deprived of civil rights, etc.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7-10; Dec. Dig. ⚭7.]

2. PARENT AND CHILD ⚭2 — CUSTODY OF CHILDREN—STATUTORY RIGHTS.

Under Civ. Code § 197, providing that the father of an unmarried minor child is entitled to its custody, services, and earnings, and section 246, specifying rules for awarding the custody or appointing a general guardian of minors, and Code Civ. Proc. § 1751, defining who may be guardian, a father on the death of the mother, to whom a child has been given by a decree of divorce, is entitled to the custody of the child.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. ⚭2.]

3. PARENT AND CHILD ⚭2 — CUSTODY OF CHILDREN—STATUTORY RIGHTS.

Prima facie a parent is presumed competent and is entitled to the custody of his child, unless found by the court to be incompetent.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. ⚭2.]

4. ADOPTION ⚭16—ABSENCE OF NOTICE TO FATHER—EFFECT.

Where a father is deprived of the custody of a minor child without knowledge of any proceeding for the adoption of the child, and without a hearing, he is entitled to relief from the judgment of adoption taken against him because of surprise, and through his excusable neglect.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 27, 28; Dec. Dig. ⚭16.]

5. ADOPTION ⚭16—ABSENCE OF NOTICE TO FATHER—STATUTORY RIGHTS.

Where a parent makes a prima facie showing that proceedings for the adoption of his child were taken against his will and without notice, the court must set aside the award and give the parent a hearing and an opportunity to oppose the adoption.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 27, 28; Dec. Dig. ⚭16.]

6. ADOPTION ⚭16—PROCEEDINGS TO VACATE—TIME OF APPLICATION.

The six months' time prescribed by Code Civ. Proc. § 473, within which an application must be made for relief against an order of adoption made without notice to the father, runs from the date of the filing of the order of adoption.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 27, 28; Dec. Dig. ⚭16.]

7. ADOPTION ⚭16—PROCEEDINGS TO VACATE—TIME OF APPLICATION.

An action by a father against his minor child and his adoptive parents for setting aside the order of adoption because made without notice is in effect an application, within Code Civ. Proc. § 473, for relief against a judgment taken through mistake or excusable neglect, and, if brought within the statutory time, is available.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 27, 28; Dec. Dig. ⚭16.]

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Jesse M. Bell against Hugh I. Krauss and others, and petition by Jesse M. Bell against Hugh I. Krauss and another, to revoke an adoption. From judgments denying relief, Jesse M. Bell appeals. Reversed in part, and affirmed in part.

J. L. Fleming, W. S. Knott, and C. W. Hatton, all of Los Angeles, for appellant. Schweitzer & Hutton, of Los Angeles, for respondents.

MELVIN, J. On September 4, 1913, Hugh I. Krauss and Birdie M. Krauss, his wife, petitioned for permission to adopt Aileen Bell, a minor child then six years of age. On the same day the court made an order of adoption, which was signed and filed September 4, 1913, but docketed and entered on the 8th day of September 1913. On March 2, 1914, Jesse M. Bell, father of the minor child, served and filed notice of a motion to be relieved from the consequences of said order, specifying in said notice Monday, the 9th day of March, 1914, as the day upon which he would make the motion. In his said notice of motion he announced that he would apply for the desired relief on the grounds that he was not a party to the adoption proceeding; that he had no notice thereof and did not consent thereto; that he was able and willing to care for his daughter and to provide her with a suitable home; that he was entitled to the custody of the infant; was a proper person to have such custody; and that he had never been judicially deprived of the possession of said minor on account of cruelty or neglect nor by reason of failure to provide. He also averred that he had not been dispossessed of civil rights nor divorced upon the grounds of cruelty or adultery, and that he had not been adjudged habitually intemperate. At the hearing of this motion petitioner introduced in evidence an affidavit setting forth the same matters in more elaborate form.

The motion of Mr. Bell was resisted, and Mr. Frank S. Hutton, one of the attorneys for Mr. and Mrs. Krauss, filed an affidavit in which he set forth, among other things, that on October 15, 1913, Jesse M. Bell had commenced an action against Mr. and Mrs. Krauss to set aside and vacate the order of adoption theretofore made. He averred that in the said

action Bell had sought to annul the order of adoption on the same grounds as those afterwards specified in his notice of motion to vacate said order; that the defendants had demurred to the complaint; that the demurrer had been sustained; and that judgment had been duly entered, upon default of plaintiff, in January, 1914. The affidavit of Mr. Hutton also contained the statement that, in an action for divorce between Leila F. Bell and Jesse M. Bell, the latter, by the judgment of the court, had been judicially deprived of the custody of his daughter by reason of cruelty and neglect.

Jesse M. Bell thereupon introduced in evidence the complaint and the decrees in said action for divorce. By order made March 9, 1914, the motion to vacate the order in the adoption matter was denied. From said order denying his motion Jesse M. Bell appeals. He also appeals from the judgment mentioned in Mr. Hutton's affidavit, and by stipulation of the parties both appeals were considered by this court at the same time.

The action commenced as aforesaid by Jesse M. Bell was against Mr. and Mrs. Krauss and the minor child Aileen Bell. It set forth substantially the same facts appearing by the affidavits and the exhibits in the later proceeding upon his motion under section 473 of the Code of Civil Procedure to be relieved of the order of adoption. The pleadings and decrees in the action for divorce, the awarding of the minor child to her mother, the death of the mother on August 19, 1913, and the adoption proceedings held without any notice to Jesse M. Bell and without his knowledge or consent were all set forth in the complaint as well as allegations of his fitness for and right to the custody of his child. It was alleged that, at the time when the adoption proceedings were instituted, Jesse M. Bell resided in Los Angeles, his place of residence being well known to Mr. and Mrs. Krauss, but that they made no effort to secure his consent to the adoption, nor did they give him any notice thereof, but, "on the contrary, willfully and intentionally concealed from him the fact that they were about to institute such adoption proceedings and kept the same carefully concealed from him until after the order of adoption had been made therein."

The prayer was that the order of adoption be declared to be null and void, that it be vacated and set aside, that the minor child be restored to the plaintiff, and for general equitable relief.

We are not favored by a brief from the respondents, and therefore are not informed regarding the theory upon which the demurrer was sustained or the application for relief in the adoption proceedings denied.

[1] Examining the application for relief under section 473 of the Code of Civil Procedure, we will first consider the order which is attacked. There was no denial by the petitioner for leave to adopt Aileen Bell that

the court's order was made without the presence or consent of the child's father and that he knew nothing of the proceeding. The recital in the order regarding the father of Aileen Bell is:

"That the father of said child has been judicially deprived of the custody of said child by reason of neglect and failure to provide."

The corresponding allegation in the petition is:

"That the said parents were, on the 21st day of July, 1909, divorced one from the other, and, in the interlocutory decree of divorce bearing the said date, the custody of said minor child was awarded to the mother upon the ground of neglect, failure to provide, and desertion of said mother and said minor child."

But the interlocutory decree and the final decree in the divorce action fail to support either the allegation in the petition or the finding of the court. The divorce was granted to Leila F. Bell from Jesse M. Bell upon the ground of failure to provide; the custody of Aileen was awarded to the mother; and payment of a monthly sum for the child's support was ordered. There was no finding that the father was an unfit person to have possession and control of the child. The placing of the infant in charge of the mother was not such judicial deprivation of the custody of the child on account of the neglect of the father as is contemplated in section 224 of the Civil Code. Divorces are not granted for offenses against children, and the bestowal of the custody of a minor in a divorce action is not, unless otherwise provided by statute, an adjudication of the fitness of the parent who is for the time denied the right to retain possession of the child. It is nothing more than the expression of the court's belief that, under the circumstances then existing, the welfare of the child would be best subserved by placing said child with one of the parents rather than the other.

[2] Upon the death of a mother to whom a child has been given by a decree of divorce the father becomes entitled to the custody of the child. *Schammel v. Schammel*, 105 Cal. 261, 38 Pac. 729; sections 197 and 246, Civ. Code; section 1751, Code Civ. Proc.

[3] *Prima facie* a parent is presumed competent, and he is entitled to have the custody of his child, unless found by the court to be incompetent. In *re Campbell*, 130 Cal. 383, 62 Pac. 613.

[4] Where a father is deprived of the custody and control of a minor child without knowledge of any proceeding in that behalf and without a hearing, he is entitled to be relieved from the judgment or order taken against him because of surprise and through his excusable neglect.

[5] Where a parent makes a *prima facie* showing that proceedings were so taken against his will and without the notice to which, under the law, he was entitled, the court should set aside the award of custody and give the parent a hearing and an opportunity to oppose the efforts of other people

to deprive him of his child. Guardianship of Van Loan, 142 Cal. 428, 76 Pac. 37.

The showing made by Jesse M. Bell in the adoption proceeding, when he asked for relief, under section 473 of the Code of Civil Procedure was, in our opinion, sufficient prima facie to establish the fact that he had been denied the care and custody of his daughter without due process of law. The affidavit of opposition did not deny the allegation in his affidavit that neither by service of notice upon him nor otherwise did he have any knowledge of the adoption matter until after the order was made.

[6] It occurs to us, however, that perhaps the order denying his application was based upon the theory that the request for relief was not made within the time limited by section 473 of the Code of Civil Procedure. If the date of filing the order of adoption be regarded as the time when it was "taken," then unquestionably the application was made too late because the order was filed September 4, 1913, and the motion was heard March 9, 1914. True, the notice of motion was filed March 2, 1914, after service upon counsel for Mr. and Mrs. Krauss, but the court was not asked to do anything for the relief of the petitioner until March 9, 1914. This, under the authorities, was too late, if we take September 4th as the starting point. *Spencer v. Branham*, 109 Cal. 337, 41 Pac. 1095; *Brownell v. Superior Court*, 157 Cal. 705, 109 Pac. 91; *Thomas v. Superior Court*, 6 Cal. App. 630, 92 Pac. 739. If we consider September 8, 1913 (the day upon which the order of adoption was docketed and entered), as the date from which Mr. Bell's right to apply for relief must be reckoned, then the last day of the six months fell on March 8, 1914, a Sunday, and the motion made on the following day was within the statutory time. Section 12, Code Civ. Proc. In *Brownell v. Superior Court*, supra, it is suggested that in probate proceedings the formal signing and filing of an order ought to set the time running against an interested person who was not present and was without notice. In that case a determination of this question was not necessary, for the reason that the formal order was signed, filed, and entered on the same day; but, applying the reasoning of the opinion in that case to the matter before us, we are constrained to hold that the period of six months available to petitioner began on February 4, 1913, and that therefore the order denying his motion was properly made.

[7] We are of the opinion, however, that the complaint in the action against Mr. and Mrs. Krauss and the child was good as against the general demurrer, which was interposed. That action was in effect an application for all that might have been granted upon a timely motion under section 473 of the Code of Civil Procedure, and for more. It pleaded facts sufficient to show that Mr. Bell was de-

nied notice of the adoption proceeding either through fraud or mistake of law and fact on the part of Mr. and Mrs. Krauss. All that we have written in the discussion of the contents of the petition of Mr. Bell applies with equal force to his complaint.

Therefore the judgment based upon the court's ruling sustaining the demurrer is reversed. The order denying petitioner's prayer for relief under section 473 of the Code of Civil Procedure is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

169 Cal. 382

WISLER v. TOMB. (L. A. 3448.)

(Supreme Court of California. Feb. 17, 1915.)

1. GIFTS — 32 — INTER VIVOS — DONOR'S NOTE — ENFORCEMENT.

A gift by a donor of his own note to a trustee in trust for the donee is not enforceable against the donor's estate, though the donor, on the day of the giving of the note, executed a declaration of trust reciting that the donor has placed a sum, the face of the note, in the hands of the trustee, and that the declaration is made to more particularly declare the purpose for the execution of the note; it being a mere promise without consideration.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 63, 64; Dec. Dig. — 32.]

2. GIFTS — 32 — INTER VIVOS — DONOR'S NOTE — REVOCATION.

A note intended as a mere gift, with no other consideration than natural affection, is not enforceable at law, for the gift is revocable until executed.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 63, 64; Dec. Dig. — 32.]

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Henry M. Wisler, as trustee, against Maria Gartrell Tomb, executrix of Thomas B. Tomb, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

N. Blackstock and S. E. Vermilyea, both of Los Angeles, for appellant. George L. Sanders, L. W. Moultrie, and A. E. Dunning, all of Los Angeles, for respondent.

MELVIN, J. Defendant demurred generally and specially to plaintiff's second amended complaint. The demurrer was sustained, plaintiff refused to amend, and judgment for defendant was entered accordingly. This appeal is taken by plaintiff from said judgment.

Plaintiff averred in his unverified complaint that he was the duly appointed, acting, and qualified trustee of the trust estate of Thomas Tomb Harbeson, a minor. He sued as such trustee and sought judgment against defendant in her capacity as executrix of the last will of Thomas B. Tomb, deceased. According to the allegations of the complaint, the following facts appear: On March 3, 1910, Thomas B. Tomb made and delivered to plaintiff, as

trustee for the former's nephew, Thomas Tomb Harbeson, a promissory note payable on or before one year after date, with interest at 6 per cent, per annum. The principal was never paid, but on April 3, 1910, the maker of said note paid \$150 as interest. On January 26, 1911, the plaintiff, as trustee, presented to the defendant, as executrix of the estate of Tomb, his verified claim on said promissory note for principal and interest then due, and the said executrix rejected the claim. On the day and date of the execution of the note, Thomas B. Tomb, the more particularly to declare the purpose for the execution of said instrument, made a written declaration of trust in which he stated that he had placed in the hands of Henry M. Wisler, the sum of \$30,000, to be used, as provided in the declaration, for the support and education of the beneficiary, Thomas Tomb Harbeson. The instrument was signed by Tomb and Wisler; the latter by the terms of the writing accepting the trust. Maria G. Tomb signed as a witness. Maria G. Tomb was then and there informed (to quote from the complaint) "that she had been appointed executrix of the last will and testament of said Thomas B. Tomb, deceased," and she then and there (to quote further) "consented to the said declaration of trust, and agreed that on the death of the said Thomas B. Tomb, deceased, she would in full, and in every particular, and without any exception whatsoever, carry out the said trust, and then and there agreed that, upon the death of the said deceased, she would immediately set apart the said \$30,000 for the express purpose of carrying out the said declaration of trust, and would, as soon as she had qualified as executrix, pay over to the said Henry M. Wisler the said \$30,000, to be invested by him as provided in the said declaration of trust." We may say, in passing, that the ghostly implication of the earlier quotation that her deceased husband not only signed the declaration, but talked to her about it, is cleared by the later excerpt from the pleading. Evidently the conversation at least was *inter vivos*, and she was not really "appointed executrix" until after her husband had died, for we think a well-known maxim may be varied to read, "*Nemo est executrix viventis.*"

The complaint contains further averments that, "pursuant to said understanding," Mrs. Tomb, "both in and out of the probate department of the superior court of the county of Los Angeles, state of California, expressly admitted and consented that the said \$30,000 was, as hereinbefore alleged, set apart and considered as a segregated fund from all of the other funds and moneys of the estate of the said deceased, Thomas B. Tomb, and on divers times and occasions offered to pay the said fund into the hands of a trustee, to be selected by herself, or a trustee to be nominated by the probate court of said county, other than the said Henry M. Wisler,

to whom she objected as trustee"; that the said Maria Gartrell Tomb in all of the proceedings in and about the estate of Thomas B. Tomb, deceased, "recognized and treated the said \$30,000 as a segregated trust fund belonging to said minor"; and that she never claimed that she was administering the \$30,000 as a part of her deceased husband's estate, but treated it as a trust fund, and offered to pay it into court, should the court order her to take such course. It is further alleged that, during guardianship proceedings instituted by the father of the minor Thomas Tomb Harbeson, Mrs. Tomb consented in open court and offered to pay the segregated fund of \$30,000 to the father, and, on his resignation as guardian, she offered to take the guardianship of the minor for the express purpose of holding the fund for his use and benefit. It is further averred in the complaint that, upon petition and proceedings duly had thereunder, the superior court on January 11, 1911, determined and adjudged that the trust was legal, and that the appointment of Henry M. Wisler was confirmed. It is averred that, since the death of Thomas B. Tomb, defendant, as executrix of his estate, has held the \$30,000 as a trust fund belonging to the minor Thomas Tomb Harbeson.

[1] Upon the authority of *Tracy v. Alvord*, 118 Cal. 655, 50 Pac. 757, the judgment must be affirmed. In that case it was held that the gift of the donor's own promissory note, either *inter vivos* or *causa mortis*, does not create an enforceable obligation in favor of the donee against the donor or his estate. Being a mere promise without consideration to give a sum of money in the future, such a note is of no legal consequence. Appellant seeks to differentiate the facts averred in his complaint from those considered in *Tracy v. Alvord*, *supra*. He calls attention to the language of the declaration by which Thomas B. Tomb states that he "has placed" \$30,000 in the hands of the trustee. This amounts to a statement, say appellant's counsel, that Tomb had placed in the trustee's hands \$30,000 in cash, and justifies the assumption that afterwards Wisler, as trustee, loaned the \$30,000 to Tomb. Such an assumption, even if it logically arose from the supposed facts indicated by the declaration of trust, would not save the complaint, because the mere incorporation of the declaration into the pleading does not amount to an allegation of the matters therein set forth as facts. If, indeed, Tomb paid the money to the trustee, and afterwards borrowed it, giving the promissory note as evidence of the debt, it would be easy to plead such a state of facts. No such pleading is presented. On the contrary, we find the averment that the declaration of trust was made "on the day and date of the execution" of the note and "in order to more particularly declare the purpose for the execution of the said note." Any presumption of consideration which

might arise in an action on the note itself is overcome by the allegations regarding the trust. The claim against the estate was upon the note itself, and therefore the action may not be supported by a mere introduction of the declaration of trust which, by the tense of one of the verbs, might support a theory that Thomas B. Tomb paid the money to Henry M. Wisler, as trustee, and immediately borrowed it. Even construing the complaint in the light most favorable to the pleader, it appears that the whole transaction was on paper. The attempt to donate the money in trust lacked the essential of all gifts—unconditional delivery. Wanting that requisite element, it was "no more than an unexecuted and unenforceable promise to make a future gift." *Beebe v. Coffin*, 153 Cal. 177, 94 Pac. 768.

[2] A note intended as a mere gift, with no other consideration than natural affection, cannot form the basis of an action at law. The gift is always revocable until it is executed, and a promissory note intended as a gift is but a promise to make a gift in the future. The gift is not executed until the note is paid. *Williams v. Forbes*, 114 Ill. 171, 28 N. E. 463.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

169 Cal. 361

HOLLAND v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO
et al. (S. F. 7084.)

(Supreme Court of California. Feb. 15, 1915.)

1. MANDAMUS ☞57—CORRECTION OF BILL OF EXCEPTIONS.

The action of the court in permitting incorporation in the bill of exceptions of matters subsequent to the entry of the judgment appealed from is erroneous, but, where such recitals were not material to the question of the validity of the judgment, they will not be considered by the appellate court; and hence their inclusion in the bill cannot prejudice petitioner's substantial rights, so that mandamus to correct the bill of exceptions will not be granted.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 68, 114-120; Dec. Dig. ☞57.]

2. MANDAMUS ☞7—PURPOSE OF RELIEF.

The granting of a writ of mandate is within the discretion of the court, and the writ should issue only when necessary to protect a substantial right.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 5; Dec. Dig. ☞7.]

3. MANDAMUS ☞57—CORRECTION OF BILL OF EXCEPTIONS.

Mandamus will not lie to compel the striking of matter from a settled bill of exceptions.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 68, 114-120; Dec. Dig. ☞57.]

In Bank. Petition by Patrick Holland for writ of mandate, prayed to be directed against the Superior Court of the City and County of San Francisco and others. Writ denied.

W. E. Cashman, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for petitioner. William A. Kelly, of San Francisco, for respondents.

PER CURIAM. Patrick Holland applied for a writ of mandate to require the respondent judge of the superior court to certify as correct a certain offered bill of exceptions (a copy of which is included in the petition) if he finds it to be correct, or to fix a time and place for the settlement of a proper bill of exceptions, excluding therefrom all matters occurring after the entry of a certain purported judgment of December 19, 1913, and particularly those things which happened after January 9, 1914. Respondents filed both a demurrer and an answer to the petition.

From the petition it appears that Patrick Holland filed a complaint in equity, naming Julia McCarthy as the principal defendant. Issue was joined, and the case was tried before Hon. George A. Sturtevant, judge of the superior court, and a jury. A verdict on three of the counts was rendered in favor of defendant McCarthy on December 18, 1913, and on the following day the clerk of the court entered that which purported to be a judgment based thereon. On January 2, 1914, Patrick Holland, the plaintiff, appealed from said judgment. On January 3d he filed his undertaking on appeal, and on the 14th of the same month gave notice of such filing to the defendant Julia McCarthy. Later he served upon the said defendant his proposed bill of exceptions, and on April 20, 1914, she served upon Patrick Holland her proposed amendments thereto, which were not accepted by him. On April 30, 1914, the bill and the proposed amendments were delivered to the clerk for the judge, and later counsel met the respondent judge for the purpose of settling the bill of exceptions. By his attorney, Patrick Holland consented to one of the amendments, but objected to all of those proposed which related to matters occurring after December 19, 1913, and after the service of the proposed bill of exceptions. The respondent judge overruled these objections and directed the attorney for Julia McCarthy to rewrite the bill of exceptions, including the proposed amendments and such written formal objections as might be submitted by the representative of Patrick Holland. He also directed counsel for the respective parties to return at some other time. On May 1, 1914, Patrick Holland served his formal written objections to defendant's proposed amendments. On May 5, 1914, the attorney for Mr. Holland wrote to the attorney for Julia McCarthy, telling him that the judge was ready to sign a certain bill of exceptions, a copy of which was sent with the letter, and informing him that the engrossed bill would be presented to the said judge at a certain hour of that day. Julia McCarthy's attorney did

not attend at the hour named, and the judge signed and certified a document which was intended to be the engrossed bill for the use of Patrick Holland on his appeal from the judgment of December 19, 1913. Subsequently Patrick Holland served notice of motion to strike out the bill of exceptions filed May 5, 1914; to authenticate and certify a form of a bill of exceptions served with the notice; or to fix a time for the settlement of said Holland's proposed bill. This motion was fully heard, and the judge stated that he would not settle nor allow any bill of exceptions to be used on the appeal from the judgment of December 19, 1913, unless said bill should contain a statement of matters which occurred subsequent to that date. These matters were: (1) An *ex parte* order made by the court of its own motion on April 1, 1914, purporting to vacate and set aside the judgment of December 19, 1913, and directing counsel for Mrs. McCarthy to prepare findings of fact and conclusions of law; (2) findings of fact and conclusions of law signed and filed April 1, 1914; and (3) a judgment based upon said findings and conclusions, and entered on April 2, 1914.

Petitioner also asserts that during the hearing of his motion on June 26, 1914, the judge wrote upon the bill of exceptions previously signed by him the words, "And the said bill is hereby settled and allowed as such," and that said bill was never refiled after said addition to it.

The *ex parte* order which petitioner desires to have eliminated from the bill of exceptions recites that the judgment of December 19, 1913, was inadvertently entered, the inadvertence "consisting in this: That said judgment was entered by said clerk before making and signing and filing of findings of fact and conclusions of law in said action, and before the rendition by said court of any judgment in said action; said judgment so entered as aforesaid having been entered by said clerk upon the verdict of the jury in said action."

Petitioner contends that by the perfecting of his appeal from the judgment of December 19, 1913, the court lost all jurisdiction over the judgment, and was divested of all power to impair the efficacy of that appeal by supplying omitted findings or in any other manner. In this behalf he cites such cases as *Livermore v. Campbell*, 52 Cal. 76; *People v. Center*, 54 Cal. 236; *Parkside Realty Co. v. MacDonald*, 167 Cal. 343, 139 Pac. 805; and *Peycke v. Keefe*, 114 Cal. 213, 46 Pac. 78.

Respondent, on the other hand, contends that the judgment in question was a nullity, and that therefore the lower court retained jurisdiction to set it aside and to enter a proper judgment based upon the decisions, findings, and conclusions of the court, rather than upon the verdict upon which the clerk erroneously acted without direction from the court. Respondent's position is this:

1. In an equity case the trial is not ter-

minated when the jury renders its verdict, but when the court renders a judgment—citing *Eates v. Gage*, 49 Cal. 128; *Warring v. Freear*, 64 Cal. 56, 28 Pac. 115; *Bell v. Marsh*, 80 Cal. 414, 22 Pac. 170; *Spottiswood v. Weir*, 66 Cal. 529, 6 Pac. 381; *Reclamation District v. Thisby*, 131 Cal. 574, 63 Pac. 918.

2. The premature entry of the judgment of December 19, 1913, was a clerical misprision.

3. Such an error, being clerical, rather than judicial, may be corrected by the trial court at any time after appeal, if such correction do not affect substantial rights of the appellant—citing *Brady v. Burke*, 90 Cal. 4, 27 Pac. 52; *City and County v. Brown*, 153 Cal. 648, 96 Pac. 281; *Egan v. Egan*, 90 Cal. 21, 27 Pac. 22; *San Joaquin L. & W. Co. v. West*, 99 Cal. 346, 33 Pac. 928; *Fay v. Stubenrauch*, 141 Cal. 575, 75 Pac. 174; *Boust v. Superior Court*, 162 Cal. 345, 122 Pac. 956; and other authorities.

4. This correction, or rather this entry of a directed judgment in place of the unauthorized one entered by the clerk, did not materially affect the rights of Patrick Holland.

[1] Apparently the judge of the trial court has acted in the matter of settling a bill of exceptions to be used on the plaintiff's appeal from the purported judgment of December 19, 1913, and has settled such a bill. We are of the opinion that the judge erred in allowing to be inserted therein the matters occurring subsequent to the date of such judgment, which are hereinbefore specified, viz.: An order made April 1, 1914, by the court, purporting to vacate and set aside the judgment of December 19, 1913, etc.; findings of fact and conclusions of law signed April 1, 1914; and a judgment made April 2, 1914, based on such findings. These things have nothing to do with the question of the correctness of the clerk's attempted judgment of December 19, 1913, and are absolutely immaterial considerations on the appeal therefrom. Being immaterial, their recital in the bill of exceptions cannot prejudice plaintiff, for they will be disregarded in the disposition of the appeal, and therefore plaintiff needs no relief in regard thereto. If, on the appeal, the clerk's judgment is determined to have been invalid, it will be reversed. The question whether the lower court, assuming such a judgment to be, and treating it as, a nullity, had the power, after the appeal therefrom, to make findings and render its judgment, is one that will be determined on the appeal from the latter judgment, which appeal the petition shows has been taken by the plaintiff.

[2, 3] The granting of a writ of mandate is a matter within the discretion of the court. It should be granted where necessary to protect a substantial right, but should not be granted where no useful purpose will be subserved thereby. Besides, we do not understand that mandamus will lie to compel the

striking out of matter from a settled bill of exceptions.

It follows from the foregoing discussion that the writ must be denied, and it is so ordered.

169 Cal. 341

CROUCH v. H. L. MILLER & CO.
(L. A. 3423.)

(Supreme Court of California. Feb. 15, 1915.)

1. JUDGMENT $\hookrightarrow$ 485—COLLATERAL ATTACK—
"JUDGMENT ROLL."

On collateral attack, a judgment must be held valid unless it is shown to be void by the "judgment roll," which, where the complaint was not answered by defendant, consists, under Code Civ. Proc. § 670, of the summons, the affidavit of proof of service, the complaint with a memorandum indorsed thereon that defendant's default for not answering was entered, and a copy of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 919; Dec. Dig. $\hookrightarrow$ 485.]

For other definitions, see Words and Phrases, First and Second Series, Judgment Roll.]

2. JUDGMENT $\hookrightarrow$ 497—COLLATERAL ATTACK—
RECITALS IN RECORD.

On collateral attack on a default judgment in a street assessment proceeding, and upon the judgment recital that "defendant H. L. Miller & Co., a corporation," had been regularly served with a copy of the summons and complaint, etc., it will be assumed that the defendant had been regularly served with summons.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. $\hookrightarrow$ 497.]

3. JUDGMENT $\hookrightarrow$ 497—COLLATERAL ATTACK—
PRESUMPTION IN FAVOR OF JUDGMENT.

Where the record is silent as to what service was had on defendant, it will be presumed in favor of the judgment that what ought to have been done was not only done, but rightly done, but where the record shows what was done, it will not be presumed that something different was done; but such rule has no application where the record does not purport to show all that was done, and the judgment states that all that was necessary to be done was done.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. $\hookrightarrow$ 497.]

4. JUDGMENT $\hookrightarrow$ 131—DEFAULT JUDGMENT—
VALIDITY.

It is not essential to the entry of a valid default judgment against a defendant that the default should have been actually entered by the clerk, as a valid default judgment may be rendered by the court though no formal judgment has been rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 245; Dec. Dig. $\hookrightarrow$ 131.]

5. CORPORATIONS $\hookrightarrow$ 514 — ALLEGATION OF
CORPORATE EXISTENCE.

An allegation in the complaint of the corporate existence of a defendant corporation is not essential to jurisdiction over either the person of the defendant or the subject-matter of the action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2052-2081; Dec. Dig. $\hookrightarrow$ 514.]

6. JUDGMENT $\hookrightarrow$ 503—COLLATERAL ATTACK—
STATEMENT OF CAUSE OF ACTION.

On a collateral attack on a judgment it is immaterial whether the complaint sufficiently stated a cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943; Dec. Dig. $\hookrightarrow$ 503.]

7. JUDGMENT $\hookrightarrow$ 497—COLLATERAL ATTACK—
STREET ASSESSMENT—JURISDICTION.

Where the complaint in a street assessment case showed a subject-matter and a demand for relief within the jurisdiction of the superior court, and the judgment roll recited that defendant corporation had been served with summons, the default judgment was valid as against a collateral attack, on which the court is concerned solely with questions of jurisdiction; and even if the assessment action did not "commence" against defendant until it was actually served with summons, and such service was not had until, under the statute, the assessment lien had expired by the lapse of two years from the date of record, this was immaterial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. $\hookrightarrow$ 497.]

8. JUDGMENT $\hookrightarrow$ 503—COLLATERAL ATTACK—
COMPLAINT—NAME OF PARTY.

On collateral attack it was immaterial that the name of a defendant in a street assessment case had not been actually substituted in the complaint for the fictitious name of "John Doe," or even that no order was made for such substitution.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943; Dec. Dig. $\hookrightarrow$ 503.]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Harry H. Crouch against H. L. Miller & Co. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order affirmed.

Davis & Rush, of Los Angeles, for appellant. Crouch & Crouch, of Los Angeles, for respondent.

ANGELLOTTI, C. J. This is an action to quiet title to a lot of land in the city of Long Beach, Los Angeles county. Plaintiff had judgment, and defendant appeals from such judgment and from an order denying its motion for a new trial.

It was stipulated that on July 20, 1910, the defendant was the owner in fee of the property here involved. Plaintiff claims to have acquired defendant's interest by virtue of certain proceedings for the enforcement of an assessment lien for street work on such land, culminating on March 25, 1912, in a deed executed by the sheriff of Los Angeles county to him, such deed having been executed to him as the purchaser at the sheriff's sale made in execution of the judgment given in the action brought to enforce the lien of the assessment. The only questions in this case are as to the validity of such judgment. If valid, plaintiff acquired the complete title to the property by the sheriff's deed. If invalid, defendant is still the owner of the property.

[1] Defendant's attack upon such judgment being collateral, the judgment must be held to be valid unless the record thereof, the judgment roll, shows it to be void—unless, as the authorities put it, it is void upon its face. In determining the question, we are restricted to the evidence afforded by the judgment roll. The rules applicable in determining such a

question are stated, so far as material here, in such cases as *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, and *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 138.

Where, as here, the complaint is not answered by a defendant personally served, the judgment roll as to him consists of the summons, the affidavit of proof of service, the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment. Section 670, Code Civ. Proc.

The complaint in the street assessment case did not name defendant as a defendant therein, nor was the summons addressed to it. One C. G. Wilcox was made defendant; it being alleged that he was the owner of said land. The other defendants were John Doe, Richard Roe, James Black, and Sarah Green, as to whom it was alleged that each of them claims some interest in or lien on the property, which is subject to plaintiff's lien, and that plaintiff is ignorant of their true names, and therefore sues them by such fictitious names, asking that when the true name of any of them is discovered the complaint be amended accordingly. The summons was directed to all of these defendants. The affidavit of service attached to the summons, made by one Agnes Crouch, substantially states that on October 11, 1910, she personally served the summons on "H. L. Miller & Co. (sued herein as John Doe) by leaving copy of summons with H. L. Miller, its president." Another portion of the affidavit indicates that a copy of the complaint was attached to the copy of the summons so left with H. L. Miller. The summons, with such affidavit, was filed in the clerk's office on December 23, 1910, and on that day the clerk indorsed on the complaint a memorandum, reciting the service on "H. L. Miller & Co., sued as John Doe," and its failure to appear and answer within the time allowed by law, and declaring that "the default of said defendant * * * is hereby duly entered according to law." The judgment of the court rendered January 27, 1911, recites as follows:

"In the above-entitled action, the defendant H. L. Miller & Co., a corporation, having been regularly served with a copy of the summons and complaint in this action, and having suffered default to be entered against them, and upon a hearing had upon this day," etc.

There is nothing to indicate that any order was ever made for the amendment of the complaint so as to substitute the name of H. L. Miller & Co. for that of John Doe as defendant, except in so far as this may be implied from the foregoing recital. It is stated by appellant's counsel in their brief that this action was commenced on July 20, 1910, and it appears that the assessment and diagram were recorded on July 24, 1908.

[2, 3] In view of the rules declared in the cases we have cited, and the recital in the judgment that "defendant H. L. Miller &

Co., a corporation," had been regularly served with a copy of the summons and complaint, etc., the claim of defendant that the affidavit of service is defective, and that there was no sufficient proof of service on file to warrant the clerk in entering the default, and that the entry of default by the clerk was ineffectual for any purpose, even if well based, is immaterial. It must still be assumed on this collateral attack in view of the recital in the judgment, that the "defendant H. L. Miller & Co., a corporation," was regularly served with summons. It is true, as claimed by defendant, that while, where the record is silent as to what was done, it will be presumed in favor of the judgment that what ought to have been done was not only done, but rightly done, yet when the record shows what was done, it will not be presumed that something different was done. But, as we said in *Sacramento Bank v. Montgomery*, supra, this statement "has no application where the record does not purport to show *all* that was done, and the judgment states that all that was necessary to be done was done." And we there quoted from *Hahn v. Kelly*, 34 Cal. 391, 407 (94 Am. Dec. 742) as follows:

"To illustrate: Suppose that portion of the judgment roll denominated the 'affidavit or proof of service' shows that personal service was made upon the son of defendant, and the remainder of the roll says nothing about service. We then have a want of jurisdiction * * * upon the face of the record. But suppose the judgment states that the defendant appeared, or that personal service was made upon him, or something else that is equivalent, as it frequently does, the opposite result follows, for the record cannot lie, and it appears that the father as well as the son had been served, which may well have been the case. The record in such a case does not blow hot and cold, as might be supposed; on the contrary, both acts may have been done. On presentation of the return of service upon the son, the court may have declared it no service, and service upon the father may have been subsequently made, and the wrong return may have found its way into the judgment roll. To hold thus would be consistent with the record, while to hold otherwise would be to contradict the judgment."

The views thus expressed have never been departed from by this court. A recital in the judgment itself controls in so far as, taken as true, it is necessarily inconsistent with the idea that the portions of the record other than the judgment show *all* that was done in the way of attempting to acquire jurisdiction of the person of the defendant. If a judgment recital is such as to affirmatively show that it is based on an attempted service which is, in fact, a nullity, or if such recital is consistent with the idea that the other portions of the record show all that was done, of course a different situation is presented. In the case at bar, conceding for the purposes of this decision that the proof of service of summons contained in other portions of the judgment roll was insufficient, the recital in the judgment itself as to service is such that it cannot be true, if such other portions of

the record show *all* that was done in the matter of service of summons.

[4] It was not essential to the entry of a valid judgment against said defendant that its default should have been actually entered by the clerk. *Drake v. Duvenick*, 45 Cal. 455, 462. "A valid judgment by default may be rendered by the court, though no formal default has been entered." *Herman v. Santee*, 103 Cal. 519, 522, 37 Pac. 509, 42 Am. St. Rep. 145. Whether or not the clerk's entry of default was ineffectual for any purpose is therefore immaterial.

[5] It has never been held, so far as we know, that an allegation in the complaint of the corporate existence of a defendant corporation is essential to the *jurisdiction* of the court over either the person of a defendant or the subject-matter of the action, and we do not see how it could be so held.

[6] It was held in *People v. Central Pacific R. R. Co.*, 83 Cal. 395, 23 Pac. 303, that such an allegation is essential to a statement of a cause of action, but this ruling was shown to be erroneous and was disapproved in *Los Angeles Ry. Co. v. Davis*, 146 Cal. 179, 79 Pac. 865, 106 Am. St. Rep. 20. However, on a collateral attack on a judgment, it is absolutely immaterial whether the complaint sufficiently stated a cause of action.

[7] Jurisdiction of the person of a defendant is acquired by the service of process—the *fact* of service, and dates from such service. *Herman v. Santee*, 103 Cal. 519, 522, 37 Pac. 509, 42 Am. St. Rep. 145. As we have seen, the court in the street assessment case expressly found that the defendant corporation had been duly served with summons. Whatever imperfection there may have been in the complaint in the street assessment case, it certainly showed a subject-matter and a demand for relief that were within the jurisdiction of the superior court. This is all that is essential on a collateral attack. See *Le Mesnager v. Variel*, 144 Cal. 463, 77 Pac. 988, 103 Am. St. Rep. 91.

Even if it be conceded that the street assessment action should be held not to have been commenced against defendant corporation until such corporation was actually served with summons (see, however, *Farris v. Merritt*, 63 Cal. 118), and that such service was not had until after the street assessment lien had expired, the statute providing that such lien shall continue "for a period of two years from the date of said recording," such concession would be immaterial on this collateral attack on the judgment. What is said in *Crane v. Cummings*, 137 Cal. 201, 69 Pac. 984, and *Le Mesnager v. Variel*, *supra*, clearly shows this to be so. These cases but declare rules that have been stated over and over again by the courts. There is no conflict in the authorities on the proposition that

the failure of a complaint to sufficiently state a cause of action in no way affects the jurisdiction of the court. And on this collateral attack we are concerned solely with questions of jurisdiction. It certainly cannot be disputed that the superior court had jurisdiction of actions for the foreclosure of street assessment liens, and it is immaterial on this attack that the complaint itself may have shown that the alleged lien had in fact expired. *Page v. W. W. Chase Co.*, 145 Cal. 578, 79 Pac. 278, cited by defendant, in no way assists it. In that case the judgment attempted to be asserted against Page was given in an action from which he had been dismissed, and, of course, was thenceforth no longer a party. This court expressly said that if he had remained a party and judgment had been rendered against him, his interest in the land would have been bound by the judgment. *Holt Manufacturing Co. v. Collins*, 154 Cal. 265, 97 Pac. 516, also cited, is along the same lines as *Page v. W. W. Chase Co.*, *supra*.

[8] It is also immaterial on this collateral attack that the name of defendant corporation was not actually substituted in the complaint in the street assessment case in the place and stead of the fictitious name of "John Doe," or even that no order was actually made by the court for such substitution. This was directly decided in *Baldwin v. Morgan*, 50 Cal. 585. Conceding that such omission was an irregularity, for which the judgment would have been reversed on appeal, it was said:

"The inquiry here, however, as to the validity of the decree, is not direct, as upon appeal, but collateral merely. The true inquiry, therefore, is not as to whether jurisdiction has been irregularly exercised, but is limited to the question whether it was obtained at all. The personal service of a summons upon Baldwin certainly vested the court without [with] jurisdiction over him, and however irregular its subsequent exercise, the validity of the decree rendered is not now open to inquiry."

See, also, *Campbell v. Adams*, 50 Cal. 203; *Tyrrell v. Baldwin*, 67 Cal. 1, 6 Pac. 867; *Johnston v. San Francisco Sav. Union*, 75 Cal. 134, 139, 16 Pac. 753, 7 Am. St. Rep. 129.

Defendant had no right on this collateral attack to introduce evidence outside the record of the judgment to show that it was not, in fact, served with summons.

What we have said substantially disposes of all the points made by defendant on this appeal. We have no doubt on the proposition that the judgment is not void on its face, and therefore that the sheriff's deed was effectual to convey all of defendant's interest in the land.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

169 Cal. 348

KUNZ v. CALIFORNIA TRONA CO. et al.
(two cases). (S. F. 6901.)

(Supreme Court of California. Feb. 15, 1915.)

1. **BILLS AND NOTES** ⇨518—**CONSIDERATION—MONEY BORROWED.**

Where money was loaned in consideration of the execution of notes by a corporation without any fraud on the part of the lender and payee, no lack of consideration for the notes would be shown by proof that the lender and payee was at the time indebted to the corporation maker in a larger amount in another transaction.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1816-1820; Dec. Dig. ⇨518.]

2. **BILLS AND NOTES** ⇨489—**ACTION—PLEADING—SET-OFF.**

Under answer in an action on notes executed by defendant corporation alleging that on or about the date of the making of the note the payee received from defendant an amount for which he accounted to it only in part and that the note was given on receipt of a part payment under the mistaken assumption that such payment was a loan, no claim of set-off was available.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1587-1642; Dec. Dig. ⇨489.]

3. **BILLS AND NOTES** ⇨384—**BONA FIDE HOLDER—SET-OFF—APPLICATION OF STATUTE.**

Code Civ. Proc. § 440, providing that, when cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could not have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment of the other, was not intended to, and does not, affect the negotiability of commercial paper, or the rights of bona fide transferees.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 957; Dec. Dig. ⇨384.]

4. **BILLS AND NOTES** ⇨497—**BONA FIDE HOLDER—PRESUMPTION—STATUTE.**

Under the express provision of Civ. Code, § 3104, the indorsee of a negotiable instrument before maturity is presumed to be a bona fide holder for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1448, 1675-1681, 1683-1687; Dec. Dig. ⇨497.]

5. **BILLS AND NOTES** ⇨509—**ACTION—EVIDENCE—CONSIDERATION.**

In an action on a note, evidence that plaintiff's attorney in fact, who signed for him certain notices of dishonor, was plaintiff's law partner and a nephew of the original payee, was inadmissible to show that there was no consideration for the payee's transfer of the notes to plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1740-1745; Dec. Dig. ⇨509.]

In Bank. Appeal from Superior Court, City and County of San Francisco; George E. Church, Judge.

Action by John F. Kunz against the California Trona Company, E. J. Boyes, and others. Judgment for plaintiff, and defendants Boyes and Simon appeal. Affirmed on hearing after judgment.

Action by John F. Kunz against the Cali-

fornia Trona Company, E. J. Boyes, and another. Judgment for plaintiff, and defendants California Trona Company and Boyes appeal. Affirmed on hearing after judgment.

Perry Evans, of San Francisco, for appellants. Arnold W. Liechti and R. H. Countryman, both of San Francisco, for respondent.

PER CURIAM. A further hearing in this court was granted after decision by the District Court of Appeal affirming the judgments and orders appealed from in the above actions. Three separate suits were brought by plaintiff as transferee of three different promissory notes to recover thereon, such separate suits being necessary by reason of the different defendants in each suit. The issues between the plaintiff and defendants in each action being identical, the cases were tried together. Judgment in each case was for plaintiff on the notes against the California Trona Company and some of the other defendants, and the latter appealed in each case from the judgment and order denying their motions for new trials. In two of these actions—those above entitled—the appeals were taken directly to the District Court of Appeal as within its appellate jurisdiction. The appeal in the other action was taken originally to this court on account of the amount involved, the California Trona Company having filed a cross-complaint in that particular action making the payee of the notes sued on a cross-defendant and asking judgment against him for \$7,500. The judgment in that case was in favor of the plaintiff and also in favor of the cross-defendant. By order of this court that appeal was transferred to the District Court of Appeal. That court disposed of the appeals in all three actions—the two above in one opinion, and the appeal which was transferred to it from this court in a separate one. A further hearing was also granted in this court from the decision of the District Court of Appeal respecting the appeal last mentioned, but that matter will be considered by us separately. Addressing ourselves now to the appeals in the cases above entitled, a further consideration of them satisfies us that they were correctly disposed of by the District Court of Appeal, and we adopt the opinion of that court written by Justice KERRIGAN as a correct determination of the points there involved. That opinion is as follows:

Plaintiff sued as a transferee in due course on three promissory notes dated respectively December 27, 1910, January 5, and January 11, 1911. The note of January 5th was for the principal sum of \$500, and the two others were for \$1,000 each. All of the notes were executed by the defendant California Trona Company to the order of E. H. Merrill, as payee; but, as each was indorsed by different parties, three different actions were brought. These were consolidated for trial, and in each case judgment was given for the plaintiff. The maker and those indorsers against whom judgment was rendered have appealed from the several judg-

ments and from orders denying motions for a new trial. In the action involving the note of January 5, 1911, the appeal was originally taken to the Supreme Court because of the amount involved. We shall in this opinion consider the appeals in the other two actions; and as the same questions are presented in each case we will, as counsel have, discuss them as though both notes were involved in the one action.

The only defense offered by the answer in each case is lack of consideration for the notes. In this behalf the answer alleges that on or about the date of the making of the note the payee, E. H. Merrill, "had and received on behalf of" the defendant California Trona Company the sum of \$10,000; that he has paid or accounted to it for only \$2,500; that of this amount \$1,000 was paid on or about the date of the note in suit; and that the note was given upon the receipt of that amount "under the mistaken assumption of the officers of the said California Trona Company that the said payment was a loan." In a proposed amended answer, which the trial court did not permit to be filed, the defendants specified somewhat more particularly the circumstances of the alleged "mistaken assumption" by averring that at the time the note was given the defendants did not know Merrill to be at all indebted to the defendant company, and that the note was executed "under the mistaken assumption that the said E. H. Merrill was at the date thereof not indebted to the California Trona Company." The answer also alleged on information and belief that the matters averred in it were known to the plaintiff before the notes were transferred to him, and that there was no consideration for such transfer.

There are various assignments of error in the exclusion of evidence, but these with one exception (which is hereinafter mentioned) relate to evidence intended to show that the payee was "at or about" the time of the execution of the notes indebted to the maker of them. The evidence shows that one of the notes at least was executed by the officers of the defendant company under express authority of a resolution of its board of directors, authorizing them to borrow \$1,000 of Merrill, and to execute the note of the corporation therefor. It is not questioned that both were corporate acts.

[1] The one question presented is, therefore, whether a note executed for money borrowed is without consideration where, at the time, the payee has received and holds money belonging to the maker of the note in an equal or greater amount, without that fact being known to the maker of the note.

In the opinion rendered upon the first hearing of this case (a rehearing having been subsequently granted), this question was answered affirmatively, upon the principle that the mere doing of that which one is legally bound to do is not consideration for a new promise. On further consideration, however, we do not regard that principle as determinative of the case presented by this record. Payment by Merrill of money which he owed to the California Trona Company would not be consideration for the execution of a note; but it was not payment of the pre-existing indebtedness unless so intended, and it is not claimed in this case that the money which the California Trona Company received from Merrill as consideration for the notes in question was delivered by him or received by it as payment of any indebtedness between the parties. Indeed, the opposite is claimed. The money was loaned by Merrill in consideration of the execution of the notes, and these were executed by the corporation in consideration of such loan. No fraud on the part of Merrill is alleged; and no lack of consideration for the notes would be shown by

proof that Merrill was, at the time, indebted to the corporation in even a larger amount on another transaction.

Where a note is given for an amount due the payee from the maker on a certain contract, this is a sufficient consideration for the note, although the payee may owe the maker at the time more than the face of the note on other contracts. *Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28.

[2] It may be suggested that a different rule is established by section 440 of the Code of Civil Procedure, in providing that: "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other." Conceding that some of the evidence offered would have been admissible if a valid defense had been pleaded by the answer, we are of the opinion that the defense pleaded, as already stated, showed no lack of consideration for the notes, and that no claim of set-off was available under the pleadings in this action even if the evidence had been received. The date of accrual of the claimed liability from Merrill to the California Trona Company is alleged only as "at or about the time" the several notes were executed, and the existence of that liability at the dates of the earlier notes is pleaded only by inference if at all. The evidence offered, so far as it discloses any dates, does not indicate the existence or admission of any liability prior to January 17, 1911, which is the date of the latest of the notes.

[3, 4] But apart from these considerations, section 440, Code of Civil Procedure, is not intended to and does not affect the negotiability of commercial paper, or the rights of bona fide transferees of such paper. The plaintiff, being admittedly an indorsee before maturity of a negotiable instrument, was presumed to be a bona fide holder for value. *Civ. Code*, § 3104; *Luning v. Wise*, 64 Cal. 410, 1 Pac. 495, 874; *Giselman v. Starr*, 106 Cal. 651, 40 Pac. 8; *Palmer v. Goodwin*, 5 Cal. 458. The answer, it is true, alleged on information and belief that he took with knowledge of the facts which are relied upon as showing want of consideration for the notes, and that the transfer to him was without consideration. But no evidence was offered upon this allegation which was either relevant or worthy of consideration.

If want of consideration for the notes had been pleaded and proved, it might be that the burden would have been shifted to plaintiff to prove his status as a bona fide holder for value; but that defense, as we have seen, was not established.

[5] The defendants sought to introduce evidence that the attorney in fact of plaintiff, who signed for him certain notices of dishonor of the notes, was the law partner of plaintiff and a nephew of Merrill, the original payee. Defendants' counsel stated that this was "offered as proof of the fact that there was no consideration for the transfer of the notes by Merrill to Kunz." It obviously had no relevancy or probative value on this issue, and was properly excluded. This being the only evidence offered in support of the allegations of the answer which negatived plaintiff's status as a bona fide holder for value, and there being, as we have seen, no pleading or proof of facts showing a want of consideration for the notes themselves, we see no error in the rulings of the trial court.

The judgments and orders appealed from are affirmed.

169 Cal. 353

KUNZ v. CALIFORNIA TRONA CO. et al.
CALIFORNIA TRONA CO. v. MERRILL.

(S. F. 6379.)

(Supreme Court of California. Feb. 15, 1915.
 Rehearing Denied March 15, 1915.)

1. PARTIES ⇨93—OBJECTION—WAIVER.

In an action by the indorsee of a note against the corporation maker, wherein the maker filed a cross-complaint against the original payee by stipulation of the other parties, the payee, who appeared but did not object to being brought into court or move to dismiss the cross-complaint, but demurred and then answered and suffered judgment in the superior court having jurisdiction of the subject-matter, the objection that the filing of the cross-complaint was improper was waived.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 153, 154; Dec. Dig. ⇨93.]

2. APPEAL AND ERROR ⇨926 — REVIEW — CONSIDERATION OF EVIDENCE.

In such action, where the action on the note and on the cross-complaint were tried together on the issue whether the cross-defendant was indebted to the maker when it executed its note to him as payee, and where it was stipulated in the trial that all objections to evidence made by plaintiff should be available to the cross-defendant, and where at the close of trial, when the plaintiff's attorney asked for judgment, the defendant rested as against the cross-defendant, the evidence offered and pertinent to the issues raised by the cross-complaint would be deemed as offered to sustain them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1279, 2899, 3729, 3730, 3735-3747; Dec. Dig. ⇨926.]

3. BILLS AND NOTES ⇨503—ACTION—EVIDENCE.

In an indorsee's action on a note, wherein the defendant, maker, filed a cross-complaint against the payee, tried together upon the issue as to whether the payee had been indebted to the maker, for money received by him from a third party for the maker's benefit, evidence for the maker of a resolution of its directors authorizing an option to such third party, and of its delivery to that party's attorney for signature by a writing from the payee authorizing the maker to charge him with \$10,000 in case of his sale of the maker's property, and evidence sought by questions as to whether the payee had ever admitted the receipt of the \$10,000, as to what the payee said when he delivered such writing, and as to whether witness knew if the payee was indebted to the defendant, was admissible.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1733-1739; Dec. Dig. ⇨503.]

4. WITNESSES ⇨240—EXAMINATION—LEADING QUESTIONS.

Such questions were not objectionable as leading questions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. ⇨240.]

In Bank. Appeal from Superior Court, City and County of San Francisco; George E. Church, Judge.

Action by John F. Kunz against the California Trona Company, E. J. Boyes, and others, with cross-complaint by the company against E. H. Merrill. Judgment for plaintiff and for Merrill, and the company and defendants Boyes and Lucien Simon appeal.

On hearing after judgment in District Court of Appeals, affirmed as to plaintiff Kunz and reversed as to the cross-defendant Merrill.

Perry Evans, of San Francisco, for appellants. Arnold W. Liechti and R. H. Countryman, both of San Francisco, for respondent.

LORIGAN, J. This is the appeal referred to in the opinion filed this day in the other appeals in the case of John F. Kunz, Plaintiff and Respondent, v. California Trona Co. et al., Defendant and Appellants (S. F. No. 6901) 146 Pac. 883, and reference is made to the opinion on that appeal for a more particular statement of the circumstances under which this and the actions embraced therein were tried in the superior court. This action was to recover on one of the three promissory notes mentioned in the appeal in the other cases—the note of January 5, 1911, for the sum of \$500. The pleadings and issues between the plaintiff and defendants as to this note are the same as there. The actions were all tried together, and the points made for a reversal of the judgment and order denying a new trial, as far as the right of the plaintiff to recover on the note in this action is concerned, are identical with those presented and considered in the other appeals, and for the reasons therein given the judgment in favor of the plaintiff and the order denying the motion of the defendant for a new trial are affirmed.

This appeal, however, involves questions other than those arising between plaintiff and defendant respecting the note sued on. After the defendants had answered the complaint, a stipulation was entered into between them and the plaintiff that an order of court might be made bringing in one E. H. Merrill, the payee and indorsee to the plaintiff of the note sued on, as a party defendant, and to that end that a cross-complaint might be filed by the defendant California Trona Company and served on said Merrill as cross-defendant. The court so ordered, and a cross-complaint was accordingly filed by the California Trona Company against Merrill, alleging that about December 27, 1910, he had received from the Western Securities Company for and on behalf of the cross-complainant, the Trona Company, the sum of \$10,000; that he had paid cross-complainant \$2,500 thereof, of which \$500 was paid when the note sued on in the complaint in the action was executed and delivered to Merrill by said Trona Company; that there never was any consideration for said note; that it was given on the receipt of said \$500 under a mistaken assumption of the officers of the cross-complainant company that said payment was a loan; that \$7,500 was still due, owing, and unpaid from said Merrill to the cross-complainant company; and prayed judgment against him for that

amount. Merrill appeared and answered the cross-complaint denying its allegations. Under the issues made by the cross-complaint and answer thereto, the trial court gave judgment for the cross-defendant Merrill against the Trona Company, and the latter appealed from that judgment and an order denying its motion for a new trial, as well as from the judgment against it in favor of the plaintiff.

[1] On the oral argument before this court, and for the first time, it was urged by the attorney of the respondent cross-defendant Merrill that under section 389 of the Code of Civil Procedure a stranger to an action already before a trial court may not be brought into it except for the purpose of making a determination of the controversy between the parties already before the court complete; that Merrill was such a stranger, not being a party to the action brought by plaintiff to recover on the note; that as the controversy between the California Trona Company and Merrill was merely to recover a balance of money alleged to be due from Merrill to said company, and this matter was in no way related or relevant to the controversy between the parties plaintiff and defendant already before the court, which was solely as to the note, that the filing of the cross-complaint was improper, and the issues raised thereunder were not properly in the case. For these reasons it was urged by counsel for respondent Merrill that this court should decline to consider the merits of the appeal of cross-complainant, but should reverse the judgment with directions to the trial court to dismiss the cross-complaint. But the answer to this point or proposition is that it is now urged too late. It may be true that, if timely objection had been made in the trial court by any of the parties to the action against the filing of the cross-complaint or by Merrill when it was sought to bring him in as a cross-defendant, it would have been improper for the trial court to have permitted the filing of that pleading or to have overruled a motion made by Merrill to dismiss it. But no such objection was made by any of the parties to the action then before the court. As far as they are concerned, they all stipulated that the cross-complaint might be filed and Merrill brought in as a cross-defendant. Merrill himself, when he appeared, raised no objection to being brought in nor did he make any motion to dismiss the cross-complaint, but on the contrary demurred and then answered to it. Even on this appeal counsel for Merrill in his briefs filed made no attack whatever on the action of the trial court in permitting the filing of the cross-complaint against him. The superior court had jurisdiction of the subject-matter embraced in the cross-complaint, and, if it be conceded that it acquired jurisdiction under an improper filing of that pleading, still as no objection whatever was made by Merrill

against being brought in as a cross-defendant under it, but on the contrary he answered to it, it is too late for him after judgment rendered by the court on the issues raised under it to make any claim that the filing of the cross-complaint was improper. He is deemed to have waived that point by failure to make it at the opportune time in the trial court. *Santa Barbara v. Eldred*, 95 Cal. 381, 30 Pac. 562. The justice of applying that rule is exemplified in this case, where it appears from the record that, if the point urged could prevail now and the cross-complaint be dismissed, the cross-complainant would be without any redress against Merrill as its right of action on the indebtedness has become barred by the statute of limitations.

[2] The sole question presented in the briefs is the correctness of certain rulings of the court in rejecting evidence which it is claimed by appellant cross-complainant was offered by it in support of the cross-complaint. We say claimed because it is insisted by counsel for respondent Merrill that the assigned errors respecting the exclusion of evidence have no relevancy in this particular appeal because he asserts that such excluded evidence was not offered on the issues raised by the cross-complaint and answer thereto, but were offered solely on the issues made by the complaint and answer respecting the note sued on in the action. Meeting this claim, appellant insists that the rejected evidence was offered on all the issues to which it was relevant whether made under the complaint and answer, or cross-complaint and answer thereto, and that it was so understood to be offered on the trial. The record is not as satisfactory on this question as it might be, but we think from a careful examination of it that it supports the claim of appellant. All the actions were tried together, and the main issue in the actions between plaintiff and defendant, as well as between the cross-complainant and cross-defendant, was whether Merrill was indebted to the California Trona Company on December 27, 1910, for money received by him from the Western Securities Company for the benefit of the Trona Company. The defendants and the cross-defendant Merrill were represented by different attorneys. It was stipulated early in the trial, however, that all objections made by the attorney for plaintiff to the introduction of evidence should be considered as made by and available to the attorney for the cross-defendant. It is true that at one point in the case the attorney for plaintiff insisted that the evidence which was then being introduced by the Trona Company should be considered solely as addressed to the issues between plaintiff and defendant and the court so limited the offer. But thereafter, when other evidence was being introduced by the Trona Company, counsel for the cross-defendant interposed objections to that evidence which

were sustained. If the evidence upon that subject was being introduced solely on the issues between the plaintiff and defendants, it was none of the business of counsel for cross-defendant to object. Whether the evidence then being offered was admissible or not did not concern his client. The only theory with which the action of the attorney for cross-defendant in making objections to the introduction of evidence is consistent is that, as the actions were being all tried together, it was considered that the evidence offered, if material, was deemed offered on all issues involved except in the one instance referred to. But any doubt on this subject is, we think, removed by what occurred at the close of the trial on the issues between plaintiff and defendants. The court having rejected practically all the evidence offered by the defendants, their attorney announced that he rested his case. The attorney for plaintiff asked for judgment in favor of the plaintiff. Thereupon the attorney for the cross-defendant inquired of the attorney for cross-complainant whether he rested also on the cross-complaint. The reply was:

"Yes, the matter already offered by us is offered in support of the cross-complaint, and in view of his honor's rulings we rest."

Counsel for the cross-defendant without any reply to this statement then moved the court for judgment in favor of cross-defendant which was ordered. No objection was made to this offer of the evidence by the attorney for cross-complainant or the court, and, if the evidence which had already been offered in the case was also pertinent to the issues raised by the cross-complaint, we think it must be treated and deemed as offered to sustain the issues made under that pleading. It was not necessary for cross-complainant to recall its witnesses, and renew its attempt to get the same evidence before the court unless opposing counsel refused to accept the offer made and required it to be done. His failure to make any objection at all to the offer was an acquiescence in it, and we must consider it and the various rulings of the court upon it as evidence offered on the issues raised under the cross-complaint.

[3] Now as to the evidence offered and the rulings of the court in excluding it: Cross-complainant offered a resolution of the board of directors of the Trona Company passed at a meeting held January 17, 1911, authorizing its president and secretary to execute in the name of the company an option for the sale of its property to the Western Securities Company, proffered proof of the execution of said option by the Trona Company, and delivery of it to its attorney to have it signed by the officers of the Western Securities Company. The terms of the option do not appear in the resolution. The following writing was also offered:

"San Francisco, Cal. January 17, 1911. California Trona Company, Central Bank Building, Oakland, Calif.—Gentlemen: I hereby au-

thorize you to charge up as paid by you against my commission contracts the sum of ten thousand (10,000) dollars in case sale of your property is made by me to the Western Securities Company. Very truly yours, E. H. Merrill."

It was admitted that the signature to this letter was that of the cross-defendant Merrill, and it was stipulated that the sale was never made and that the option referred to in the resolution had expired. An objection to the introduction of the resolution and the letter was made on the ground that they were immaterial, irrelevant, and incompetent, and not responsive to the issues, and sustained. The secretary of the Trona Company was asked in his examination as a witness on behalf of said Trona Company this question:

"Did E. H. Merrill ever admit to you that he received any money from the Western Securities Company?"

Further:

"On January 17, 1911, did E. H. Merrill state to you that he had received the sum of \$10,000 from the Western Securities Company and for that reason the option of the Western Securities Company which he required the company to give would be for \$990,000 and that he wished you would not ask him what he had done with the \$10,000?"

Objections to these questions on the ground, to the first, that it was immaterial, irrelevant, and incompetent and calling for the conclusion of the witness; to the second, for the same reason with the additional ground that it was leading—were sustained by the court. To the next inquiry made of this same witness, "Has Colonel E. H. Merrill stated to you that he had received the sum of \$10,000 from the California Trona Company?" the same objections were urged and sustained. The president of the Trona Company, as a witness, testified that the letter from Merrill above set forth was delivered to him by Merrill, and he was then asked, "What, if anything, did Colonel Merrill state to you when he delivered that letter?" Objection was made to this question that it was immaterial, irrelevant, and incompetent and not responsive to any issue, and sustained. Another question to this witness, "At the meeting of January 17, 1911, did E. H. Merrill state anything bearing upon his connection with the option given by the California Trona Company to the Western Securities Company?" was objected to on the ground that it was irrelevant, immaterial, and incompetent, called for the conclusion of the witness, and was leading, and the objection sustained. A further question to this witness, "Do you know if on January 17th Colonel E. H. Merrill was indebted to the California Trona Company?" was sustained by the court on the ground that the inquiry was not responsive to the issue, though it was objected to on the further grounds urged against the last preceding question. This constitutes the evidence offered and excluded.

[4] It will be noted that some of the evidence was excluded as not responsive to the issues. That ground had reference solely to the offered evidence as applying to the defense of the defendants against liability on the note to which this evidence was also being offered. This objection that the evidence was not responsive to the issues could, of course, have no application to the cross-complaint against Merrill. We think that this evidence sought to be presented was relevant and competent on the issue of whether Merrill was indebted to the cross-complainant Trona Company raised under its cross-complaint and the answer thereto of Merrill. Nor is it clear that the objections to some of these questions that they were leading were well taken. Most of them, however, were not open to these objections or to any other. All were pertinent to the issue and should have been allowed to be answered, as the court should also have allowed in evidence the resolution of the Trona Company and the letter of Merrill. The refusal to do so constituted prejudicial error.

Our conclusion therefore is that, as far as the appeal herein applies to the judgment and order in the action between plaintiff and defendants involving the promissory note of January 5, 1911, that judgment and order should be affirmed.

As to the appeal from the judgment and order in favor of the cross-defendant Merrill, that judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SLOSS, J.; SHAW, J.; HENSHAW, J.

169 Cal. 365

In re CULLBERG'S ESTATE. (S. F. 6937.)
(Supreme Court of California. Feb. 15, 1915.)

1. WILLS ⇨289 — PROBATE — BURDEN OF PROOF—TESTAMENTARY CAPACITY—CONTEST.

Although the burden of proof of testamentary incapacity is on contestants of the will, nevertheless the proponent must first make a prima facie showing of due execution to satisfy the statute, though execution is not an issue under the contest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 653-661; Dec. Dig. ⇨289.]

2. WITNESSES ⇨266—WITNESSES TO WILL—CROSS-EXAMINATION BY CONTESTANTS AS TO EXECUTION.

Where a preliminary examination of the subscribing witnesses to a will, probate of which was contested for mental unsoundness, was had to satisfy the statute of wills, cross-examination by the attorneys for the contestants was proper as an aid to the court, though contestants were not strictly parties to such preliminary hearing.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 907-912, 914-920, 922; Dec. Dig. ⇨266.]

3. WILLS ⇨52—TESTAMENTARY CAPACITY—PRESUMPTION OF SANITY.

Where the only evidence offered in a contest over the probate of a will bore on the regularity of the execution, an order denying probate

cannot be sustained on the ground of testatrix's unsoundness of mind, since sanity is presumed in the absence of evidence disproving it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101-110; Dec. Dig. ⇨52.]

4. WILLS ⇨302—EXECUTION — SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to show due execution of a will to meet the prima facie requirements of the statute before contest over probate on other grounds was possible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 575, 581, 700-710; Dec. Dig. ⇨302.]

5. WILLS ⇨120—EXECUTION — REQUEST TO WITNESSES.

In the absence of words spoken by testatrix, declaring a document to be her will, or of a special request from her to the witnesses to sign it as such, it was sufficient for a proper execution if such declaration and request were unmistakably indicated by her conduct and action.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 314-317; Dec. Dig. ⇨120.]

6. WILLS ⇨71 — STATUTE OF WILLS — CONSTRUCTION.

The courts cannot dispense with the statutory requisites to the making of wills; but, in determining what the requisites are, regard should be had to the purpose and spirit of the statute, rather than to a rigid reading of the words used by the Legislature.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 187, 188; Dec. Dig. ⇨71.]

7. WILLS ⇨120—EXECUTION—REQUISITES.

No act indicating acquiescence of testatrix in another's request that witnesses sign her will as such is necessary to find an implied request, where she knew what was going on and did not object.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 314-317; Dec. Dig. ⇨120.]

8. WILLS ⇨386 — PROBATE — APPEAL — REVIEW—QUESTION OF FACT.

The question of due execution of a will is one of fact, the trial court's decision on the point not being reversible unless so clearly without support in evidence as to constitute error as a matter of law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 859; Dec. Dig. ⇨386.]

In Bank. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Application by Isaac Cullberg, Jr., for the probate of the will of Hannah M. Cullberg, deceased, contested by certain of the heirs at law. Probate was denied, and proponent appeals. Reversed, with directions.

A. J. Monroe, of Eureka, Gibson & Woolner, of Oakland, and E. Lyders, of San Francisco, for appellant. Chapman & Trefethen, of Oakland, for respondent.

SLOSS, J. This is an appeal from an order denying probate of a paper claimed to be the last will of Hannah M. Cullberg, deceased. The petition for admission to probate was filed by Isaac Cullberg, Jr., named in the alleged will as executor. Certain of the heirs at law filed a contest, specifying unsoundness of mind as their sole ground of contest. When the matter came on for hearing, the court required the proponent to make preliminary proof of the execution of the will. The subscribing witnesses and the

proponent were called and examined. Over the objection of the proponent, the contestants were permitted to cross-examine these witnesses. At the conclusion of their testimony the court announced that it was satisfied that the will was not properly executed, but expressed its willingness to hear testimony on the issue of the testatrix's soundness of mind. Under these circumstances, the proponent declined to offer further testimony, and an order was entered denying probate. This order recited that the testatrix did not declare to the attesting witnesses that the instrument was her will, and that she did not request said witnesses to sign as witnesses.

[1,2] Although the contestants had the burden of proof on the issues raised by their contest, the court acted properly in first calling for a prima facie showing of due execution. *Estate of Latour*, 140 Cal. 414, 437, 73 Pac. 1070, 74 Pac. 441. While this was not an issue presented by the contest, the court could not admit the will to probate without a showing that it had been executed according to the statutory requirements. The contestants were not, strictly speaking, parties to this preliminary inquiry; but we cannot see that the court violated any substantial right of the proponent by permitting the contestants to cross-examine the witnesses regarding the details of the alleged execution. Whether the court questioned these witnesses itself, as it undoubtedly had the right to do, or permitted the contestant's attorneys to do in the inquiry, is not a matter of serious moment.

[3] The only question remaining is whether the evidence justified the court's finding that the will had not been duly executed. There is no merit in contestants' claim that the order may be sustained on the ground of want of proof of testamentary capacity. Soundness of mind is presumed, in the absence of evidence disproving it, and the showing before the court was not such as to overcome the presumption. Furthermore, the court made it entirely clear that its ruling was based solely on the ground of want of execution. It did not assume to pass, even preliminarily, on the issue of soundness of mind.

[4] The testimony of the persons present when the will was signed varied in some particulars. But there was little, if any, conflict on the facts which we regard as essential. Taking the version most favorable to the claim of the contestants, the showing was, briefly, as follows: Mrs. Cullberg, the testatrix, was of the age of 80 years, or more. She was in feeble health, and was residing at Oakland with her husband, Isaac Cullberg, who was some years older and was in an even more precarious physical condition. Both husband and wife were under the medical care of Dr. Clara M. Holmes (now Dr. Holmes-Brazelton), one of the subscribing witnesses. A nurse, Mrs. Nettie F. Bowen,

was attending the husband. The proponent, Isaac Cullberg, Jr., was a nephew of Isaac Cullberg. On the morning of the day the will was signed, Dr. Holmes informed Isaac Cullberg, Jr., that the old gentleman was near death, that his wife might not long survive him, and that if she wanted to arrange her affairs she had better have it done at once. The nephew consulted Mrs. Cullberg, and was told by her that she wanted to make a will. She referred him to certain papers in a safe deposit box, handed him the key to the box, and directed that a will be drawn as indicated by those papers. He obtained the papers, had a will drawn by an attorney, and took the draft back to the home of Mrs. Cullberg. He, Dr. Holmes, and Mrs. Eberts, a niece of Mrs. Cullberg, went into Mrs. Cullberg's room. The will was handed to Mrs. Eberts, who began to read it aloud. After reading a part of the paper, she said she could not go on, as she was overcome by emotion. She left the room, and Mrs. Bowen was called. The only persons then in the room were Mrs. Cullberg, Isaac Cullberg, Jr., Dr. Holmes, and Mrs. Bowen. The will was handed by Mrs. Cullberg to Dr. Holmes, who proceeded to complete the reading of it aloud. The paper contained an attestation clause in the usual form, declaring that the foregoing instrument was, on its date, by Hannah M. Cullberg, "signed and sealed and published as, and declared to be her last will and testament, in the presence of us, who, at her request and in her presence, and in the presence of each other subscribed our names as witnesses thereto." This, too, was read aloud by Dr. Holmes. Mr. Cullberg then indicated to Mrs. Cullberg the place for her signature. She signed. He then asked Dr. Holmes and Mrs. Bowen to sign under the attestation clause, and they did so. During the entire proceeding, according to the testimony of Dr. Holmes, not a word was spoken by Mrs. Cullberg.

[5-7] Notwithstanding the silence of Mrs. Cullberg, we think the court should have found that due execution of the will had been shown. As we have very recently had occasion to say, it is not necessary that the testator should have spoken words declaring the document to be his will, or that he should expressly request the witnesses to sign it as such. It is sufficient if this declaration and request are unmistakably indicated to the persons signing as witnesses by the testator's conduct and action, although there is no declaration in words to that effect. *Est. of Silva* (S. F. No. 6772) 145 Pac. 1015. Unless Mrs. Cullberg was incapable of understanding what was going on—and this was not shown and is not presumed—the whole course of proceedings was inconsistent with any other conclusion than that she intended to have those present know that she gave effect to the paper as her will, and that she desired Dr. Holmes and Mrs. Bowen to sign it as attesting witnesses. It was perfectly

apparent that Isaac Cullberg, Jr., was acting in her behalf for the purpose of assisting her to make a will. When he had her sign the paper which had been read, and then asked the physician and the nurse to sign at the end of the attestation clause which had also been read, her silent acquiescence was, under the circumstances, open to no other interpretation than that she joined in or approved the declaration and request which had been made on her behalf. The courts have, of course, no right to dispense with proof of any of the statutory requirements for the making of wills (In re Walker, 110 Cal. 390, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104); but, in determining what is required, regard should be had to the essential purpose of the various provisions, rather than to a strict and rigid reading of the words used by the Legislature. And so it has generally been held that, under statutes like ours, the declaration by the testator that the document is his will, and his request for its attestation, need not be stated in exact terms, but may be implied from his conduct and the attendant circumstances. 40 Cyc. 1115; Coffin v. Coffin, 23 N. Y. 9, 80 Am. Dec. 235; Rogers v. Diamond, 13 Ark. 474, 487; Moore v. Moore, 2 Bradf. Sur. 261, 265; Doe v. Roe, 2 Barb. (N. Y.) 200; Savage v. Bowen, 103 Va. 540, 49 S. E. 668; Conrades v. Heller, 119 Md. 448, 87 Atl. 28; In re Miller's Estate, 37 Mont. 545, 97 Pac. 935. The cases cited afford examples of the circumstances which will give rise to the inference of declaration and request. In most of them facts parallel to those before us are held to be sufficient. In Hull v. Hull, 117 Iowa, 738, 89 N. W. 979, the court, in speaking of the evidence necessary to establish attestation, says that:

"It seems to be sufficient that in the presence of the testator and at his request a third person asked the witnesses to attest the execution of the will, and that such request was, in the presence of the witnesses, approved of by some sign or act on the part of the testator, and that the witnesses, with the knowledge of the testator, and in response to such request, signed their names. * * * Indeed, it is settled that not even an act or motion indicating acquiescence by the testator in the request to the witnesses is necessary, where it is made in his presence, and he knows that the witnesses are signing in response to such request, and makes no objection. Under such circumstances, his silence is a sufficient indication that the request is by his authority."

See, also, Matter of Nelson, 141 N. Y. 152, 36 N. E. 3; Harp v. Parr, 168 Ill. 459, 43 N. E. 113; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; Bundy v. McKnight, 48 Ind. 502; Inglesant v. Inglesant, L. R. 3 Prob. & Div. 172.

[8] We are not unmindful of the consideration that the question of due execution is one of fact, and that its determination by the court below is not to be overthrown unless that determination is without support in the evidence. But we are satisfied that under the undisputed evidence, and on a correct

construction of the statute, only one conclusion, that of due execution, could be drawn. The court below should have held that the proponent had met the requirements of a prima facie showing, and should have proceeded to a hearing of the contest on the issue of soundness of mind.

The order is reversed, with directions to the court below to proceed in accordance with this opinion.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

169 Cal. 404

PEOPLE v. VERTREES. (Cr. 1866.)

(Supreme Court of California. Feb. 19, 1915.)

1. CRIMINAL LAW — 534 — EXTRAJUDICIAL CONFESSION—PROOF OF CORPUS DELICTI.

Conviction cannot be had on the extrajudicial confession of a defendant, unless corroborated by proof aliunde of the corpus delicti, and though all the elements of the crime charged must appear in such proof, it need not be of such a conclusive character as is required for conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1202-1205, 1222-1224; Dec. Dig. — 534.]

2. CRIMINAL LAW — 1169 — HARMLESS ERROR — ADMISSION OF EVIDENCE.

In a prosecution against V. for burglary with intent to steal, certain written evidence used in proceedings before the grand jury leading up to the indictment of K., the admission in evidence of such indictment was harmless error, where the fact of the indictment was already in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. — 1169.]

3. BURGLARY — 31 — EVIDENCE—RELEVANCY.

In a prosecution against V. for burglary with intent to steal, papers used in proceedings before the grand jury leading up to an indictment against K., evidence that defendant showed witnesses a check drawn by K. in favor of V. is not admissible; no connection between the crime and check being shown.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 83, 86, 88; Dec. Dig. — 31.]

4. WITNESSES — 372 — BIAS—COMPETENCY OF EVIDENCE.

Where, in a prosecution against V. for burglary with intent to steal papers used in proceedings before the grand jury, leading up to the indictment of K., the father of K. admitted on the stand that he was interested in the suit, as he was jointly charged with V., the prosecution could not, to show bias of witness, elicit a story as to forgery of a check by V., not connected with the burglary.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. — 372.]

5. CRIMINAL LAW — 369, 376 — EVIDENCE OF OTHER OFFENSES.

The prosecution is not only forbidden to prove another crime, but may not introduce evidence designed merely to degrade and prejudice the defendant before the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824, 836-839, 841, 843; Dec. Dig. — 369, 376.]

Shaw and Lawlor, JJ., dissenting.

In Bank. Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Jesse C. Vertrees was convicted of burglary, and he appeals. Reversed.

Ben F. Geis, of Willow, and Durand F. Geis, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Claude F. Purkitt, Dist. Atty., of Willow, for the People.

MELVIN, J. Defendant was convicted of the crime of burglary of the first degree. He was sentenced to imprisonment for the term of 10 years.

It was the theory of the prosecution that the defendant, on or about July 21, 1912, entered the office of the district attorney of Glenn county with intent to commit larceny and that he stole and took away from said office certain letters, a hotel register, and a page which had been torn from the register of another hotel. These articles had been used before the grand jury during the proceedings which led to the indictment of one Otto Klemmer on the charge of contributing to the dependency of a minor. Defendant appeals from the judgment and from the order denying his motion for a new trial, urging as reasons for reversal: (1) That there was no proof of the corpus delicti aside from the confessions of the defendant; (2) that the court committed error in certain rulings on the admissibility of testimony; and (3) that there was no evidence showing the commission of the alleged offense in the nighttime, and hence no proof justifying a verdict of burglary of the first degree.

The district attorney testified that after the indictment of Otto Klemmer he took the exhibits with him to his office. The letters were placed in his files, and the hotel register, containing and folded up within it the leaf from the other hotel register, was put in a drawer in his desk. He saw the exhibits at various times until about two weeks before he discovered that they were missing. On or about July 21, 1912, he had occasion to examine the exhibits, and then found that they were not in his office. He and his stenographer made careful search, and in the course of the investigation he found that the screen to the window of the room in which the papers had been filed was cut. About three feet below the window, outside of the building, was the surface or top of a cellar door. The district attorney thus described the condition of the screen:

"There was a steel post that went through the screen into the hole in the wall. At this point here it was, which was about nine inches about, above the lower east corner of the window, and one that went through the opposite side, the west side, of the window, and also another that went through on the east side of the screen here, being the same kind of screen as this is in size, but old. [Referring to screen in courthouse window back of witness chair.] The steel post that went through this part of the window had a mark on it, corrugated marks,

running lengthwise the same way as the post did, of bright, new, freshly put on there marks, and this side of the window had been forcibly torn out, splitting the wood. The screen had also been torn loose from the jamb of the window on this side of the top."

Witness also stated that he had seen tracks of a man's shoes outside of the building and passing under one of the windows of his office. These tracks were in the freshly worked ground between the building and the beaten path. He had observed these tracks a few days before he missed the exhibits from his office; his attention having been directed thereto by the janitor. This testimony which was corroborated by other witnesses, who saw the broken screen and the tracks under the window, related all the facts upon which the prosecution sought to establish the corpus delicti, aside from the alleged confession of the defendant. On the witness stand the defendant denied that he had entered the office of the district attorney, or that he had made any confession. Witness Noble related two alleged confessions, and witness Wieland testified that he overheard one of them. Noble stated that between the first and the second conversations with the defendant he went to the district attorney and told that officer that he could "produce the man that committed the crime or said he had," but did not mention any name. After the second conversation with defendant, according to Noble's testimony, he told the district attorney the name of the man who had made the confessions. The first confession, as related by Noble, was as follows:

"Mr. Vertrees told me that he entered the office of the district attorney Purkitt, and secured some papers; took some papers that was evidence pertaining to the Otto Klemmer case; that he entered through the window and he got the papers; some were on file and some were in the north drawer of the desk, and he left the office in company with Mr. Lenus Klemmer; went to the Sacramento river and burned the papers."

The conversation, he said, occurred in the yard of the premises where he and Vertrees lived. The second conversation, according to Noble, took place near the back door of the house. To quote Noble's own words:

"I asked him how he got in the office and got the papers without being detected without a light in the small hours of the morning, and he said he entered the window and got the papers, some of them were on file, and some were in the north end of the drawer, and I believe he said he had a flash light, and I am not positive about that. I asked him about the light, and whether he said he turned on the light or had a flash light, I am not positive, but he told me then that he got them and where they were and how he left with him."

Wieland said that he overheard a conversation between Vertrees and Noble as they stood near the back door of the house. Witness was in a shed connected with the house, and was concealed from the view of Vertrees. Regarding this conversation Wieland said:

"I can give the substance of it, not in any exact words or anything, but Vertrees told Noble

that he had come to the courthouse with Lenus Klemmer and entered the window of the district attorney's office and took the evidence in the Otto Klemmer case while Lenus Klemmer stood guard with the machine. * * * They took the papers in the machine and took them out the Jacinto road and burned them."

The janitor and the stenographer connected with the district attorney's office testified that neither of them had taken away the exhibits, and that neither of them knew anything about the disappearance of those articles.

[1] It is the settled law that no conviction may be had upon the extrajudicial confession of a defendant unless such confession be corroborated by proof aliunde of the corpus delicti, and while slight proof of the corpus delicti has, in many cases, been properly held a sufficient basis for the admission of such confessions, it is nevertheless true that the confessions and admissions of the defendant cannot be used to establish any necessary element for the commission of the crime. *People v. Simonsen*, 107 Cal. 346, 40 Pac. 440; *People v. Jones*, 123 Cal. 68, 55 Pac. 698; *People v. Tapia*, 131 Cal. 651, 63 Pac. 1001; *People v. Frank*, 2 Cal. App. 285, 83 Pac. 578; *People v. Frey*, 165 Cal. 144, 131 Pac. 127. Applying these rules with all liberality, we cannot say that the corpus delicti was proven without the alleged confession of Vertrees. The district attorney's office is a public one, and the fact that papers disappeared from it would not prove that burglary had been committed. The circumstance that a window screen had been broken did not establish either an unlawful entry or the stealing of the exhibits by the person making such entry. It was not shown that the papers and the hotel register were in the office at the time the window screen was broken, or at the time when the tracks appeared on the soft earth outside of the office. Undoubtedly the corpus delicti may be proven by circumstantial evidence, but the circumstances related by the district attorney and the other witnesses who corroborate his statements utterly fail to establish the crime of burglary. The two elements of corpus delicti are: "(1) Certain facts forming its basis; and (2) the existence of criminal agency as the cause of them." *People v. Jones*, supra. Both of these elements were lacking until they were supplied by Noble and Wieland, who repeated alleged conversations with Vertrees. Without the details given in their testimony no one could positively say that burglary had been committed by some one entering the office of the district attorney with intent to commit larceny. While the facts related by the district attorney would properly arouse his suspicions, they would not amount to circumstantial proof of the crime charged. It has been held in this state that although all of the elements of the crime charged must appear in the proof of the corpus delicti, it is not necessary that the evidence of the

criminal act should be of the conclusive character required for conviction before the confession may be admitted in evidence. *People v. Spencer*, 16 Cal. App. 759, 117 Pac. 1039; *People v. Rowland*, 12 Cal. App. 10, 106 Pac. 428. But no authority has been cited which justifies the use of the confession itself to prove one or more of the necessary elements in the commission of the crime that would be wholly lacking without such confession.

We see no reason for extending a rule based on reason and experience and intended to protect a defendant from the possibility of fabricated testimony out of which might be wrongfully established both the crime and its perpetrator. Confessions themselves as presented in court have been described by leading text-writers as the sort of testimony calculated to arouse and stimulate suspicions. Wharton's *Crim. Ev.* (10th Ed.) § 635; Wigmore on *Ev.* § 866. We should therefore preserve the safeguards surrounding their lawful introduction. It follows that the judgment must be reversed for the reasons above stated.

The defendant testified in his own behalf. On cross-examination he was asked if he had ever been convicted of a felony. He replied in the affirmative, saying that the crime of which he had been convicted was an attempt at burglary. He denied that he had ever been convicted of any other felony, and the district attorney was permitted, over the objection of defendant's counsel, to show by the record of a trial in which Vertrees had appeared as a witness that he had admitted a previous conviction of the crime of manslaughter, committed in the state of Oregon. The prosecution seeks to justify this course under section 2052, Code of Civil Procedure, while defendant's counsel insist that the fact of prior conviction may only be shown by the admission of the witness or the production of the record (section 2051, Code Civ. Proc.), and that admissions made by him at other times and places touching the matter of his former conviction may not be shown in lieu of the written record of his conviction and imprisonment. As the district attorney will have ample time before the next trial to produce the record of conviction, if one exists, we need not discuss this question. If the record is not in existence, of course the prosecuting officer will not ask the witness anything about conviction of a felony in Oregon.

[2] Against the objections of defendant's counsel the indictment against Otto Klemmer was introduced in evidence. Defendant was not injured by the introduction of this piece of evidence, as it was already in proof that such an indictment had been returned, and that the missing exhibits had been used as evidence before the grand jury that returned it. It was improper for the prosecuting officer to ask Otto Klemmer on direct examination, when he was called as a witness for the people, if he (witness) were the same

person who had been tried under the name of Otto Klemmer on certain dates, and if he were the person who had been indicted at a certain time. Such questions could only have been propounded for the purpose of impeachment, and, even granting that the witness may have been hostile to the prosecution, it was not within the rights of the district attorney to call him merely for the purpose of throwing discredit upon him. When the questions were asked the witness had uttered no word of testimony showing any bias or prejudice towards the commonwealth's case.

[3] The witness Noble and Wieland testified that during a talk with the defendant the latter reached in his pocket, pulled out a paper, and said, "Gee, here is something I thought I had lost or spent." The paper, witnesses said, was a check on the Glen County Bank, apparently drawn by Otto Klemmer for \$275, and made payable to Jesse O. Vertrees. The time of the conversation and the exhibiting of the check was fixed as being before Vertrees made confession of the burglary. There was no further showing with reference to this check, except that Otto Klemmer was permitted to prove by his checkbook and his canceled checks that no issuance of any check to Vertrees appeared therefrom. The prosecution made no connection between this check and the crime for which Vertrees was on trial. The learned Attorney General defends the introduction of this testimony on the ground that it tends to exhibit the motive of the defendant for the commission of the alleged burglary. As there was no showing and no attempt to prove that the check was given for any particular purpose, and as its alleged existence was attributed to a time long after the disappearance of the papers, we fail to see its relevancy as showing motive or for any other purpose.

[4, 5] Lenus Klemmer was jointly indicted with the defendant Vertrees. He was mentioned in the testimony of the witnesses Noble and Wieland as the person inculpated by Vertrees' confession in the crime of burglariously entering the office of the district attorney. He took the stand and testified that he had not participated in nor had he been cognizant of any burglary. On cross-examination he admitted that he was interested in the case, being charged jointly with Vertrees. Later, in the cross-examination of this witness, the court permitted the district attorney to ask him certain questions about a forged check not, as the court said, for the purpose of proving that the defendant Vertrees had committed forgery, but to show the bias of the witness. The prosecution on cross-examination developed the fact that Lenus Klemmer had become possessed of a certain paper purporting to be a check drawn by Otto Klemmer but really, as Vertrees confessed, written by him. This check was for \$100. The grand jury was investigating the matter of that forgery—a fact, as witness

admitted, which was known to him. He was then asked the following question, and after the overruling of an objection gave the appended answer:

"I will ask you then, Mr. Klemmer, if you at that time advised your son, Otto, concerning the prosecution of Mr. Vertrees about that check, referring to the matter then before the grand jury? * * * A. I told him it was his business and not mine; he could do as he pleased."

Witness also stated that he knew of an arrangement whereby Vertrees borrowed the money to make the check good, and that he agreed to pay over a small amount of this indebtedness each week to the creditor out of the wages of Vertrees, who was employed by the witness. The prosecution insists that the cross-examination of Lenus Klemmer comes within the exception to the general rule that proof of other offenses is not permissible in the trial of a person charged with crime. But this cross-examination does not come within the doctrine which admits evidence of other crimes to prove the motive of the defendant. Such cases as *People v. O'Bryan*, 165 Cal. 58, 130 Pac. 1042, *People v. Walters*, 98 Cal. 141, 32 Pac. 864, and others cited in that behalf, have no application to the facts of this case. The general rule is that the prosecution is not only forbidden to prove another crime, but may not introduce evidence designed merely to degrade and prejudice the defendant before the jury. *People v. Glass*, 158 Cal. 655, 112 Pac. 281. Nor may a cross-examiner do indirectly that which the law prohibits him from doing directly. *People v. Vidal*, 121 Cal. 222, 53 Pac. 558. Having elicited the fact that Lenus Klemmer was interested in the acquittal of Vertrees, he was not then privileged to go further and under the guise of developing bias elicit the story of a transaction, the details of which must have been injurious to the defendant, but could have no connection with the commission of the burglary charged in the indictment. In *Jones' Commentaries on Evidence* (vol. 5, § 829, p. 151) the rule is thus stated:

"The rule has several times been declared in judicial decisions that, where the cross-examiner ascertains from the admission of the witness that he is prejudiced against or entertains a feeling of hostility toward the adverse party, the inquiry cannot be pressed further to show the cause or ground of such hostility, or the details of the facts showing bias."

People v. Goldenson, 76 Cal. 328, 349, 19 Pac. 101, is cited by the learned author in support of the text. In *People v. Breen*, 130 Cal. 78, 62 Pac. 408, a witness for the prosecution was president of the company that employed a detective to ascertain the origin of the fire which, according to the indictment, was set by the defendant. Defendant's counsel asked witness how much had been paid to the detective for his services, and this court approved a ruling sustaining an objection to the question. Applying this principle to the case at bar, we must hold

that after the prosecution had obtained from the witness an admission of his interest in the acquittal of the defendant, he could not be interrogated additionally to the extent of eliciting facts tending to prove a crime committed by Vertrees but having no possible connection with the offense of burglary for which the latter was on trial.

The only testimony of burglary of the first degree is found in the statement of Noble which is quoted herein. The time of entering a building is one of the essential elements of the crime of burglary of the first degree, and that constituent of the offense may not be proved by the confession of the defendant alone.

Appellant complains of the giving of this instruction:

"If any witness examined before you has willfully sworn falsely in this case to any material matter, it is your *duty* to distrust his entire evidence."

This form of the instruction was disapproved in *People v. Delucchi*, 17 Cal. App. 103, 118 Pac. 935, and if this case shall be tried again, we would suggest an adherence to the form which has been approved.

The judgment and order are reversed.

I concur: LORIGAN, J.

ANGELLOTTI, C. J. I concur in the judgment. I am of the opinion that there was sufficient evidence of the corpus delicti to warrant the admission in evidence of the alleged confessions of defendant. But I have no doubt on the proposition that the lower court erred in its action relative to the cross-examination of defendant in regard to alleged statements made by him on other occasions as to prior convictions, and in allowing proof to contradict his testimony on that subject. Furthermore, it is clear to me that the court erred in allowing the cross-examination of Lenus Klemmer on the matter of the \$100 check, a matter not touched upon in his direct examination, and one altogether foreign to any issue in this case. The claim that this testimony was admissible to show interest and bias on the part of the witness appears to me, under the circumstances of this case, to be absolutely without foundation. Whatever may be said as to the question of prejudicial effect of the testimony tending to show statements of defendant admitting prior convictions other than the one he had acknowledged, there is no question in my mind as to the prejudicial effect of the testimony given by Lenus Klemmer on cross-examination relative to the \$100 check. An examination of the record in this case has satisfied me that the case is not one where it may fairly be said that a verdict of guilty would or ought to have been rendered in the absence of this testimony. So far as I can see, there is nothing substantial to connect defendant with the commission of the alleged

offense except his alleged confessions, the making of which was denied by him, and the testimony as to which, to say the least, is not at all satisfactory. The testimony of one of the two witnesses who testified as to the alleged confession, as to the possession by defendant of a check for \$275, signed by Otto Klemmer, was almost conclusively shown to be unfounded in fact. In view of the circumstances of this case, as shown by the record, I do not think that section 4½ of article 6 of the Constitution warrants an affirmance.

It may be added that the foundation for conclusion that if a burglary was committed, it was burglary of the first degree, is exceedingly slight, and it is extremely doubtful if it is sufficient. I am not prepared to assent to a conclusion that such a matter may not be shown by the confession of the defendant alone.

We concur: SLOSS, J.; HENSHAW, J.

SHAW, J. I dissent. I am of the opinion that the cross-examination of Lenus Klemmer concerning the \$100 check was allowable to show the interest he was taking in the case, and to determine the degree of credit to be given to his testimony favorable to the defendant.

With regard to the other rulings complained of, I do not consider them sufficiently prejudicial to require a reversal, or to show that a miscarriage of justice has resulted therefrom, even if they were erroneous, which I do not concede as to all of them.

I concur: LAWLOR, J.

169 Cal. 399

RICKERT v. ZOEGER et al. (L. A. 3436.)

(Supreme Court of California. Feb. 18, 1915.)
APPEAL AND ERROR ⇐102—DISMISSAL—NOTICE OF APPEAL—NONAPPEALABLE ORDER.

An order sustaining or overruling a demurrer not being an appealable order where a notice of appeal is from a decision on demurrer and the record does not show any other notice of appeal or that any judgment was entered, the appeal must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 688-698; Dec. Dig. ⇐102.]

Department 1. Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

Action by Fred Rickert against E. Zoeger and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Appeal dismissed.

Stephen Monteleone, for appellant. Howard J. Fish, Jones & Weller, and Guy Eddie, all of Los Angeles, for respondents.

SHAW, J. The action is to recover a sum of money alleged to be due upon an agreement for the sale of a "saloon business" in the city of Los Angeles.

The notice of appeal states that the plaintiff appeals "from the decision of the superior court rendered in said action, whereby the said court sustains defendants' demurrer to plaintiff's fifth amended complaint without leave to amend." The record does not show that any judgment was entered, and it does not contain any other notice of appeal.

An order sustaining or overruling a demurrer is not an appealable order. *Moraga v. Emeric*, 4 Cal. 308; *Moulton v. Ellmaker*, 30 Cal. 529; *Agard v. Valencia*, 39 Cal. 297; *Daniels v. Lansdale*, 38 Cal. 567; *Hibberd v. Smith*, 39 Cal. 146; *Ashley v. Olmstead*, 54 Cal. 618. This court is therefore without jurisdiction to act upon the so-called appeal, and it must be dismissed.

The appeal is dismissed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.

26 Cal. App. 301

PENNYCOOK v. BOYLE, Auditor, et al.
(Civ. 1426.)

(District Court of Appeal, First District, California. Jan. 13, 1915. Rehearing Denied by Supreme Court March 12, 1915.)

1. MANDAMUS ☞143—LACHES—SUSPENSION OF OFFICER.

A municipal department inspector who was suspended for nearly one year under charges, though the civil service laws limited the period of such suspension to 30 days, and who appeared daily and reported ready for duty, though his duties were being performed by another, and who presented a claim each month for his salary and instituted mandamus proceedings to compel the payment of his salary for the time he was suspended within two months after the charges were dismissed and he was reinstated, was not guilty of such laches as would bar his right to the remedy, since he was not entitled to that remedy so long as another was in possession of the office under a claimed authority.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 282-285; Dec. Dig. ☞143.]

2. MANDAMUS ☞15—GROUNDS—DEFENSES.

A city can act only through its officials, and mandamus will not be denied to an official to compel the payment of a salary for the time during which he was wrongfully suspended from duty by his superiors, on the ground that it is an injustice to an innocent party to compel the city to pay such salary.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 47, 49; Dec. Dig. ☞15.]

Appeal from Superior Court, City and County of San Francisco; Charles Monroe, Judge.

Petition for mandamus by William G. Pennycook against Thomas F. Boyle, Auditor, and others. From a judgment directing issuance of the writ, the defendants appeal. Affirmed.

Percy V. Long, City Atty., and Harry G. McKannay, Asst. City Atty., both of San Francisco, for appellants. W. H. Smith, Jr., of San Francisco, for respondent.

PER CURIAM. This is an appeal from the judgment of the superior court directing

the issuance of a writ of mandate compelling the auditor of the city and county of San Francisco to audit, and the treasurer to pay, certain salary demands of the petitioner as inspector of the department of electricity of said city, said demands covering the period between February, 1911, and the major portion of the month of January, 1912.

The pleadings and proof show that during the above period the petitioner was absent from his post of duty as such inspector under suspension upon charges of neglect of duty, which charges were never heard, but were finally dismissed, and the petitioner reinstated in his position in the latter part of the month of January, 1912. Within two months after such reinstatement the petitioner instituted this proceeding to compel the payment of his salary during the period of his suspension.

[1] The chief and practically only point made for the appellants is that the petitioner was guilty of laches in not sooner instituting this proceeding, and that for that reason his application for a writ of mandate should be denied. In support of this position the appellants point out that the civil service provisions of the charter of San Francisco limit the power and period of suspension of a subordinate official to 30 days, and the appellants insist that after this period of suspension had elapsed the petitioner was in a position to have demanded and retaken his place and performed his duties, and that, not having done this, he ought not to be permitted to wait for a period of over a year before applying for a writ of mandate to compel the payment of a salary for which he rendered no service. The proofs in the case, however, show that whether or not the suspension of the petitioner was lawful for a longer period than 30 days, it was actually maintained by the persons ordering it for nearly a year, during which time another person was actually in possession of the petitioner's place, claiming title to it, and that, although the petitioner daily for a period of three months after his suspension presented himself at his proper place of service and offered to perform its duties, his offer was refused, and that in addition to this the petitioner presented regularly and during the entire year of his suspension his salary demand in due form to the city officials, whose duty it was to audit and pay the same. The record further shows that within two months after his reinstatement he instituted this proceeding. We do not think that laches can be predicated upon this state of facts, and can hardly see what more the petitioner could have done to keep alive his rights to his position and salary than he is shown to have done. He could not be expected to break into an office occupied by another by force, particularly when the intruder was there by official sanction

of his superiors; nor could he have successfully applied for a writ of mandate during the period of suspension under the authority of the case of *Black v. Board of Police & Fire Commissioners*, 17 Cal. App. 310, 119 Pac. 674. The record shows that he filed his application for the writ within two months after the ban of his suspension had been removed, and he had been restored to his office. Clearly he was guilty of no laches.

[2] The further contention of the appellants that the writ should have been denied because its issuance would result in great loss and injury to the city and county of San Francisco, which is an innocent party to the affair, is equally devoid of merit. The city only acts through its officials, and must expect to suffer from their wrongful acts. So far as the record here shows, the petitioner herein was an innocent and injured party throughout, and was at all times entitled to his office and its emoluments, and he certainly ought not to be made to suffer any further delay in the procurement of the salary to which at all times he was shown to have been entitled.

The judgment and order are affirmed.

26 Cal. App. 261

HANSBROUGH et al. v. MANN et al.
(Civ. 1384.)

(District Court of Appeal, First District, California. Jan. 7, 1915. Rehearing Denied by Supreme Court March 8, 1915.)

1. WORK AND LABOR — 27 — ACTIONS — EVIDENCE — ADMISSIBILITY.

Where, in an action for the balance due as the reasonable value of labor performed and materials furnished in the construction of a building, defendants pleaded the general issue, and alleged that plaintiffs agreed to perform the work in a good and workmanlike manner and to furnish none but good materials and complete the building within a reasonable time, and that they failed so to do, to defendants' damage, evidence of the value of the lot and improvements, to show that the building should have brought in a greater revenue than it did, and would have done so but for defective workmanship and difficulty in securing and retaining tenants in a badly constructed and leaky building, was admissible.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 50-54; Dec. Dig. ¶ 27.]

2. TRIAL — 114 — CONDUCT OF COUNSEL — REFERENCE TO MISCONDUCT OF ADVERSE COUNSEL AND JUROR.

Counsel for a party may demand during the trial, in the presence of the jury, an investigation of the result of an interview had by counsel of the adverse party and a juror.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 275-278, 296; Dec. Dig. ¶ 114.]

3. TRIAL — 133 — MISCONDUCT OF COUNSEL — INSTRUCTIONS — EFFECT.

The misconduct of counsel in commenting on matters not proper for argument is not ground for reversal, where the trial court directed the jury at the time to exclude from consideration everything, except that which bore directly on the issues.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 316; Dec. Dig. ¶ 133.]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by J. W. Hansbrough and another, copartners, doing business under the firm name and style of Hansbrough & Johnston, against A. L. Mann and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Louis H. Brownstone, of San Francisco, for appellants. R. L. Mann and Curtis Hillier, both of San Francisco, for respondents.

LENNON, P. J. This action was brought by plaintiffs in assumpsit to recover from the defendants a balance due as the reasonable value of labor performed and materials furnished and for the amount of moneys advanced for the benefit of the defendants in the construction of a certain building.

From the evidence it appears that the defendants were the owners of a lot in San Francisco, and had engaged one Andrew McElroy to construct a building upon the same upon a percentage basis, the cost of which was to be limited to the sum of \$10,000. After the plans had been prepared, McElroy died, and the defendants then employed plaintiffs to do the work. It is the claim of plaintiffs that the contract contained no limitation as to cost, and that their compensation was to be the cost of the labor and materials, plus a commission of 6 per cent. for their services. The defendants, on the other hand, allege that the plaintiffs were engaged to do the work upon the same basis as McElroy, and to carry out McElroy's contract, the terms of which, they were informed, were the reasonable value, not exceeding \$10,000, including commissions and all extras; plaintiffs having discretion in substituting cheaper materials than those called for by the plans and specifications, but they were to do a good job.

It appears in evidence that the departure from the plans and specifications was provided for on account of the limited funds possessed by the defendants, they being unable to procure any sum in excess of the \$10,000 mentioned, and that a strict adherence to the plans and specifications would bring the amount of the contract beyond the means of the defendants. There was no written agreement between the parties, but the plaintiffs went on and erected the building, the cost of which they alleged amounted to the sum of \$13,907.73, plus their commissions of \$834.81, which brought the total amount up to the sum of \$14,742.54. The defendants paid the sum of \$9,520, on account, which they claim to be the reasonable value of the work; and, having refused to pay any further sum, plaintiffs sued for the alleged balance of \$5,222.54.

Defendants tendered issue under a general denial, and also interposed what they termed a counterclaim, under which they set forth

that by their contract the plaintiffs agreed to perform the work in a good and workmanlike manner and with good judgment and skill, and to furnish none but good materials, and to complete the building within a reasonable time, but they failed so to do, to the damage of the defendants in the sum of \$2,000.

All the matters set forth in the so-called counterclaim could have been proved under the general denial, and this pleading amounts to nothing more than a general denial. The only issue, therefore, involved under the pleadings, was as to the amount of the cost of the structure, and whether or not the plaintiffs had properly completed the building under the terms of the contract or expended the money as alleged.

The case was tried before a jury, and the verdict went for the defendants. Judgment was entered thereon, from which, and from an order denying a new trial, plaintiffs have appealed.

The evidence in support of the issues raised by the pleadings was voluminous, and a substantial conflict appears; and, unless the alleged errors complained of as having occurred during the trial were prejudicial to plaintiffs, the judgment must be affirmed.

[1] The alleged errors complained of consist in the introduction by defendants of evidence as to the value of the lot and improvements, and the amount of income derived therefrom, and also three instances of alleged misconduct on the part of the defendants' counsel during the course of the trial.

Evidence of the value of the lot and improvements was permitted by the trial court over objection. The purpose of the evidence was to show that the building should have brought in a greater revenue, and would have done so but for the defective workmanship and the difficulty of securing and retaining tenants in a badly constructed and leaky building.

While this character of evidence going to prove such facts may not have been the best, it certainly afforded some slight evidence upon the subject, and its admission can hardly be said to constitute error.

[2] The three instances of misconduct on the part of defendants' counsel which are assigned as error consisted in the demanding by said counsel of an investigation, during the course of the trial, of the result of an interview had by plaintiffs' counsel and one of the jurors; the conduct of the defendants' counsel in commenting upon this fact before the jury in his arguments; and the further act of the defendants' counsel in his argument to the jury in offering to let plaintiffs have the property for 40 per cent. of defendants' equity.

With reference to the first objection, it is sufficient to say that counsel for the defendants was acting within his rights in demanding an investigation of the circumstances which to him warranted an investigation.

[3] As to the other acts, it appears from the record that, when these matters were called to the attention of the trial court, the jury was instructed at the time that it was to exclude from its consideration everything except that which bore directly upon the issues of the case. Under these circumstances, we feel that whatever effect these statements may have had upon the minds of the jury was cured by the charge of the trial court.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

26 Cal. App. 293

TALCOTT v. MEAKIN et al. (Civ. 1416.)
(District Court of Appeal, First District, California. Jan. 12, 1915.)

1. PLEADING $\S$ 205—DEMURRER—COMPLAINT.

A complaint on a note and mortgage is not subject to a general demurrer, where from the allegations as a whole it can be determined that the obligation of the note had matured and was due and payable at commencement of the action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-493, 495, 496, 498-510; Dec. Dig. $\S$ 205.]

2. PLEADING $\S$ 10—WRITTEN INSTRUMENTS—MORTGAGE.

A complaint on a mortgage is not demurrable because the mortgage is not set out in *hæc verba*, where it is set out according to its legal effect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 30; Dec. Dig. $\S$ 10.]

3. PLEADING $\S$ 8—CONCLUSION—ULTIMATE FACT—NONPAYMENT OF DEBT.

In an action on a note and mortgage, an allegation of the complaint that there has been paid a certain amount, and that nothing more has been paid, is the statement of an ultimate fact, and not a conclusion, and hence does not render the complaint demurrable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. $\S$ 8.]

Appeal from Superior Court, Alameda County; William H. Donohoe, Judge.

Action by Jonathan R. Talcott against William Meakin, Laura E. Meakin, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Lomba & Ford, of Oakland, for appellants. Vance McClymonds and Dudley Kinsell, both of Oakland, for respondent.

PER CURIAM. [1] There was no error committed by the trial court in the overruling of the defendants' demurrer. The plaintiff's complaint alleged the execution of the defendants' promissory note to the plaintiff for a specified sum, and the contemporaneous execution of a mortgage by the defendants as security for the payment of the obligation of the note. The note in suit was alleged to have been made, dated, and delivered to the plaintiff on the 23d day of October, 1907; and it is not disputed that, as against a general demurrer, it appears with sufficient certainty from the allegations of the complaint

as a whole that the obligation of the note had matured and was due and payable at the time of the commencement of the action.

[2] The plaintiff's complaint was not demurrable on the ground of uncertainty, etc., merely because it did not set out in *hæc verba* the mortgage in suit. The plaintiff's complaint purported to plead, in substance and legal effect, the terms, conditions, and covenants of the mortgage, including the covenant concerning attorney's fees; and a contract may be declared on either in *hæc verba*, or in substance and according to its legal effect. *Stoddard v. Treadwell*, 26 Cal. 294; *Love v. S. N. L. W. & M. Co.*, 32 Cal. 639, 91 Am. Dec. 595; *Murdock v. Brooks*, 38 Cal. 596; *White v. Soto*, 82 Cal. 654, 23 Pac. 210.

[3] The demurrer upon the ground of insufficiency of facts pleaded to constitute a cause of action was general in its terms; and it is conceded to have been directed solely to the point that the complaint was fatally defective in not containing a sufficient allegation of nonpayment of the obligation evidenced by the note and secured by the mortgage in suit. The allegation of the complaint in this behalf is as follows:

"That there has been paid on said note or obligation on account of interest the sum of two hundred and fifty (\$250) dollars, and that nothing further has been paid on account of principal or interest or otherwise."

This averment means more than the mere conclusion of the pleader. It was the statement of an ultimate fact, because, in effect, it declared that, of the aggregate of the sum due for principal and interest upon the note at the time of the commencement of the action, no part thereof had been paid, save and except the sum of \$250.

The judgment appealed from is affirmed.

26 Cal. App. 295

PEOPLE v. TSURUHE TOMINGA.
(Cr. 474.)

(District Court of Appeal, First District, California. Jan. 12, 1915.)

1. CRIMINAL LAW — §730—CONDUCT OF COUNSEL — CROSS-EXAMINATION OF WITNESS — CURE OF ERROR.

Conduct of counsel, in a prosecution for murder, in eliciting on cross-examination the fact that defendant had a venereal disease, from a witness who testified that defendant was insane, because he had a conversation with him in which defendant showed despondency, is cured by the court's admonition to the jury to disregard it, especially where counsel inadvertently asked for the fact when he wished to show that the despondency was caused by such disease.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. §730.]

2. WITNESSES — §277—CROSS-EXAMINATION—INSANITY.

Where, in a prosecution for homicide, defendant pleaded insanity, and a witness, to show it, recounted a conversation with defendant, in which defendant showed despondency over his troubles, in absence of objection that no foundation had been laid, a question on cross-examina-

tion as to whether defendant had not stated that his despondency was due to a venereal disease is proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. §277.]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Tsuruhe Tominga was convicted of murder, and he appeals. Affirmed.

Philip M. Walsh, of Piedmont, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant in this case was charged with the crime of murder. He was convicted of murder in the first degree, and the penalty therefor was by the jury fixed at life imprisonment in the state prison.

[1] In addition to his plea of "not guilty," the defendant interposed the defense of insanity. A witness for the defendant upon direct examination testified that in his opinion the defendant was insane at the time of the commission of the homicide, and among other things stated that the reason for the opinion was based upon conversations had with the defendant shortly before the commission of the homicide, wherein the defendant stated, in substance, that his mother was dead; that his wife was in poor condition; that he had no money to provide for her; that he had abandoned all hope, and would, because of these misfortunes, kill himself. Upon cross-examination this witness was asked if he did not know it to be a fact that at the time of the conversation referred to the defendant was suffering from a venereal disease. The question was answered in the affirmative, apparently before counsel for the defendant had an opportunity to object; and upon motion the answer was stricken out upon the ground that the question was not proper cross-examination. The asking of the question was assigned as misconduct. The district attorney conceded that the question as framed was improper, and explained that inadvertently he had asked for a fact when it was his purpose to ask if the defendant had not said that he was despondent because he was suffering from a venereal disease. Thereupon the trial court, at the request of the defendant, admonished the jury to disregard the question and answer.

The explanation of the district attorney apparently satisfied the lower court that the question complained of was propounded in good faith; but, even if this were not so, we are convinced that the trial court's admonition to the jury cured whatever misconduct there may have been in the asking of the question.

[2] Upon further cross-examination the same witness was asked if the defendant had not said that his despondency was due, not

only to his family troubles and poverty, but also to the fact that he was afflicted with a venereal disease. An objection to this question upon the ground that it was not proper cross-examination was overruled, and the question was answered in the negative. We see no error in the ruling. The witness was properly permitted, when examined in chief, to testify that his opinion as to the insanity of the defendant was based upon certain specific declarations of the defendant as to the cause of his despondency; and the question complained of was allowed to be answered upon the theory that the prosecution was entitled to know if the defendant had given any other and further reason for his despondency. Clearly, if the defendant had said he was despondent because he was afflicted with a venereal disease, this was a fact which the prosecution would have been entitled to have in evidence; and, if the question complained of had been answered in the affirmative, it would have helped rather than harmed the defendant, because such an answer would have tended to show that, in addition to his other troubles, he had good and sufficient reason to be despondent. True, the question complained of should perhaps have been preceded by the general question as to whether or not the witness had narrated all of the reasons given by the defendant for his despondency. Such a general question would undoubtedly have been proper cross-examination. No objection, however, was made to the question complained of upon the ground that a proper foundation had not been laid therefor; and, in the absence of such an objection, the ruling under discussion was not error.

This disposes of the principal point made in support of the appeal, and what we have said in effect disposes of the one remaining point.

The judgment and order appealed from are affirmed.

26 Cal. App. 291

PEOPLE v. TODD. (Cr. 527.)

(District Court of Appeal, First District, California. Jan. 12, 1915.)

1. CRIMINAL LAW — 338—PREJUDICIAL ERROR—EVIDENCE—ADMISSION.

On a trial for rape, the testimony of the physician attending prosecutrix, as to the manner of her delivery of a child, but in technical terms, was not objectionable as arousing the indignation of the jury against accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. —338.]

2. CRIMINAL LAW — 1169—ERROR IN ADMISSION OF EVIDENCE—WITHDRAWAL BY INSTRUCTIONS.

Alleged error in admitting evidence calculated to arouse the indignation of the jury against accused is cured by an instruction to disregard it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137—3143; Dec. Dig. —1169.]

3. CRIMINAL LAW — 404—EVIDENCE—ADMISSIBILITY—EXHIBITION OF CHILD.

Where prosecutrix, prior to charging accused, a white man, with rape, had filed a complaint against a mulatto, and at the trial insisted that accused was the father of her child, and that the mulatto had on various occasions attempted to ravish her, the exhibition to the jury of the child, light complexioned, to give the jury an opportunity to compare its appearance with that of accused, to aid in determining the question of paternity, was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891—893, 1457; Dec. Dig. —404.]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

W. A. Todd was convicted of rape, and he appeals. Affirmed.

P. M. Walsh, of Piedmont, for appellant. U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was charged by information with the crime of statutory rape. He was tried, convicted, and sentenced to 25 years' imprisonment in the state prison at San Quentin. The present appeal is from the judgment and order denying defendant's motion for a new trial.

While the evidence is contradictory in many respects and is not as satisfactory or convincing as might be desired, it cannot be said that it is not sufficient to sustain the judgment of conviction.

[1] Defendant asserts that the court committed error in permitting the doctor who attended the prosecuting witness at the birth of the child, resulting from the alleged acts of intercourse between her and the defendant, to testify to the manner of its delivery. This evidence was not elaborate, but was short and couched in technical terms; and we are unable to agree with the defendant that it contained anything that would tend in any way to arouse in the minds of the jurors a feeling of horror and indignation against the defendant.

[2] But even if the admission of this evidence may be said to be error, the court having later ordered it to be stricken out, and instructed the jury to disregard it, it will be presumed that the jury obeyed the instruction, and that thus the error, if any, was cured. *People v. Burke*, 18 Cal. App. 72, 102, 122 Pac. 435.

[3] The defendant also complains that the court over his objection permitted the child of the prosecuting witness, born only a short time before the trial, to be exhibited to the jury. We think this evidence was admissible. Prior to charging the defendant with the crime, the prosecutrix had filed a complaint against one Earl Platt, a mulatto or colored youth; and notwithstanding that at the trial she insisted that the defendant had had sexual intercourse with her and was the father of her child, she still maintained that Earl Platt had on three different occasions

attempted to ravish her. Naturally, under these circumstances, some doubt would be created in the minds of the jurors as to whether the defendant or the colored youth were the guilty party. The child was light complexioned; and the jury's inspection of it was for the purpose of giving them an opportunity to compare its appearance with that of the defendant as an aid to determining the question of its paternity. The competency of this character of testimony finds authority in the case of *People v. Richardson*, 161 Cal. 552, 561, 120 Pac. 20.

The judgment and order are affirmed.

26 Cal. App. 263

PACIFIC IMPROVEMENT CO. v. MAXWELL. (Civ. 1393.)

(District Court of Appeal, First District, California. Jan. 8, 1915. Rehearing Denied by Supreme Court March 8, 1915.)

1. APPEAL AND ERROR ⇨1042 — **HARMLESS ERROR—RULINGS ON PLEADINGS.**

Under Code Civ. Proc. § 426, providing that new matter in the answer in avoidance, or a defense, or a counterclaim must be deemed denied, plaintiff need not plead the statute of limitations against items of defendant's counterclaim, and where the case is determined on the theory contemplated by this provision, the question of the elimination of an answer to the counterclaim is immaterial on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4110-4114; Dec. Dig. ⇨1042.]

2. BILLS AND NOTES ⇨538—**INSTRUCTIONS—FORBEARANCE—CONSIDERATION.**

An instruction that if a maker's indorsement on a note sued on, whereby he acknowledged the indebtedness and promised to pay the principal and interest, accrued and to accrue, according to the tenor of the note, was made on the consideration that the payee should forbear to sue on the note, and he did not sue thereon for seven years, the forbearance was a good consideration supporting the enforcement of the indorsement did not charge that mere forbearance was a good consideration, and did not by implication state that there was an agreement to forbear, but the jury must have understood that forbearance was not a consideration for the indorsement unless it was founded on and induced by a preceding promise to forbear.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1895-1898, 1900-1910; Dec. Dig. ⇨538.]

3. TRIAL ⇨295 — **INSTRUCTIONS—CONSTRUCTION AS A WHOLE—FORBEARANCE—CONSIDERATION.**

Such instruction, and another instruction that to constitute a valid consideration forbearance must be founded on an agreement to forbear, correctly stated the law on the question of forbearance.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. ⇨295.]

4. BILLS AND NOTES ⇨538—**ACTIONS—EVIDENCE—INSTRUCTIONS.**

Where the complaint in an action on a note pleaded the maker's indorsement in *hæc verba*, which expressly declared that it was made by the maker to prevent the bar of limitations, and the note with the indorsement was admitted in evidence, an instruction that to constitute a valid consideration forbearance must be founded on

an agreement to forbear was within the issues and the evidence.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1895-1898, 1900-1910; Dec. Dig. ⇨538.]

5. TRIAL ⇨260—**INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY CHARGE GIVEN.**

It is not error to refuse an instruction sufficiently covered by an instruction given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. ⇨260.]

6. LIMITATION OF ACTIONS ⇨199—**ISSUES—EVIDENCE—INSTRUCTIONS—QUESTION FOR JURY.**

Where issue was joined on the plea of limitations to a claim for services, and the evidence as to the time of rendering the services was conflicting, the question as to the time of the accrual of a cause of action on the claim was a mixed question of law and fact and properly submitted to the jury.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 727-730; Dec. Dig. ⇨199.]

7. TRIAL ⇨234—**INSTRUCTIONS—AMBIGUOUS INSTRUCTIONS.**

An instruction in an action on a note that for plaintiff to recover it must appear that there was a consideration for the note was ambiguous, as leading the jury to believe that the burden of proof was on plaintiff to show a consideration for the note, and was properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 534-538, 566; Dec. Dig. ⇨234.]

8. BILLS AND NOTES ⇨493—**CONSIDERATION—WANT OF CONSIDERATION—BURDEN OF PROOF.**

The burden of proving want of consideration for a note rests on the maker.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1652-1662; Dec. Dig. ⇨493.]

9. TRIAL ⇨194, 240—**INSTRUCTIONS—WEIGHT OF EVIDENCE.**

An instruction that disputable presumptions, while evidence, are evidence the weakest and least satisfactory is properly refused because argumentative in form and directed to the weight of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466, 561; Dec. Dig. ⇨194, 240.]

10. TRIAL ⇨139—**PRESUMPTIONS OF FACT—QUESTION FOR JURY.**

Whether presumptions of fact have been overcome by evidence is for the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⇨139.]

11. FRAUDS, STATUTE OF ⇨129 — **PAROL AGREEMENT FOR SALE OF LAND—PART PERFORMANCE.**

A parol agreement for the sale and purchase of land is not void nor unenforceable, where it has been partly performed by part payment of the price.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. ⇨129.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Pacific Improvement Company against George H. Maxwell. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Dorsey and W. E. Cashman, both of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for appellant. Platt & Bayne and J. P. Langhorne, both of San Francisco, for respondent.

LENNON, P. J. In this action the plaintiff sued to recover from the defendant upon the latter's promissory note executed to the plaintiff in the sum of \$15,452.34 on March 19, 1907, and payable one day after date. The plaintiff's complaint, in addition to counting upon the note, alleged and relied upon the defendant's two indorsements of the note made and dated, respectively, on January 31, 1901, and January 23, 1909, whereby he acknowledged the existence of the indebtedness evidenced by the note, and promised and agreed to pay the principal and all interest accrued and to accrue thereon according to its tenor and effect. The plaintiff's complaint, by appropriate allegations, further averred facts which showed the defendant's absence from the state from and after the making and maturity of the note and the indorsements thereon for a period of time sufficient to toll the statute of limitations. The answer of the defendant pleaded a want of consideration for the execution of the note and the indorsements made thereon, and further alleged that the note in suit was executed in lieu of and as a renewal of 12 prior promissory notes executed by defendant to plaintiff, which it was alleged had theretofore been fully paid and discharged, and it was further alleged, with respect to these particular notes, that the consideration for their execution had failed prior to the commencement of the action on the note in suit, for the reason, as alleged, that they were executed upon the agreed consideration "that the same should be applied on account of the purchase by the defendant from the plaintiff of the interest of plaintiff in certain lands in Sonoma county; that plaintiff had since then sold to others than the defendant a large part of said lands, so that the fact is it could not now, or when this action was commenced, carry out on its part the aforesaid agreement with the defendant." Finally as a set-off and counterclaim the answer of the defendant pleaded an indebtedness in the sum of \$50,000, alleged to be due to him from the plaintiff for professional services rendered to the latter. The allegations of the defendant's counterclaim were denied in an answer filed by the plaintiff, which answer also pleaded the statute of limitations against the items of the defendant's counterclaim.

[1] At the outset the defendant and appellant asks this court to strike out, or at least disregard, the plaintiff's answer to his counterclaim. A like motion was made in the court below and there denied; but it was stipulated by the parties to the action that the answer in question might be incorporated as a part of the record on appeal. It is in-

sisted that the plaintiff's answer was not required under our system of pleading, and is therefore not properly in the case. Section 426 of the Code of Civil Procedure provides that any new matter in the answer of a defendant in avoidance or constituting a defense or a counterclaim, must be deemed denied. Under this section there was no necessity for any further pleading upon behalf of the plaintiff; nor was it necessary to formally plead the statute of limitations against the items of the defendant's counterclaim. That statute was deemed pleaded by operation of law. *Cuttriss v. Sprague*, 49 Cal. 301; *Grangers', etc., v. Clark*, 84 Cal. 201, 23 Pac. 1081; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Peck v. Noe*, 154 Cal. 351, 97 Pac. 865. The case was tried and determined upon the theory contemplated by the code section last referred to, and, therefore the question as to whether the plaintiff's answer to the counterclaim should be eliminated can have no bearing upon the merits of the appeal, and is of no consequence save as a matter of practice.

The action was tried by the court below with a jury, and resulted in a verdict and judgment in favor of the plaintiff for the full amount of the principal and interest found to be due and unpaid upon the note in suit. The appeal is from the judgment and from the order denying the defendant a new trial. The case comes here upon the judgment roll and a bill of exceptions.

In support of the appeal it is claimed that the court erred in the giving and refusing of certain instructions, and that the evidence is insufficient to support the verdict and judgment.

[2] It is one of the contentions of the appellant that the court erred in its instructions to the jury on the question of forbearance, wherein the jury were in effect told that if they should find that the defendant's written indorsement of the note dated January 31, 1901, was made upon the consideration that the plaintiff should forbear to sue on the note, and did not in fact sue upon the note for a period of seven years thereafter, then as a matter of law such forbearance was a good consideration, which was sufficient to support the execution and enforcement of the obligation of the indorsement. It is claimed that this instruction is not only unsound in its statement of the law, but that it is based upon a theory not disclosed by the pleadings nor developed by the evidence. The contention is not well taken. As we understand the contention in this behalf, it is based upon the erroneous assumption that the instruction complained of charged that mere forbearance was a good consideration, and by implication told the jury that there was an agreement between the parties to forbear. From this it is argued that the trial court not only misstated the law and assumed a fact not in evidence, but invaded the province of the jury as well

by charging upon a matter of fact. We do not think that the instruction complained of is fairly susceptible of the construction contended for. Liberally construed, it did no more nor less than state to the jury that the plaintiff's forbearance to sue, if the jury should find such to be the fact, was a good and valid consideration for the defendant's indorsement of January 31, 1901, only in the event that the jury should further find that such indorsement "was made upon the consideration that plaintiff should forbear to sue. * * *" True the proposition of law involved might have been more clearly and exactly stated, but the word "consideration" is recognized in law and is generally understood as the equivalent or return given or suffered by one for the act or promise of another, and therefore the phrase "in consideration," considered in connection with the context of the instruction complained of, may be fairly said to have been understood by the jury to mean that if they found that the plaintiff did in fact forbear to sue on the note, such forbearance would not constitute a good and valid consideration for the defendant's indorsement of the note unless they should also find as a fact that such forbearance was founded upon and induced by a preceding promise to forbear. So construed, the instruction complained of correctly stated the law, and did not assume and then charge upon the existence of a fact in the case.

[3] But apart from these considerations the trial court of its own motion, when charging upon another phase of the case which involved the law of forbearance, indicated clearly enough to the jury that, in order to constitute a good and valid consideration, forbearance must be founded upon "an agreement" to forbear. This being so, we are satisfied that the charge of the court as a whole clearly and correctly stated the law of the case in so far as the question of forbearance was concerned, and that therefore the jury was neither confused nor misled by the particular instruction complained of.

[4] That this instruction was well within the issues raised by the pleadings and developed by the evidence is manifested by the fact that the plaintiff's complaint pleaded the defendant's indorsement of the note in *æc verba*, which expressly declared that it was made by the defendant "for the purpose of preventing the bar of the statute of limitations." Subsequently the note and its indorsement were admitted in evidence. This being so, we are unable to perceive why the instruction complained of was not responsive to the issues and the evidence in the case.

[5] The court did not err in refusing to give the defendant's requested instruction to the effect that forbearance, to constitute a good and valid consideration, must be founded upon an agreement to forbear. This proposition we think was sufficiently covered by the instruction hereinbefore referred to

and other instructions contained in the charge of the court.

[6] Complaint is made of an instruction, given at the request of the plaintiff, to the effect that the defendant's counterclaim was barred by the statute of limitations if it was found by the jury that none of the services alleged to have been rendered to the plaintiff "were rendered within four years immediately prior to the commencement of the action, and that defendant's cause of action for such services accrued prior to said four-year period." It is not contended that this instruction was erroneous in its statement of the law, but it is claimed that it submitted to the jury the question of law as to when, with reference to the commencement of the action, the defendant's cause of action had accrued, and that it should not have been given at all because the evidence shows that the employment of the defendant was continuous, and that the services rendered thereon extended over a period of time which would have taken the defendant's claim without the bar of the statute. Conceding the evidence to be as is claimed, the instruction in question nevertheless left the ascertainment of the fact as to whether or not the defendant's claim was barred by the statute of limitations to the jury, and therefore we cannot perceive how such instruction operated to the prejudice of the defendant. Issue having been joined on the plea of the statute of limitations, and the evidence upon this phase of the case being conflicting, the question as to when with reference to the commencement of the action the defendant's cause of action on his counterclaim accrued was a mixed question of law and fact, which was properly left to the jury for determination. *Reed v. Swift*, 45 Cal. 255; *Shaw v. Yarbrough*, 3 Ala. 588; *Clarke v. Dutcher*, 9 Cowen (N. Y.) 674; *Chapin v. Warden*, 15 Vt. 560.

[7] Complaint is made of the trial court's refusal to give the defendant's requested instruction which charged " * * * that in order that the plaintiff may recover in this action it must appear that there was a consideration for the execution of the note in suit." This language of the instruction is obviously ambiguous to the extent that it might have been inferred therefrom that the burden of proof was upon the plaintiff to show that the promissory note in suit was executed for a valuable consideration, and for that reason the instruction was rightfully refused.

[8] It may be noted that the court elsewhere in its charge clearly and correctly stated the rule of law which places the burden of showing a want of consideration upon the maker of a promissory note, and declares that there can be no recovery upon a promissory note shown to have been executed without a consideration.

[9, 10] The trial court rightfully refused

that portion of a requested instruction of the defendant which charged that: "Disputable inferences or presumptions while evidence, are evidence the weakest and least satisfactory." While this language was employed by way of argument in the opinion in the case of *S. & L. Society v. Burnett*, 106 Cal. 514, 529, nevertheless we are satisfied that it was not intended as the statement of a rule of law which should govern a jury in its decision of the question as to whether or not a disputable presumption had been overcome and dispelled by other evidence. This must be so because, aside from the fact that the requested instruction was argumentative in form, it was directed to the weight of the evidence, and it is the settled rule that the force and effect of presumptions of fact, and the question as to whether they have been overcome by other evidence, are for the jury to determine. *Cummins v. James*, 4 Ark. 616; *Bigelow v. Doolittle*, 36 Wis. 115; *Hancock v. Supreme Council*, 69 N. J. Law, 308, 55 Atl. 246; *Pennsylvania v. Weiss*, 87 Pa. 447; *Sessions v. Newport*, 23 Vt. 9.

[11] The defendant's requested instruction numbered 5 was to the effect that an agreement required to be in writing was invalid and could not be made the foundation of any obligation or liability in favor of or against either the plaintiff or the defendant, if the jury found that such an agreement had not been reduced to writing. As an abstract proposition of law this instruction was correct, but as applied to the facts of the present case it was defective and rightfully refused, because it did not contain the exception to the rule that a parol agreement for the sale and purchase of land was neither void nor unenforceable if the jury found that it had been partly performed by a part payment of the purchase price. The evidence upon the whole case is undoubtedly in substantial conflict, and we do not understand that the point is made that the evidence does not generally support the verdict and judgment, but apparently it is contended that there was some evidence in the case, offered upon behalf of the defendant, which, if it had been accepted by the jury, would have been sufficient to warrant a finding that there were services rendered the plaintiff at its special instance and request by the defendant of a value equal to, if not greater than, the sum sued for by the plaintiff, and that the jury was prevented from considering this evidence by the instruction of the court which told the jury that if they found that none of the defendant's services had been rendered within four years prior to the commencement of the action, the defendant was not entitled to an offset, because his claim would be barred by the statute of limitations. From this it is argued that the verdict and judgment were contrary to the evidence upon that phase of the case which involved the

items of the defendant's counterclaim and the bar of the statute of limitations. We must confess that we cannot comprehend the force of this contention. As previously pointed out, the instruction of the court upon this particular matter was free from error, and left to the jury the determination of the question as to whether or not the defendant's counterclaim was in fact barred by the statute of limitations, and if this be so, clearly the instruction last complained of did not have the effect of withdrawing any of the evidence in the case from the consideration of the jury.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

26 Cal. App. 309

PEOPLE v. SOULEOTES. (Cr. 562.)

(District Court of Appeal, First District, California. Jan. 13, 1915.)

1. INDICTMENT AND INFORMATION $\Leftrightarrow$ 196 — RAPE—WAIVER OF DEFECTS.

Defect in an information for rape in averring that the offense was committed on the person of an infant not being then and there "with wife of" accused, arising from the use of the word "with" instead of the word "the," is waived unless raised by demurrer.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 628-635; Dec. Dig. $\Leftrightarrow$ 196.]

2. MARRIAGE $\Leftrightarrow$ 5—VALIDITY—MARRIAGE OF PERSONS UNDER THE AGE OF CONSENT.

Under Civ. Code, § 69, providing for the consent of the parent or guardian to the marriage of a minor, and section 82 authorizing the annulment of a marriage if either party is below the age of consent, and the marriage was celebrated without consent of parent or guardian, a marriage of an infant below the age of consent, but with the consent of the parent, is valid.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 23, 24; Dec. Dig. $\Leftrightarrow$ 5.]

3. WITNESSES $\Leftrightarrow$ 61—HUSBAND AND WIFE—COMPETENCY OF WIFE.

Where prosecutrix, under the age of consent, married accused with the consent of her parent, she could not be compelled to testify against accused, in a prosecution for a prior rape upon her.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 163, 174-176; Dec. Dig. $\Leftrightarrow$ 61.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

John Souleotes was convicted of rape, and he appeals. Reversed and remanded.

Johnson & Schuhl, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal from a judgment of conviction of the crime of rape.

[1] Two points are made upon the appeal. The first is that the information is fatally defective in the following respect: Instead

of averring that the offense was committed upon the person of the minor "not being then and there *the* wife of said John Souleotes," its words are "not being then and there *with* wife of said John Souleotes." There was no demurrer or other objection to the sufficiency in form of the information until after the defendant's conviction. We think the point made for the first time after conviction is without merit. The substitution of the word "with" for "the" was a mere clerical misprision by which the defendant could not have been misled, and to which he should have demurred. Not having done so, he must be held to have waived the objection.

[2, 3] The second point made by the appellant is that the court erred in overruling the defendant's objection to the action of the court in requiring the minor girl, who was the subject of the alleged crime, to be sworn, and to testify as a witness against the defendant; it appearing to the court, in support of the objection, that a marriage ceremony had been performed between the defendant and the said minor after the arrest of the former but before the trial, and that by virtue thereof they were, at the time she was called as a witness, husband and wife. It is conceded that the minor girl at the time of her said marriage was of the age of a little over 14 years, and hence below the age of consent, but it is also shown that the marriage was otherwise regularly solemnized with the consent of the mother of the said minor. The question is: Was such a marriage void, voidable, or valid? If either voidable or valid, it would necessarily follow that the trial court erred in compelling the witness to testify.

It seems clear that the marriage is not void, but at most voidable. At common law the marriage of minors below the age of consent was merely voidable. 2 Nelson on Divorce and Separation, §§ 721 to 725, and notes. The well-established rule of the common law in this regard has not been expressly changed by our Code. There are but three kinds of marriage which are expressly declared to be void by the terms of the Civil Code. This is not one of them, but, on the contrary, the fact that a minor has been married when below the age of consent is made a ground for annulment, under the provisions of section 82 of the Civil Code, under the terms of which a strong inference arises that the rule of the common law has not been changed, and that such marriages are merely voidable.

In addition to this, a reading of section 69 of the Civil Code, providing for the consent of the parent or guardian to the marriage of a minor, will show that such consent may be given when the minor girl is below the age of 18 years, but without further limitation upon the time within which such consent is required in order to validate the marriage of

the minor. When sections 69 and 82 of the Civil Code are read together, they would seem to justify the conclusion that the consent of the parent may be given to the marriage of the minor below the age of legal consent, and that, when the marriage of such minor is otherwise legally solemnized, it is not even a voidable marriage. This being so, it follows necessarily that the court was in error in compelling the wife of the defendant to be a witness against him.

The judgment and order are reversed, and the cause remanded for a new trial.

26 Cal. App. 305

CLARK et al. v. KOESHEYAN. (Civ. 1444.)
(District Court of Appeal, First District, California. Jan. 13, 1915.)

1. APPEAL AND ERROR ⇨933—NOTICE OF INTENTION TO MOVE FOR NEW TRIAL—TIME.

Where it did not necessarily appear from the record that defendant had such notice of the entry of judgment as would satisfy the statute, his notice of intention to move for a new trial, though technically late, would be regarded as timely, and the case heard upon its merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. ⇨933.]

2. LANDLORD AND TENANT ⇨172—EVICTION—DEPRIVATION OF WATER AND LIGHT.

A landlord's acts in cutting off water connections with the premises and in boarding up and obstructing a porch and rear windows by which the premises received necessary light and air over his other land, so as to make the premises untenable for use as a store or residence and to compel the tenant to vacate, amounted to an "eviction."

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695-703; Dec. Dig. ⇨172.]

3. LANDLORD AND TENANT ⇨124—USE OF PREMISES—TENANT'S RIGHT TO WATER SERVICE—"APPURTENANCE."

Water pipes and water service in place and in use in connection with the premises at the time of the lease thereby became an "appurtenance" to the premises, to the continued use of which the tenant was beneficially entitled during his term, without charge or cost, in the absence of a contrary provision in the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 437-440; Dec. Dig. ⇨124.]

For other definitions, see Words and Phrases, First and Second Series, Appurtenance.]

4. TRIAL ⇨69—MOTION FOR NONSUIT—RE-OPENING CASE.

After a motion for nonsuit, the court may reopen the case to permit the plaintiff to strengthen it in the respects in which the motion shows it to be defective.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 164, 165; Dec. Dig. ⇨69.]

5. LANDLORD AND TENANT ⇨180—EVICTION—DAMAGES.

In a tenant's action for damages for an eviction, the testimony of the tenant, who had personally conducted the business on the premises, as to her daily average profits therefrom, from her own knowledge, was competent to show the damage to the business from the eviction.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 715-729; Dec. Dig. ⇨180.]

6. HUSBAND AND WIFE $\hookrightarrow$ 208—ACTION BY WIFE—JOINDER BY HUSBAND.

A married woman carrying on her separate business on premises leased by her, whose husband was made a party plaintiff in her action for damages for an eviction, was entitled to recover, since the joinder of the husband in the action and in the judgment protected the landlord from another action by him for damages.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 756, 757, 760-764, 968, 973; Dec. Dig. $\hookrightarrow$ 208.]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Mary J. Clark and husband against K. S. Koesheyman, sometimes known as K. S. Cashin. Judgment for plaintiffs, and, from an order denying a new trial, defendant appeals. Affirmed.

W. D. Crichton and C. K. Bonestell, both of Fresno, for appellant. Strother & Aynsworth, of Fresno, for respondents.

PER CURIAM. [1] This is an appeal from an order denying a motion for a new trial, in an action for damages for eviction from certain premises in Fresno. The verdict in favor of the plaintiffs was rendered February 27, 1913, and judgment was rendered and entered on the same day. On March 4, 1913, the defendant applied to the court for, and was granted, a stay of execution. On March 8th defendant served a notice of motion to strike out the plaintiffs' cost bill "upon the papers, pleadings, and records in the cause." This motion was heard in open court and decided on March 17, 1913. On March 28, 1913, defendant gave notice of intention to move for a new trial. Plaintiff moved to dismiss said motion, and at all times objected and now objects to the hearing of the same by the trial court or upon this appeal upon the ground that the notice of intention was not given in time, relying upon *Gardner v. Stare*, 135 Cal. 118, 67 Pac. 5, and cases cited. We think it does not necessarily appear from this record that the defendant had such notice of the entry of the judgment as would satisfy the statute. This being so, we are disposed to hear and determine the case upon its merits.

[2] The plaintiff Mary J. Clark, joining her husband, sued for damages for eviction from certain premises leased to her by the defendant. The acts of eviction of which she complained were: First, the cutting off of the water connections with the premises by the defendant; second, the boarding up and obstruction of a certain porch and of certain windows in the rear of the premises by which the leased premises received necessary light and air over other lands of the defendant. These two acts of the defendant the plaintiff claimed and the jury found rendered the premises untenable for use as a store or place of abode, and compelled the plaintiff to vacate the premises, thus causing an eviction. The plaintiff Mary J.

Clark is shown to have been a married woman, but entered into this lease in her own name, and conducted the business of a store on the premises apparently as her own business.

The appellant contends that the facts above relied upon by the plaintiff were not sufficient to constitute an eviction, but with this contention we cannot agree.

[3] As to the water, we think that the fact that the water pipes and the water service were in place and in use in connection with the premises at the time of the lease made them an appurtenant to the premises, to the continued use of which the plaintiff was beneficially entitled during her term without charge or cost to her, in the absence of a provision to the contrary in the lease. 1 *Underhill's Taylor on Landlord and Tenant*, p. 427, § 284; *Bradbury v. Higginson*, 162 Cal. 602-606, 123 Pac. 797; *Gans v. Hughes* (City Ct. Brook.) 14 N. Y. Supp. 930; Civ. Code, § 662. We think, also, that the defendant's interferences with the plaintiff's right to receive light and air into the rear of the premises were in violation of her contractual rights as a lessee of the premises, such as would suffice to work an eviction. The cases cited by the appellant to the effect that the owner of lands is not entitled to the easements of light and air from his surrounding owners have no application to the case of landlord and tenant; and there can be no doubt that such an interference with a tenant's light and air as materially detracts from the habitable quality and uses of the leased premises is a breach of the covenant of the lease which may amount to an eviction. *McDowell v. Hyman*, 117 Cal. 67, 71, 48 Pac. 984.

[4] The appellant's further contention is that the court erred in reopening the case after motion for nonsuit, and in permitting the plaintiff to prove the value of the grocery business lost by reason of her eviction. As to the right of the court upon motion for nonsuit to permit the plaintiff to strengthen her case in the respects in which the motion for nonsuit shows it to be defective, there can be no question, for that is the very purpose of the motion.

[5] Nor do we think that the court erred in permitting the plaintiff to give the testimony that she did give as to the value of her business, based upon its average daily profits. The plaintiff owned, conducted, and attended to the business herself, and personally kept all such accounts of its purchases and sales as were kept; and she testified to the matter of her daily profits therefrom from her own knowledge, and not merely as a matter of guess or opinion. This was perfectly competent evidence to show her damage suffered in the destruction of her business as the result of her eviction.

[6] The objection that the business con-

ducted by the plaintiff Mary J. Clark upon property she had individually leased was community property, for the loss of which she was not entitled to recover, has no merit. The whole trend of the evidence goes to show that the plaintiff Mary J. Clark was acting throughout in the capacity of one dealing with her own separate property; and there is not only no showing that the husband had any community interest in the grocery business, but the strong inference arises that it was the separate property of the wife. It further appears that the husband is made a party plaintiff with her, and that the judgment is in favor of both. All that the defendant would be entitled to would be protection against another action by the husband in relation to this property; and the joining of the husband in the action and in the judgment gives the defendant that protection.

The order denying a new trial is affirmed.

26 Cal. App. 295

RAYMER v. HOBBS et al. (Civ. 1567.)

(District Court of Appeal, Second District, California. Jan. 12, 1915.)

1. BROKERS ⇨7 — CONTRACTS OF OPTION—OPTION CONTRACT.

One acquiring an option contract for the purchase of real estate within a specified period for a specified price does not thereby obtain authority to sell as agent of the owner.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 5-8; Dec. Dig. ⇨7.]

2. BROKERS ⇨51 — COMPENSATION — WHEN EARNED.

Where an agent to sell real estate never brought the owner and a purchaser together and did not acquaint the owner with the fact that the purchaser was desirous of purchasing or one to whom a sale might be made, the agent had not earned commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 69; Dec. Dig. ⇨51.]

3. VENDOR AND PURCHASER ⇨18 — OPTION CONTRACTS — ELECTION TO PURCHASE — NECESSITY.

One who acquires an option contract for the purchase of real estate within a specified period for a specified price must exercise his right to purchase within the specified time or he acquires no right under the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. ⇨18.]

4. VENDOR AND PURCHASER ⇨18 — OPTION CONTRACT—SUBSEQUENT SALE BY OWNER—EFFECT.

Where defendant gave plaintiff an option for the purchase of real estate within a designated time for a designated price without notice that a third person was negotiating purchasing the property, or that plaintiff procured the option in the interest of the third person, defendant did not breach the option contract by contracting within the life of the option to sell to a third person subject to rights of plaintiff to purchase under his option.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. ⇨18.]

5. VENDOR AND PURCHASER ⇨18 — OPTION—PAROL EVIDENCE OF CONSIDERATION.

An owner, giving to another a written option contract for the purchase of real estate

within a specified period for a specified time, may show that no consideration was paid for the option notwithstanding a recital of a consideration, so that it could be repudiated at any time before the exercise of the right to purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. ⇨18.]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by A. Raymer against Susan A. Hobbs and another. From a judgment for plaintiff, defendants appeal. Reversed.

J. W. Morin, of Pasadena, for appellants. Z. B. Stuart, of Los Angeles, for respondents.

SHAW, J. Action to recover damages in the sum of \$500. Judgment for plaintiff, from which defendants appeal.

At plaintiff's request, defendants executed and delivered to him an option, dated April 15, 1912, to purchase a certain tract of land owned by them. This document was as follows:

"For a valuable consideration and the payment of one dollar, the receipt of which I hereby acknowledge, I, the undersigned, hereby agree to convey, or cause to be conveyed to whomsoever A. Raymer shall designate, within the time limit of this option (as stated below), all that certain piece of property, situated in the county of Orange, state of California, and known and described as follows, to wit: * * * For the sum of twelve thousand three hundred and fifty (0) 100 dollars, net to me, payable to me on terms and conditions as follows: * * * In case the provisions as set forth above, are not exercised within sixty days from date hereof, this option shall be null and void. * * *

"Signed: Susan A. Hobbs.
T. E. Hobbs.

Plaintiff testified this option was procured at the suggestion of and for his clients G. W. Schroeder and wife, to whom he, without written authority and without defendants' knowledge, had shown the property in an effort to sell the same for the sum of \$18,000. Other than this option given by defendants to plaintiff, there was no written authority given by defendants to plaintiff whereby he was given the right to purchase or act as agent in the negotiation of a sale of the property. At no time prior to May 20, 1912, when Raymer, by letter, notified defendants that he was negotiating with Schroeder, to whom he had expected to sell the property, did defendants have any notice from Raymer that Schroeder was a possible buyer. On said last-mentioned date, in a letter to Hobbs, he stated that the party to whom he expected to sell the land was "one of the notion of buying your land," and stated that it was Mr. Schroeder. Also saying that he would release Hobbs from the option on condition that if Schroeder later on should conclude to buy, he plaintiff should be paid a commission on the sale by Hobbs. Prior to the receipt of this letter, to wit, about May 1st, Hobbs met Schroeder, who had purchased a piece of land adjoining that owned by de-

plaintiff and defendant testimony that he desired to purchase more land. Holds at the time, as stated, having no knowledge of the fact that Schroeder was the party in whom plaintiff was acting in procuring the option, suggested to Schroeder that he purchase the stock, with the understanding that there was no sale between them and that the money advanced by plaintiff to Holds, was, by written contract, placed at the disposal of Schroeder, to pay the price and upon the basis of which plaintiff was entitled to receive the following:

"This sale is to be made about June 10, 1912, at the place where the stock is to be sold, and the proceeds are to be paid to Mr. Schroeder."

Thereafter, to wit, on or about May 22d, pursuant to this agreement, defendants executed a deed and placed the same, with certain instructions pertaining to the delivery of the same, in escrow, it being stated in these instructions that:

"The agreement is given with the understanding that J. A. Brown, who is entitled to the same, has no right to sell or convey on this property expiring on that date, and this money and the deed and agreement are to be returned to said parties respectively."

[12] It is clear from the record that the option cannot be construed as a writing authorizing an agent to sell, but even so construed, it is plain to see that plaintiff never brought Holds and Schroeder together, nor at any manner prior to May 22d, apprised Holds with the fact that Schroeder was a person desirous of purchasing the land, or one in whom a sale thereof might be made. It likewise necessarily appears that at no time during the duration of the option did plaintiff exercise his right to purchase the same or tender any money in payment thereof. Under these circumstances it is difficult to understand upon what theory plaintiff could be entitled to recover damages for breach of any contract made by Holds. *Mason v. Lutz*, 2 Cal. App. 2d, 67 Pac. 122.

[13] At the time defendants entered into the contract for the sale of the property to Schroeder, on or about May 1st, they had no notice or knowledge that he had ever consummated the purchase of the property through plaintiff, and recognizing the fact that plaintiff had an option to purchase the same for the price specified therein, the contract with Schroeder was made subject to plaintiff's right under said option, thus fully protecting him in case he desired to consummate the purchase in the exercise of his right so to do. Plaintiff, according to his own testimony, procured the option at the suggestion and in the interest of Schroeder. He was not the agent of defendants, but was dealing with them at arm's length and, so far as shown by the written document, solely and alone for himself. This is not affected by the fact that

plaintiff reported to them the property to Schroeder at an advance price than he paid to purchase it himself. While it is true that plaintiff tendered the option to Schroeder in the sale made by defendants to Schroeder, nevertheless, if, as alleged by defendants, no consummation was made, the option was not exercised. It is contended by defendants that the exercise of the right to purchase by the plaintiff himself, would in fact, exhaust the right of the plaintiff to exercise the right to offer proof in support of the allegation. The theory of the trial court appears to have been that the period of consummation in the contract was extended and thereby as to plaintiff or not as to a consummation was paid therefor, and also that since the deed was executed and placed in escrow for delivery, subject to the instructions deposited therein, it was immaterial that it was not delivered and the sale consummated until after the expiration of the option. Subject to plaintiff's right to purchase the land under the terms of his option, defendants, without notice to plaintiff, had the right to sell to whomsoever they pleased, and in no event to plaintiff in a position to complain, without a showing that within the life of the option he tendered the amount specified therein in compliance with its terms, or otherwise signified his acceptance of the proposed offer.

Judgment reversed.

We concur: CONREY, P. J.; JAMES, J.

20 Cal. App. 2d

PEOPLE v. RAICH. (Cr. 545.)

(District Court of Appeal, First District, California. Jan. 11, 1915.)

1. INFANTS § 27—OFFENSES AGAINST CHILDREN—EVIDENCE—CORROBORATION OF PROSECUTOR.

In prosecution for lewd conduct with a child, contrary to Pen. Code, § 268, it is not necessary that the testimony of the prosecuting witness be corroborated in order to sustain a conviction.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 20; Dec. Dig. § 20.]

2. CRIMINAL LAW § 553—TRIAL—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES.

Contradictions in the testimony of a witness do not destroy the credibility of such witness, so as to render his testimony insufficient to support a conviction, but the effect of such contradictions is purely a question affecting the credibility of the witness and for the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1252; Dec. Dig. § 553.]

3. INFANTS § 26—OFFENSES AGAINST CHILDREN—PROSECUTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for lewd conduct with a child, evidence held not to show that the testimony of the prosecuting witness was so inherently incredible as not to sustain a conviction based thereon.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 26; Dec. Dig. § 20.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

John Emil Raich was convicted of lewd conduct with a child, and he appeals. Affirmed.

Pierre A. Fontaine, of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal from a judgment of conviction and from an order denying a new trial in a case where the defendant was charged with the commission of the felony defined by section 288 of the Penal Code.

But two points are presented in support of the appeal, namely, that the evidence is insufficient to support the verdict, in this: That the testimony of the complaining witness, upon which the case of the people was primarily rested, was not corroborated, and that her testimony is so inherently improbable and incredible that it amounts to no evidence at all.

[1] Neither point is well taken. The statute defining the offense of which the defendant was convicted does not require that the testimony of the complaining witness shall be corroborated; and we know of no statutory or other rule of law which calls for corroboration of the testimony of the complaining witness in cases of the character under consideration.

[2] The contention that the testimony of the complaining witness is so inherently incredible and improbable is based upon the claim that her story, as told upon her examination in chief concerning the conduct of the defendant at the time of the commission of the crime, was in a measure contradicted upon cross-examination, and by a showing that her testimony upon the trial varied in certain details from her testimony given upon the preliminary examination of the defendant.

Mere contradictions of the testimony of a witness will not, standing alone, suffice to utterly destroy the credibility of such witness. It is the peculiar and exclusive province of the jury to decide upon the credibility of witnesses; and although impeaching evidence, in the nature of contradictions or otherwise, has been received, it is still not only the right but the duty of the jury to determine to what extent they will believe or disbelieve the testimony of the witness thus assailed. It is the peculiar and exclusive province of the jury to decide upon the credibility of a witness; and in so doing it is their duty to reconcile, if possible, any apparent conflict in the evidence, whether such conflict is developed upon the whole case or in the testimony of an individual witness. In other words, the jury are the sole judges as to whether or not a witness

has been impeached by proof of contradictory statements or otherwise; and finally it is for them to say to what extent they will believe or disbelieve the testimony of the witness thus assailed.

[3] The complaining witness, among other things, testified, in substance, that the lewd and lascivious conduct charged against the defendant was perpetrated upon her every day for three successive months; that through all of this time she attended school every day; and that once a week during the same time she was bathed by her mother. It is insisted that this testimony of itself shows that the story of the complaining witness was inherently improbable, and therefore utterly unworthy of belief, because, as is argued, it would have been physically impossible for the defendant to have repeatedly done the things charged against him without leaving some outward evidence of his acts upon the person and clothing of the complaining witness, and at the same time visibly and injuriously affecting her health. This may be true; but the record does not show whether any observation of the person, clothing, or health of the complaining witness was made by any person at any time. True, the mother of the complaining witness had an opportunity to make the observations referred to; but the fact remains that it does not appear that she did so; and, even though she had done so and found no evidence of the crime charged against the defendant, this would not necessarily have demonstrated the improbability of the testimony of the complaining witness.

The judgment and order appealed from are affirmed.

26 Cal. App. 311

LYNCH v. DE BOOM. (Civ. 1439.)

(District Court of Appeal, First District, California. Jan. 13, 1915.)

1. JUDGMENT $\Leftrightarrow$ 143—VACATING—EXCUSABLE NEGLECT—SUFFICIENCY OF SHOWING.

Where a showing that plaintiff, who was an attorney and at the time in charge of his own case, appeared in court the morning the case was set for trial, learned that it was not on the trial calendar for that day, and was informed by the clerk that the action would not be tried that day, and that the clerk would assign a later date for resetting the case for trial, whereupon the plaintiff left the courtroom, was uncontradicted, it was an abuse of the trial court's discretion to refuse to set aside a judgment of dismissal entered that day because of plaintiff's failure to appear, under Code Civ. Proc. § 473, allowing the court to relieve a party from a judgment taken against him through his excusable neglect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272–291; Dec. Dig. $\Leftrightarrow$ 143.]

2. JUDGMENT $\Leftrightarrow$ 139—VACATING—EXCUSABLE NEGLECT—EXERCISE OF DISCRETION.

While it is within the court's discretion, under Code Civ. Proc. § 473, to grant or refuse relief from a judgment taken against a party by mistake, inadvertence, surprise, or excusable neglect, that discretion should be exercised in

favor of securing a determination of the case upon its merits, where the undisputed circumstances are such as would naturally cause the judge to hesitate in deciding the motion for such relief.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. ¶139.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by Thomas B. Lynch against William John De Boom, as executor of the estate of Romaine Camille De Boom, deceased. From an order denying plaintiff's motion to vacate a judgment of dismissal, the plaintiff appeals. Reversed, with directions to vacate the judgment.

Leo. J. McEnerney, of San Francisco, for appellant. W. P. Caubu and Stafford & Stafford, all of San Francisco, for respondent.

PER CURIAM. In this action the plaintiff sought to recover from the defendant, as the executor of the last will and testament of Romaine Camille De Boom, deceased, the sum of \$612.50 for services rendered the deceased by plaintiff's assignor. The appeal upon a bill of exceptions is from an order denying plaintiff's motion to vacate a judgment of dismissal entered upon the request of and in favor of the defendant.

[1] The motion to vacate was grounded upon the alleged inadvertence, mistake, and excusable neglect of the plaintiff, and it was supported by the affidavit of the plaintiff and his attorney, Mr. Leo. J. McEnerney. The latter's affidavit dealt largely with matters of conversation with one of the counsel for the defendant concerning the setting of the cause for trial, and upon the whole tended to show a tentative agreement between counsel that the cause would not be set for trial nor tried until some time after the middle of July, 1913, when counsel for the plaintiff would have returned from a business engagement at Seattle. The affidavit of plaintiff, in addition to being an affidavit of merits—the sufficiency of which is not questioned here—alleged substantially the following facts: The plaintiff was an attorney at law. On July 11, 1913, at 9:55 a. m. he, in the absence of his attorney, McEnerney, appeared in the courtroom of department 12 of the superior court of the city and county of San Francisco, in response to an order of the court previously made setting the cause for trial on that date, and then and there called the attention of the clerk of the court to the fact that the cause was omitted from the court's calendar of causes to be tried on that date, and at the same time inquired of the clerk concerning the cause of the omission. Thereupon the clerk informed the plaintiff that the action would not be tried on that date, and that he (the clerk) would assign a later date for the resetting of the cause for trial. The plaintiff, relying up-

on the statements made to him by the clerk, left the courtroom at 10 minutes past 10 o'clock, fully believing that no action would be taken in the case by the court on that date. After the plaintiff had left the courtroom, however, the cause was by the court called for trial, and, there being no appearance for the plaintiff, a motion to dismiss the case was made and granted, and judgment accordingly entered for the defendant.

The only showing made upon behalf of the defendant in opposition to the motion to vacate consisted of a counter affidavit of Mr. W. M. Stafford, one of the attorneys for the defendant, which, after admitting the allegations of the McEnerney affidavit, in so far as they related to the agreement not to try the cause until after the middle of July, 1913, averred that in keeping with the agreement of counsel the cause was duly and regularly set for trial on July 11, 1913. This affidavit, however, denied that counsel for the defendant had any agreement with McEnerney to the effect that the hearing of the motion to set the cause for trial would be continued until the latter's return from Seattle. The allegations of the plaintiff's affidavit concerning the conversation with the clerk of the court were not contradicted by any evidence, oral or documentary.

Upon the showing thus made, we are of the opinion that the court below abused its discretion in refusing to vacate the judgment of dismissal. The allegations of the plaintiff's affidavit concerning his conversation with the clerk of the court constituted a prima facie showing of excusable neglect which, in the absence of a counter showing by the defendant, should have impelled the lower court to set aside the judgment.

[2] While it is true generally that the exercise of the power to set aside a judgment taken as the result of the alleged excusable neglect of one of the parties to an action is largely a matter of discretion in the court below (Code Civ. Proc. § 473), nevertheless, where the disclosed and undisputed circumstances attending the taking of the judgment are such as would naturally cause the lower court to hesitate in its decision of the motion to vacate, that discretion should be so exercised as to bring about a judgment upon the merits of the action (*Grady v. Donahoo*, 108 Cal. 211, 41 Pac. 41). In view of the fact that the plaintiff was an attorney at law and for the time being in charge of his own case, it may be conceded that he was guilty of neglect in not waiting for the judge of the lower court to appear upon the bench in order to ascertain with certainty what action would be taken in the case, but the fact was undisputed that he had in good faith endeavored to ascertain from the clerk of the court what was the condition of the cause upon the court's calendar, and was honestly misled by the information which he received. Under these circumstan-

es, the neglect of the plaintiff was excusable within the intent and meaning of the provisions of section 473 of the Code of Civil Procedure.

The facts of the case of *Anaconda Mining Co. v. Saile*, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472, presented a situation practically similar to the case at bar. There the Supreme Court said:

"We think Atkinson (the respondent) was excusable in relying upon the information which the clerk gave him. The clerk was the ministerial officer of the court. We think that the attorney had a perfect right to rely upon the statements of such a court officer that no business would be done until a certain time. It is not as if this information came from the sheriff, or a bailiff, or some attendant upon the court. The clerk had the records of the court, and knew its business."

The order appealed from is reversed, with directions to the lower court to enter an order vacating the judgment of dismissal entered in favor of the defendant.

26 Cal. App. 315

**McKAMY v. BOARD OF TRUSTEES OF
CITY OF BAKERSFIELD et al.**
(Civ. 1677.)

(District Court of Appeal, Second District, California. Jan. 13, 1915. Rehearing Denied Feb. 3, 1915.)

1. MUNICIPAL CORPORATIONS—§131, 159—OFFICERS—POWER OF BOARD OF TRUSTEES.

Where the petitioner did not question that portion of a decree depriving him of a city office, a vacancy was created, and the board of trustees may fill it by appointment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 305, 350-356, 378; Dec. Dig. §131, 159.]

2. PROHIBITION—§6—SCOPE OF REMEDY.

The function of the writ of prohibition, as shown by Code Civ. Proc. § 1102, is to restrain the doing of judicial acts, where the board or tribunal is proceeding without or in excess of jurisdiction; hence prohibition will not lie to restrain the trustees of a city from performing the ministerial act of filling a vacancy in the office of town marshal.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 31-33; Dec. Dig. §6.]

3. PROHIBITION—§19—PARTIES.

Where petitioner was deprived of his office of city marshal, prohibition to prevent the appointment of a successor will not lie, where neither the judge who made the decree, nor the relator who made the complaint, were parties.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. § 68; Dec. Dig. §19.]

Application by James McKamy for writ of prohibition against the Board of Trustees of the City of Bakersfield and W. V. Matlack, as members. Writ denied.

See, also, 143 Pac. 752.

Matthew S. Platz, of Bakersfield, for petitioner. James F. Farragher, of Yreka, and Alfred Siemon, of Bakersfield, for respondents.

SHAW, J. Petitioner, who was city marshal of the city of Bakersfield, was by decree of court, pursuant to the provisions of section 772 of the Penal Code, deprived of his

office and adjudged to pay a fine of \$500 to W. C. Dorris, at whose relation the accusation was filed. The proceeding is brought against the board of trustees of the city of Bakersfield; neither the court which rendered the decree, nor Dorris, the relator, being made a party herein.

[1] The prayer of the petition is that a writ of prohibition issue directed to said board of trustees and its members, prohibiting it and them from proceeding to appoint a city marshal to fill the vacancy created in said office by the removal of petitioner therefrom, and also asking that the judgment rendered in favor of said W. C. Dorris, relator, for \$500, be set aside. The proceeding is not directed against that part of the decree adjudging that petitioner be deprived of his office. It also appears from the record that petitioner unsuccessfully sought to have the proceeding reviewed in the Supreme Court both on appeal and by writ of review, the denial of which writ, since an appeal does not lie (143 Pac. 752), must be deemed an adjudication of the regularity of the proceeding in which the decree was rendered.

Since no attack is made upon the final decree adjudging that petitioner be deprived of his office, it must follow that a vacancy exists in the office of city marshal of the city of Bakersfield, which vacancy the board of trustees is empowered to fill by appointment. See Gen. Laws, *Municipal Corporation*, 5th class.

[2] Moreover, the act of appointing a successor to petitioner, whether ministerial or executive, at all events is not judicial in its character. The function of the writ of prohibition is to restrain the doing of judicial acts where the board or tribunal is proceeding without or in excess of jurisdiction. Section 1102, Code Civ. Proc. It does not lie to prohibit the doing of ministerial acts. See *Camron v. Kenfield*, 57 Cal. 550, *Farmers' Union v. Thresher*, 62 Cal. 410, and *Hobart v. Tillson*, 66 Cal. 211, 5 Pac. 83, where it is held that the act of the Legislature in attempting to enlarge the office of the writ of prohibition, so as to apply to ministerial acts, was unauthorized by the Constitution.

[3] Aside from other reasons which might be assigned for denying the application, it clearly appears: First, that neither the court which rendered the decree, nor the relator, the judgment in favor of whom it is sought to have set aside, is made a party to the proceeding; second, that the decree in effect declaring a vacancy to exist in the office of city marshal, being final, it is the duty of the respondents to appoint some one to fill such vacancy; and, third, that the matter of such appointment, even though unauthorized, is not a judicial act.

The application for the writ is denied, and the proceeding dismissed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 352

DONOVAN v. KEMPER. (Civ. 1434.)

(District Court of Appeal, First District, California. Jan. 18, 1915. Rehearing Denied by Supreme Court March 18, 1915.)

1. TRIAL ⌘139—**NONSUIT—WHEN PROPER.**

A nonsuit may not be granted, if there be any evidence tending to sustain the plaintiff's cause of action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⌘139.]

2. BILLS AND NOTES ⌘537—**ACTIONS—SUFFICIENCY OF EVIDENCE.**

In an action by the assignee of an alleged accommodation maker of a note to recover from her comaker the amount which she was compelled to pay on the note, evidence *held* to make a prima facie showing that plaintiff's assignor did not receive and share equally with her comaker in the consideration for the note, and hence a nonsuit was properly denied.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. ⌘537.]

3. APPEAL AND ERROR. ⌘1061 — **HARMLESS ERROR—OMISSIONS IN TESTIMONY—CURE.**

Even though plaintiff's evidence did not show that she did not share equally in the con-

sideration given, the denial of a nonsuit was harmless, where defendant, testifying as a witness in his own behalf, admitted that he personally received for his own use and benefit the full consideration for the note, as he thereby supplied the omission in plaintiff's evidence and waived his motion for a nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4137, 4209–4211; Dec. Dig. ☞1061.]

4. BILLS AND NOTES ☞518—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action to recover the amount paid on a note by a deceased accommodation maker, evidence held to support the court's finding for plaintiff, though defendant's testimony that he made a loan to the accommodation maker, and that she made the payment on the note in satisfaction of such loan, was not directly contradicted.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1816–1820; Dec. Dig. ☞518.]

5. LIMITATION OF ACTIONS ☞182—PLEADING—SUFFICIENCY TO SUPPORT JUDGMENT.

In an action to recover the amount paid on a note by an accommodation maker, in which there was not sufficient evidence to show a new promise by defendant to pay the debt, where, though the complaint apparently relied mainly upon the allegation of a new promise, it sufficiently stated a cause of action upon the original indebtedness, against which limitations had run, and defendant neither demurred because the two causes of action were not separately stated, nor pleaded limitations by demurrer or answer, the complaint supported the findings and judgment for plaintiff.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676–680, 682, 695, 705; Dec. Dig. ☞182.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Nellie McM. Donovan against E. R. Kemper. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Appeal from judgment dismissed, and order affirmed.

J. G. Reisner, of San Francisco, for appellant. Devlin, Devlin & Maddux, of San Francisco, for respondent.

PER CURIAM. In this action the plaintiff's complaint in substance alleged that in consideration of a loan of \$1,500 to the defendant, he and Mrs. C. B. McMorry, plaintiff's assignor, executed and delivered their joint promissory note in the amount of the loan to George W. Locke; that Mrs. McMorry was merely an accommodation maker of the note; that she received no part of the borrowed money, but that it was all received and retained by the defendant; and that plaintiff's assignor paid to Locke, the holder and owner of the note, the sum of \$400 for the use and benefit of the defendant. The defendant's answer admitted the execution of the note, but denied every other material allegation of the plaintiff's complaint. Judgment was entered in favor of the plaintiff and against the defendant for the sum of \$400, with interest thereon amounting to the sum of \$112.

The appeal from the judgment cannot be considered because it was not taken within six months from the entry of the judgment. This is conceded; but it is insisted upon the appeal from the order denying the defendant a new trial, which comes here upon a bill of exceptions, that the trial court should have granted the defendant's motion for a nonsuit.

[1, 2] A motion for a nonsuit may not be granted, if there be any evidence tending to sustain the plaintiff's cause of action. In the present case Locke, the owner and holder of the note, testified as a witness upon behalf of the plaintiff that the defendant, a druggist, was dissatisfied with his business partner, and made an application to plaintiff's assignor, Mrs. McMorry, for a loan of money sufficient to purchase the interest of his partner. Mrs. McMorry did not have the money, but she requested the witness to make the loan to the defendant, and volunteered to sign the latter's note for the same. The loan and note were made accordingly, and to the best of the recollection of the witness the defendant in person received the money. This witness further testified that the defendant paid part of the sum due on the note at the rate of \$15 per month, and that when he ceased making such payments Mrs. McMorry upon demand paid the sum of \$400, which was credited on the note on account of the principal due. The defendant from time to time thereafter paid the interest as it accrued on the note. A. E. Shaar, bookkeeper for Locke, the owner of the note, and a witness for the plaintiff, testified as to the making of the note, and that the sum of \$1,100 of the principal and all of the interest was paid by the defendant, but that \$400 of the principal was paid by plaintiff's assignor, Mrs. McMorry, and that all of Locke's dealings concerning the note subsequent to its making were had with the defendant save and except as to the payment of \$400 by Mrs. McMorry.

The plaintiff, as a witness in her own behalf, testified that Mrs. C. B. McMorry was her mother; that the latter was dead. The witness further testified that her mother gave her a check for \$400, which she, the witness, in person delivered to Locke, the owner of the note, with directions to apply it on account of the principal due on the note; that in a conversation with the defendant he admitted the indebtedness to plaintiff's assignor, but refused to give a note therefor. This evidence tended to overcome the presumption, if any, arising from the fact that plaintiff's assignor, as the apparent maker of a joint and several note, received and shared equally with her comaker in the consideration given for the note, and was, we think, sufficient to make out a prima facie case for the plaintiff; and therefore the motion for a nonsuit was properly denied.

[3] But, even if this were not so, the denial of the motion for a nonsuit would have been

harmless, because of the fact that the defendant, when testifying as a witness in his own behalf, admitted that he had personally received for his own use and benefit the full sum of \$1,500 received as the consideration for the note. The defendant thereby supplied the omission, if any, in the evidence presented in support of the plaintiff's case, and as a consequence must be held to have waived his motion for a nonsuit. *Ringgold v. Haven et al.*, 1 Cal. 108; *Vica Valley, etc., v. Mansfield*, 84 Cal. 560, 24 Pac. 145; *Lowe v. S. F., etc., Ry. Co.*, 154 Cal. 573, 98 Pac. 678; *Bowley v. Mangrum*, 3 Cal. App. 229, 84 Pac. 996.

[4] Upon his examination in chief the defendant, as a witness in his own behalf, testified that about a week after the execution of the note plaintiff's assignor borrowed from him the sum of \$400, and that when she paid the \$400 in suit to Locke, the owner of the note, it was paid for and on account of the defendant and with the intent and purpose of satisfying her individual indebtedness to the defendant. It is claimed that because the defendant's testimony in this behalf stands uncontradicted by any direct evidence, the trial court's findings of fact in favor of the plaintiff, to the effect that her assignor had paid the \$400 in suit for the individual benefit of the defendant, is contrary to the evidence.

The mere fact that the testimony of the defendant in the particular stated was not and could not be contradicted by a living witness to the transaction was not in and of itself sufficient to compel the trial court to find in favor of the defendant. Notwithstanding the fact that his testimony may not have been contradicted by any direct evidence, it was still the right and duty of the trial court to determine the credit and weight to be given to such testimony, when considered in conjunction with the facts and circumstances of the transaction as shown by the evidence adduced upon the whole case. In this connection the record shows as matters of evidence that, notwithstanding his denial in his verified answer that he had received the whole of the \$1,500 evidenced by the note, he subsequently admitted, when under oath as a witness in his own behalf, that he had received such sum in full for his individual use and benefit. Moreover, the plaintiff in rebuttal testified in detail to a conversation with the defendant, wherein he admitted and acknowledged his indebtedness to the plaintiff's assignor in the sum in suit. Added to this the fact stands out prominently that the defendant's testimony in chief concerning his alleged loan of \$400 to the plaintiff's assignor was seriously shaken if not entirely shattered upon cross-examination. We are satisfied that the established circumstances of the transaction, considered in connection with the dubious character of the defendant's testimony, jointly influenced the trial court to discredit his

story that he had loaned the plaintiff's assignor the \$400 in suit. Eliminating his testimony in this particular, we have no doubt but that the evidence, direct and circumstantial, adduced upon the entire case, is amply sufficient to warrant and support the findings of the trial court.

[5] The plaintiff's complaint in effect alleged a cause of action for moneys had and received, which upon its face showed that it was barred by the statute of limitations, and then proceeded to allege that the defendant had renewed the indebtedness by a written promise to pay the same. The plaintiff's proof upon this phase of the case consisted solely of certain letters which had passed between the parties concerning the transaction in suit. It is conceded that these letters did not suffice to show a new promise of the defendant to pay the original indebtedness. It is now urged upon behalf of the defendant that inasmuch as the plaintiff's proof failed to show a new promise, and that her complaint upon its face showed that the original indebtedness was outlawed, the findings and judgment should have been for the defendant.

This contention cannot be sustained. Conceding, without deciding, that it was the apparent purpose of the plaintiff to rely for a cause of action mainly upon the allegation of the defendant's written renewal of the obligation to pay the original indebtedness, nevertheless the plaintiff's complaint in its entirety, although perhaps inadvertently, sufficiently stated a cause of action upon the original indebtedness. Although the two causes of action were not separately stated, no demurrer was interposed upon that ground, and as the statute of limitations was not pleaded, either by demurrer or by answer, as a defense to the plaintiff's cause of action upon the original indebtedness, it must be held that the complaint contains and sufficiently states a cause of action which warrants and supports the findings and judgment.

The appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

26 Cal. App. 342

PAGANINI v. POLOSTRINI. (Civ. 1419.)
(District Court of Appeal, First District, California. Jan. 18, 1915.)

HUSBAND AND WIFE — §270 — COMMUNITY PROPERTY — ACTIONS — AUTHORITY OF WIFE.

The husband having full control of the community property, the wife cannot, in her own name, sue the administrator of an infant to recover the value of necessities furnished the infant out of their community property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 968-971, 973-984, 988; Dec. Dig. § 270.]

Appeal from Superior Court, City and County of San Francisco; James M. Seavell, Judge.

Action by Mary Paganini against Cathar-

ina Polostrini, as administratrix. From an order of nonsuit, plaintiff appeals. Affirmed.

James M. Thomas, of San Francisco, for appellant. T. Z. Blakeman, of San Francisco, for respondent.

PER CURIAM. This is an appeal from an order of the trial court granting a motion for nonsuit.

The plaintiff, a married woman living with her husband, brings this action to recover the reasonable value of certain necessities of life furnished a minor while not under the care of his parents or guardian, and while said minor was living in the home of the plaintiff and her husband, and was being supplied with such necessities out of their community property. There is no averment or proof that the plaintiff rendered to the minor any special service, or expended upon him any money from her own separate estate. On the contrary, it appears that the necessities which the minor received were furnished chiefly from the grocery store of the husband, from which the general supplies of the household were taken. Upon the conclusion of the plaintiff's case in which these facts appeared, the defendants moved for a nonsuit upon the ground that the plaintiff had no right of action, and that the husband would have been the only proper party to bring the suit.

We think the court committed no error in granting the motion for nonsuit. This is not a case of defect or nonjoinder of parties plaintiff. The sole right of recovery in this transaction was in the husband, and he alone had the original right to sue. The cases cited by the appellant have no application to the question in issue here. In each of these cases the plaintiff, the wife, was suing in her own name on account of some special contractual or personal right of her own which had been violated; as in the case of *Schwarze v. Mahoney*, 97 Cal. 133, 31 Pac. 908, for the unlawful detainer of premises of which she was the lessor; and in the case of *Tingley v. Times-Mirror Co.*, 151 Cal. 2, 89 Pac. 1097, for damages for libel directly affecting the plaintiff's personal character; and in the case of *Baldwin v. Second Street Cable Ry. Co.*, 77 Cal. 391, 19 Pac. 644, for personal injuries suffered by the plaintiff in a railway accident. In each of these cases the plaintiff, if unmarried, would have had the sole right of recovery, and, being married, she had not lost that right, but was only obliged, by the statute, to join her husband with herself as a formal party plaintiff in its assertion. Her failure in such cases so to do would be the proper subject of dilatory pleas, which would be waived by their non-assertion; but this is not one of such cases. Here the community property has been used to furnish necessities to a minor child. Under the terms of the statute the reasonable

value of such necessities may be recovered in a proper action; but the husband being in full control of the community property, and hence of all choses in action accruing out of its use, is the only proper person to bring the action for the recovery of the reasonable value of such property so employed. There is no right of action whatever in the wife in such a case (*Duncan v. Duncan*, 6 Cal. App. 404, 92 Pac. 310), and hence in this case none could be established by the proofs. It is not a case of nonjoinder of the husband, or of mere want of legal capacity in the plaintiff to sue. It is a case where one, having no right of action in herself, has nevertheless brought suit. The objection was properly made by motion for nonsuit, and the nonsuit was therefore properly granted. Judgment affirmed.

26 Cal. App. 369

BROWN v. DWYER et al., Board of State Harbor Com'rs. (Civ. 1447.)

(District Court of Appeal, First District, California. Jan. 18, 1915.)

1. MANDAMUS $\Leftrightarrow$ 77—DISCRETIONARY ACTS—REMOVAL OF OFFICER.

Where the findings of the board of harbor commissioners and its order removing plaintiff from the position of wharfinger was based on the testimony supporting the charge of incompetency filed against plaintiff, it could not be said that the board abused the discretion vested in it, and the court properly refused mandamus to review its order; and the case did not fall within the exception to the rule declaring that a dismissal from office, based upon evidence showing only a minor and excusable dereliction, may be deemed an abuse of discretion.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 161-169; Dec. Dig. $\Leftrightarrow$ 77.]

2. MANDAMUS $\Leftrightarrow$ 176—ACTS OF BOARDS — PAYMENT OF SALARY.

Mandamus to compel the board to pay and allow plaintiff's salary pending the hearing and determination of its power to remove him was properly refused.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 392-394; Dec. Dig. $\Leftrightarrow$ 176.]

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Mandamus by W. A. Brown against J. J. Dwyer and others, members of and constituting the Board of State Harbor Commissioners of the State of California. Judgment for defendants, and plaintiff appeals. Affirmed.

Mastick & Partridge, of San Francisco, for appellant. Daniel A. Ryan, of San Francisco, for respondents.

PER CURIAM. The appellant in this proceeding prayed for the mandate of the lower court, compelling the defendants and respondents, as members of the state board of harbor commissioners, to reinstate him to the position of wharfinger of the port of San Francisco, from which position he had been dis-

missed by said board after a trial upon the charge of incompetency and neglect of duty. The judgment of the lower court went for the respondents, and upon appeal therefrom it is urged upon behalf of the appellant that the evidence adduced upon the hearing in the lower court shows that the respondents, sitting as the board of state harbor commissioners, abused the discretion vested in them to discharge the appellant from his position with the state, and that therefore the lower court's findings and judgment should have been in favor of the appellant.

The specific charge filed with the respondents and upon which they tried and discharged the appellant, was the violation of rule 112 of the state board of harbor commissioners, which provides in part that "each wharfinger must be on duty every day, legal holidays excepted, from 8 o'clock a. m. until 5 o'clock p. m."; and the findings made by the respondents after a regular hearing of the charge against the appellant were, in substance, that upon one occasion the appellant did not report for duty until after the hour prescribed by rule 112 of the board, and his failure on another occasion to remain on duty the full length of time provided by the same rule. Incidentally the findings of the respondents declare further that on another occasion appellant did not remain on duty until the noon hour, which impliedly was required of him by the same rule.

[1] It may be conceded that these findings would not have been conclusive upon the court below if it had been shown that they were not based upon any evidence at all, or that the evidence offered and received at the trial of appellant before the respondents was so slight as to amount to no evidence at all. But it appears from the record before us that upon the trial of the case in the court below it was shown that the findings and order of the respondents were based upon the testimony of witnesses which sufficiently support the charge filed with the respondents against the appellant. This being so, it cannot be said that the respondents abused the discretion vested in them, and accordingly it must be held that the court below was justified in refusing its mandate to review or revise the respondents' order dismissing the appellant from the service of the state. In our opinion the evidence offered and received upon the trial of appellant before the respondents—which evidence was reproduced substantially upon the hearing of the application for the writ in the court below—showed something more than a mere technical and unintentional disregard of official duty on the part of the appellant. Such evidence, therefore, furnished a legal and substantial basis for the respondents' order dismissing the appellant from his position, and as a consequence the present case does not fall within the exception to the general rule which declares that a dismissal from office, based

upon evidence which shows only a minor, technical, unintentional, and excusable dereliction of duty, may be deemed an abuse of discretion.

[2] Incidentally the appellant prayed the mandate of the lower court to compel the respondents to allow and pay his salary pending the hearing and determination of the power of the respondents to remove him from office. This the lower court rightfully refused to grant. If it had been determined that the appellant had been illegally discharged from his position, as a matter of course he would have been entitled to the accrued salary which the state had stipulated to pay him, but until such time as the appellant was reinstated as an officer of the state, and his name restored to the state's pay roll, he was not entitled to the remedy of mandamus to compel the payment of any salary which may have accrued to him pending the hearing and determination of the cause of his removal. *Meredith v. Sacramento, etc.*, 50 Cal. 433; *Chicago v. People*, 210 Ill. 84, 71 N. E. 816.

The judgment appealed from is affirmed.

26 Cal. App. 336

PEOPLE v. WILSON. (Cr. 348.)

(District Court of Appeal, Second District, California. Jan. 15, 1915.)

1. CRIMINAL LAW ⚡543—EVIDENCE—TESTIMONY ON FORMER TRIAL—ADMISSIBILITY.

In a prosecution for manslaughter, where the sheriff showed that he had used due diligence to serve process on a witness, and that the witness could not be found within the state, testimony of such witness on a former trial was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236; Dec. Dig. ⚡543.]

2. CRIMINAL LAW ⚡1153—APPEAL—DISCRETION OF COURT—EVIDENCE.

Where there was evidence to support the conclusion of the trial judge as to the admission of testimony of a witness at former trial, the matter being one of discretion, the ruling cannot be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. ⚡1153.]

3. CRIMINAL LAW ⚡539—EVIDENCE—TESTIMONY ON PREVIOUS TRIAL—STATUTE.

Under Pen. Code, § 686, subd. 3, as amended in 1911 (St. 1911, p. 364), providing that, where the testimony of a witness for the people has been taken in the presence of defendant, who had an opportunity to cross-examine, such testimony may be read in evidence, where it is satisfactorily shown to the court that such witness is dead, insane, or cannot with due diligence be found within the state, in a prosecution for manslaughter evidence of a witness on former trial whom sheriff could not find was admissible against defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1230; Dec. Dig. ⚡539.]

4. CONSTITUTIONAL LAW ⚡266—CRIMINAL LAW ⚡539—EVIDENCE—PREVIOUS TESTIMONY—STATUTE—CONSTITUTIONALITY.

Pen. Code, § 686, subd. 3, as amended in 1911 (St. 1911, p. 364), providing that, where

the testimony of a witness for the people has been taken in the presence of defendant, who had an opportunity to cross-examine, such testimony may be read in evidence where it is satisfactorily shown to the court that such witness is dead, etc., is not in conflict with Const. art. 1, § 13, providing that none shall be deprived of life, liberty, or property without due process of law, and that there may be taken in the presence of accused and counsel depositions of witnesses in criminal cases other than cases of homicide, where there is reason to believe that the witness will not or cannot attend the trial.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 756; Dec. Dig. ☞ 266; Criminal Law, Cent. Dig. § 1230; Dec. Dig. ☞ 539.]

5. CRIMINAL LAW ☞ 662—EVIDENCE—PREVIOUS TESTIMONY—FEDERAL CONSTITUTION.

Const. U. S. Amend. 6, concerning the right of an accused person to be confronted with the witnesses against him, restrains only the federal government, and not the action of the states.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3, 1538-1548; Dec. Dig. ☞ 662.]

6. CRIMINAL LAW ☞ 662—EVIDENCE—TESTIMONY ON PREVIOUS TRIAL—STATUTE.

Under Code Civ. Proc. § 1897, providing that the written law of the state is contained in its Constitution and statutes, and in the Constitution and statutes of the United States, the provisions of the sixth amendment of the Constitution of the United States concerning the right of an accused person to be confronted with the witnesses against him are not rendered restrictive upon state action.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3, 1538-1548; Dec. Dig. ☞ 662.]

7. CRIMINAL LAW ☞ 732—TRIAL—INSTRUCTIONS—MATTERS OF FACT.

In a prosecution for manslaughter, where the court charged as to the probative value of proof of a motive, the instruction was not in violation of Const. art. 6, § 19, forbidding judges to charge juries with respect to matters of fact, where it did not indicate to the jury the opinion of the judge as to the existence of a motive, but merely defined the purposes for which evidence bearing on motive had been received and should be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1696; Dec. Dig. ☞ 732.]

8. CRIMINAL LAW ☞ 829—TRIAL—REQUESTS FOR INSTRUCTIONS ALREADY GIVEN.

In a prosecution for manslaughter, the refusal of the court to give certain requested instructions substantially covered by other charges was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ☞ 829.]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

William Wilson was convicted of manslaughter, and he appeals. Affirmed.

B. F. Thomas, of Santa Barbara, and A. B. Bigler, of Santa Maria, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant, having been convicted of the crime of manslaughter, appeals from the judgment. The facts shown by the evidence at the trial of this case are substantially the same as indicated in the

statement made by this court on a former appeal and contained in volume 23, Cal. Appellate Reports, at page 513 et seq., 138 Pac. 971.

The errors which led to a reversal after the former trial have not been repeated at the last trial, and it is only necessary to consider points urged with respect to matters newly arising in the present record.

[1, 2] The court did not err in admitting in evidence the testimony of Seth Traut as given at the former trial. The return made by the sheriff showing his inability to find Mr. Traut and serve a subpoena upon him, and the testimony of the sheriff on the same matter, were sufficient to support the ruling of the judge that due diligence had been shown, and that the witness could not be found within the state. This was a subject to be determined within the discretion of the trial judge, and, since there was evidence to support his conclusion, the ruling cannot be disturbed. *People v. Lederer*, 17 Cal. App. 374, 119 Pac. 949.

[3-6] The admission of this evidence is permitted by subdivision 3 of section 686 of the Penal Code, as amended in 1911. It must be held, in harmony with former decisions involving the same principle, that the section as amended is not in conflict with section 13 of article 1 of the Constitution of the state of California. *People v. Sierp*, 116 Cal. 249, 48 Pac. 88; *People v. Clark*, 151 Cal. 201, 204, 90 Pac. 549. The provisions of the sixth amendment to the Constitution of the United States concerning the right of an accused person to be confronted with the witnesses against him are not applicable here. "The fifth and sixth amendments of the Constitution of the United States are restrictive of the powers of the federal government, and not restraints upon the states." *Davis v. Texas*, 129 U. S. 651, 653, 11 Sup. Ct. 675, 35 L. Ed. 300; *Brown v. New Jersey*, 175 U. S. 174, 20 Sup. Ct. 77, 44 L. Ed. 119. We are of opinion that this conclusion is not affected by the statement contained in section 1897 of the Code of Civil Procedure that the written law of this state is "contained in its Constitution and statutes, and in the Constitution and statutes of the United States."

[7] Objection is made to the thirtieth instruction given to the jury, which reads as follows:

"The evidence or nonevidence of a motive for the commission of the crime charged in this case is an important question of fact which must be considered by you with all of the evidence in this case as a circumstance tending to show the guilt or innocence of the accused."

"The failure of a proof of motive, if there has been such a failure in this case, is a circumstance in favor of the innocence of the defendant; and, if you find upon a careful examination of all the evidence that it fails to show any motive, cause, or reason on the part of the defendant for the killing of the deceased, Thomas Wilson, if you find beyond a reasonable doubt that the said Thomas Wilson was killed, then you must consider that fact in de-

termining the guilt or innocence of the defendant.

"In criminal cases the proof of the moving cause is permissible, and oftentimes valuable, but it is never essential. Where the perpetration of the crime has been brought home to the defendant, the motive for its commission becomes unimportant. Evidence of motive is sometimes of assistance in removing doubt and completing proof which might otherwise be unsatisfactory, and that motive may be shown by positive evidence or gleaned from the facts and surroundings of the act. Then proof of the motive becomes a circumstance, but nothing more than a circumstance, to be considered by the jury, and its absence is equally a circumstance in favor of the accused, to be given such weight as the jury deems proper. But proof of motive is never indispensable in a criminal case."

It is claimed that in stating that the evidence or nonevidence of a motive for the commission of the crime was an important question of fact, and in the further statement that in criminal cases the proof of the moving cause is never essential, the instruction is in violation of article 6 of section 19 of the state Constitution, which forbids judges to charge juries with respect to matters of fact. We think that the instruction is not subject to such objection. It did not in any manner indicate to the jury any opinion of the judge as to whether a motive for the alleged crime had or had not been shown, but it did fairly define the purposes for which evidence having reference to a possible motive had been received and should be considered.

[8] Error is claimed in the court's refusal to give certain instructions requested by the defendant, which on examination we find are substantially contained in other instructions which were given. The remaining matters presented in the argument are of minor importance, or involve propositions which do not seem to require further discussion.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

26 Cal. App. 332

WINNETT v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY. (Civ. 1638.)

(District Court of Appeal, Second District, California. Jan. 15, 1915.)

JUSTICES OF THE PEACE ⇨171—APPEAL—DECISIONS REVIEWABLE—NECESSITY OF DETERMINATION ON MERITS.

Under Code Civ. Proc. § 873, providing relative to justices' courts that, unless postponed, the trial of the action must commence at the expiration of one hour from the time specified in the notice of hearing and must be continued until all the issues are disposed of, and section 884, providing that, if either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party, where, in an action to recover for labor performed and materials furnished, in which defendant by his answer denied the allegation that he was indebted therefor, plaintiff failed to appear, and defendant thereupon introduced evidence, whereupon the court found that defendant was not indebted to plaintiff and rendered a judgment for costs in favor of defendant, plain-

tiff was entitled to appeal therefrom for a trial de novo in the superior court, even conceding that an action cannot be tried anew in the superior court until the issues of fact have been tried in the justice's court, as the facts did not bring the case within that rule.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 655-657; Dec. Dig. ⇨171.]

Petition by T. B. Winnett for a writ of review directed to the superior court in and for the county of Los Angeles. Writ dismissed.

George M. Pierson and Collier & Clark, all of Los Angeles, for petitioner. Hammack & Hammack, of Los Angeles, for respondent.

SHAW, J. Review. Petitioner was defendant in an action brought by the Adjustment Corporation in the justice's court to recover the value of certain services and material alleged to have been furnished to defendant by plaintiff's assignor. The case was regularly set down for trial, due notice of the time fixed therefor being given by plaintiff to defendant, who at the time specified in the notice duly appeared with his witnesses. Plaintiff, however, failed to appear, and after the expiration of one hour, as provided in section 873, Code of Civil Procedure, the case was called for trial, when, as appears from the return, the trial proceeded. A witness was sworn and testified on behalf of defendant; whereupon the court determined that defendant was entitled to judgment for his costs, and "ordered and adjudged that T. B. Winnett do have and recover of and from Adjustment Corporation the sum of ——— dollars, together with costs herein incurred by defendant." Thereafter, plaintiff duly appealed from said judgment, upon questions of both law and fact, to the superior court, which, after denying a motion made by defendant to dismiss said appeal for want of jurisdiction to entertain the same, rendered judgment in favor of plaintiff. The purpose of this proceeding is to have the judgment annulled and set aside for want of jurisdiction.

Conceding, as claimed by petitioner, that an action commenced in the justice's court cannot be tried anew in the superior court until the issues of fact have been tried in the justice's court (Null v. Superior Court, 4 Cal. App. 207, 87 Pac. 392), and that a judgment rendered under such circumstances will be annulled by this court in proceedings to review the same, we are nevertheless of the opinion that the record here does not bring the case within such rule. While plaintiff alleged that defendant was indebted to it in the sum of \$80.60 for labor performed and materials furnished, the defendant by his answer denied such allegation. Section 884, Code of Civil Procedure, relating to trials in justices' courts, provides:

"If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party."

Under this section, defendant had the right to proceed with the trial until, as provided in section 873, Code of Civil Procedure, all the issues were disposed of. The issue here involved was whether or not defendant was indebted to plaintiff as alleged in the complaint, and upon the evidence introduced the court found that he was not. In our opinion, the judgment rendered by the justice of the peace would have constituted a bar to another action based upon the same claim, and, if this be true, then clearly the only remedy for plaintiff was by appeal to the superior court upon issues both of law and fact and a trial de novo, which was had.

The record discloses that a trial was had upon the merits of the case as the issues were tendered in the justice's court. Hence the writ must be dismissed, and it is so ordered.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 375

FARRINGTON et al. v. McCLELLAN et al.
(Civ. 1256.)

(District Court of Appeal, Third District, California. Jan. 20, 1915. Rehearing Denied by Supreme Court March 18, 1915.)

1. APPEAL AND ERROR $\hookrightarrow$ 1011—REVIEW—FINDINGS OF FACT—CONFLICTING EVIDENCE.

A finding by the trial court that there was no understanding between the parties that a written agreement was not to become binding until ratified by defendant's wife will not be disturbed on appeal, where there was a direct conflict in the evidence on that issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. $\hookrightarrow$ 1011.]

2. HUSBAND AND WIFE $\hookrightarrow$ 262—COMMUNITY PROPERTY—PRESUMPTION.

Under Civ. Code, § 164, defining community property, and providing that a conveyance to a wife shall be presumed to be as her separate property, and that a conveyance to husband and wife is presumed to give the wife her share as tenant in common, property conveyed to a husband after marriage is presumed to belong to the community.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. $\hookrightarrow$ 262.]

3. BROKERS $\hookrightarrow$ 82—ACTIONS FOR COMPENSATION—VARIANCE.

Under Civ. Code, § 172, providing that a husband has the same power of disposition, other than testamentary, over community property, that he has over his separate estate, except that he cannot give it away without the written consent of the wife, there is no material variance between an allegation in a complaint by a broker for his commission that a written contract, whereby a husband and wife or either of them agreed to pay a commission for the sale of community property, was signed by both husband and wife, and proof that it was signed by the husband alone, who also affixed his wife's signature thereto, but without authority from her, which would prevent a judgment against the husband, since the contract is binding upon him severally without his wife's signature.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101-103; Dec. Dig. $\hookrightarrow$ 82.]

4. BROKERS $\hookrightarrow$ 60—COMPENSATION—PROCURING PURCHASER.

A broker who procures a purchaser ready, willing, and able to buy on the terms specified by the owner is entitled to a commission though the contract of sale is never performed or never entered into.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 91; Dec. Dig. $\hookrightarrow$ 60.]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by A. L. Farrington and another against F. E. McClellan and another. Judgment for plaintiffs against defendant McClellan, and he appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant. Carlton C. Case, of Stockton, for respondents.

HART, J. The controversy here arises out of certain agreements alleged in the complaint to have been entered into between the plaintiffs and the defendants, whereby the latter agreed to pay the former certain compensation for negotiating the sale of certain real property situated in the city of Stockton.

Judgment was awarded the plaintiffs as against the defendant and appellant, F. E. McClellan, in the sum of \$350 (the amount sued for), with interest thereon from the 1st day of February, 1913. Furthermore, in accordance with the prayer of the complaint based upon averments thereof that the contract declared upon contained a misdescription of the property involved, the court adjudged and decreed that said contract be so reformed as that the same be described therein according to its true description.

The complaint alleges that on the 11th day of November, 1912, the appellant, F. E. McClellan, executed and delivered to the plaintiffs a writing whereby the latter were invested with authority to sell or procure for him a purchaser of the property referred to in the complaint for the sum of \$3,900 net, and in cash, within 60 days from the date of said writing, "and thereafter until notice in writing be given the said Farrington & Hubbard of the withdrawal of said property, and if a sale of said property shall be negotiated during that time, I promise to pay the said Farrington & Hubbard a commission of any amount above \$3,900."

It is further alleged that after the date of said instrument, "and within the time therein provided, and in pursuance of the terms thereof, the plaintiffs procured a purchaser, to wit, Stockton Grove, No. 118, U. A. O. Druids, ready, willing, and able to purchase the said property for the sum of \$4,250"; that the plaintiffs negotiated a sale of said property with the said purchaser, and thereafter the said purchaser entered into a written agreement with the defendants to purchase the said real property for the sum of \$4,250, and thereupon tendered to the defendants the said sum of money, "and the said sum is now in possession and under the control of said

defendants"; that on the 19th day of December, 1912, another writing or agreement, purporting to have been executed and signed by both F. E. and Minnie McClellan, the defendants, was delivered to the plaintiffs, and which reads as follows:

"In consideration of commission earned by A. L. Farrington and F. B. Hubbard, composing the real estate firm of Farrington & Hubbard, in the sale of our property consisting of lot No. 8, in block No. 33, east of Center street, in Stockton, California, we, or either of us, agree to pay to the said Farrington & Hubbard out of the final payment for said property, which is due and payable February 1, 1913, by Stockton Grove, No. 118, U. A. O. Druids, the sum of \$350."

Both the above-mentioned writings are set out in the complaint in *hæc verba*.

A demurrer to the complaint, interposed by both defendants, having been overruled, the latter filed separate answers, in which they specifically denied the averments of the complaint and set up certain special defenses. In her answer, by way of a special defense, the defendant Minnie McClellan alleged that, when the agreements above referred to were made, she was an invalid; that she was often required to take opiates for relief from the great physical pain from which she was suffering, with the result that, during the period of time covering the negotiations and transactions mentioned in the complaint, she was incapable of understanding business transactions of any kind, and that she had no knowledge of the agreements set out in the complaint or of any matters appertaining thereto until the 24th day of December, 1912, when the transaction involved here was explained to her, "to the effect that the alleged agreements had been signed by her husband for her, subject to her approval, and that she then and there refused to ratify said proposed agreements, or either of them, or to be bound by any of the provisions thereof."

The special defense interposed by the appellant involves the charge that the plaintiff Farrington obtained the contract of December 19, 1912, "by means of threats, misrepresentation, fraud, concealment, and unfair practices," the nature of which is described with considerable particularity in the answer, but which it is believed to be unnecessary to explain here, since there is no serious claim that there is evidence which supports that charge.

The facts of the transaction upon which the action is founded as the same were developed by the evidence from which the court evidently made its findings are substantially: On the 11th day of November, 1912, the plaintiff Farrington and the appellant met on one of the streets in the city of Stockton and there held a conversation, in the course of which the appellant asked the said plaintiff (who was then, with the plaintiff Hubbard, engaged in the buying and selling of real estate in said city) if he could not sell the property referred to in the complaint. After some discussion, the appellant

said he would take \$3,900 net for said property, and agreed that the plaintiffs might retain, as their compensation for selling or procuring a purchaser of the property, all that they might receive for the same in excess of that sum. Farrington thereupon prepared a written contract embracing the terms stated, and, as seen, giving the plaintiffs 60 days, or thereafter until notice of the termination of the contract was given them by the appellant, within which to make the sale. It appears that the lot was erroneously, and doubtless inadvertently, given to Farrington by the appellant as "No. 6" in the block in which it is situated, whereas it was, in fact, lot No. 8, in said block, and that this error was not discovered until after the execution of the contract of November 11, 1912, authorizing the plaintiffs to sell the property upon the terms above specified. Parenthetically, it may be said that no question could arise as to the particular lot to which the agreement was intended to relate, since it does not seem to be disputed that the lot which it was the understanding that the plaintiffs were given authority to sell was the one upon which the appellant's blacksmith shop stood, and that that was the lot to which the transaction referred.

After the making of the said agreement, the plaintiffs advertised the property for sale in a Stockton newspaper at the sum of \$4,250, and also made other personal efforts to sell it. Within 60 days from the date of the authorization granted to the plaintiffs to sell the property, they negotiated the sale of the same to a fraternal organization in the city of Stockton, known and designated as Stockton Grove, No. 18, U. A. O. Druids, for the sum of \$4,250. The trustees of the Druids deposited with the plaintiffs the sum of \$200 as the initial payment on the purchase price, and the plaintiffs thereupon reported the sale to the appellant and tendered him the sum so deposited. The appellant refused to accept the \$200, saying that he desired a deposit of \$250, or \$50 more than the amount so deposited. Thereupon the plaintiffs secured from the trustees of the Grove an additional \$50, and the full sum of \$250 was thereupon paid by Farrington to and received by the appellant. This occurred on the 19th day of December, 1912, and at the same time the appellant executed the commission agreement pleaded in the complaint and above referred to, and also entered into a written contract with the Grove of Druids, or its trustees as the agents of said organization, whereby he agreed to sell the property to that organization for the sum of \$4,250. It appears, as her answer alleges, that the defendant Minnie McClellan, at the time of these transactions, was an invalid, confined to her bed, and was suffering from such an intensely painful malady as to make it necessary to frequently administer to her opiates or other pain-destroying narcotics, and that, as a consequence, she was not capable of

transacting business. The appellant, however, signed his wife's name to the instruments.

After the above-mentioned transaction, Mrs. McClellan refused to give her assent to the same, and of this Farrington was informed over the telephone by the daughter of the defendants. Later he interviewed the appellant, who explained that his wife's condition was such as to render her incompetent to transact business, but assured Farrington that the deed "would be signed later." Subsequently (on the 1st day of February, 1913) Edward F. Harris, cashier of the Commercial and Savings Bank of Stockton, accompanied by the plaintiffs and one Tweed, representing the Druids, called at the home of the defendants for the purpose of paying them the balance of the purchase price of the property. The appellant was not at home at the time. His son-in-law, one Cassidy, was there, however, and, when the absence of the appellant was made known to the visiting party, Harris stated to Cassidy that he was there to pay the McClellans the balance of the purchase price, and asked permission to tender it to Mrs. McClellan. She was yet confined to her room, but, having been apprised by Cassidy of the purpose of the presence of Harris and his companions, returned word that she would accept neither the money nor a tender thereof, whereupon Harris pinned upon the hat rack in the house a written tender of the money. On the same day, the trustees of the Druids delivered to the sheriff of San Joaquin county a written notice, addressed to the defendants, which notice recited the circumstances of the attempt by Harris, as above explained, to pay or tender to the defendants the balance of the purchase price of the property, to wit, the sum of \$4,000, and which contained the further statement that the said money was then on deposit in the said Commercial and Savings Bank to the account of the defendants. The sheriff served said notice on the appellant on the 1st day of February, 1913.

It was shown that the property concerned here was acquired by the appellant through a deed from one Henry J. Kuechler on the 1st day of February, 1908, which was, according to the evidence, during the coverture of the defendants.

The appellant testified that he was wholly without authority to affix his wife's name to the agreements of December 19, 1912, and that the understanding which was had between all the parties was that said agreements should possess no binding force unless or until his wife, when sufficiently restored to health to understand their nature, either subscribed her own name to the same or otherwise ratified them. But Farrington positively contradicted that testimony and declared that there was no such conversation or understanding; he having been present when both the agreements were made and signed by the appellant. It is therefore plainly ap-

parent that upon that question there is a decided conflict in the proofs.

The appellant makes no claim in his brief that the evidence is insufficient to sustain the finding upon which the court decreed a reformation of the instrument conferring upon the plaintiffs the authority to negotiate the sale of the property. It is contended, however, that there exists a fatal variance between the agreement of December 19, 1912, and the evidence in this: That, while said agreement, as pleaded, purports to be the agreement of the defendants, the name of each appearing to have been subscribed thereto, the evidence shows that it was never signed, acquiesced in, nor ratified by the defendant Minnie McClellan, and that it was therefore the agreement alone of the defendant F. E. McClellan. Like objection is urged as to the contract, made on the same day that the above-mentioned commission agreement was executed, and wherein the defendants are purported to have joined, and whereby the latter purport to agree to sell the property to the Druids for the sum of \$4,250.

The specific contention with respect to said agreements is two-fold, to wit: (1) That, to impart to them binding force, it was essential that the wife of the appellant, Minnie McClellan, should have become a party thereto; (2) that the appellant signed both agreements and without her consent attached his wife's name thereto with a distinct understanding with the plaintiffs and the representatives of the proposed purchaser (the Druids) that, if the said Minnie McClellan should refuse to assent to the agreements, they would become null and void and should be canceled. In other words, the proposition is that, although the appellant signed the agreements and subscribed the name of his wife thereto, it was agreed by and between all the parties that the validity or binding force of said instruments should entirely depend upon their subsequent ratification by the defendant Minnie McClellan. It is hence argued that, the wife having repudiated the agreements after their execution by the appellant or refused to assent to or ratify them, the instruments became nullities and were, from the beginning, without binding force upon either of the defendants.

[1] First taking up the proposition last above stated, it is sufficient to say that a conclusive reply thereto is to be found in the fact, hitherto shown, that Farrington testified that no such understanding as that upon which the validity of said proposition may be sustained was had between the parties, and although, as before stated, there appears to be a direct conflict between Farrington and the appellant upon that point, the testimony of the former, under the well-known rule relative to conflicting evidence, must be accepted by this court as having established the fact found from it by the trial court, viz., that the agreements were not exe-

cuted upon any such understanding or agreement, or, in other words, were made by the appellant without any such qualification or condition as that referred to by him.

[2, 3] Nor is there a fatal or any legal variance between the agreements involved here and the proofs. The evidence, as we have seen, discloses that the property involved here was conveyed to the appellant after his marriage to the defendant Minnie McClellan, and while the relation of husband and wife existed between them. The presumption is, therefore, that said property belonged to the community. Civ. Code, § 164. While the husband cannot make a gift of the community property or convey it without a valuable consideration, unless the wife, in writing, consents thereto, he nevertheless has the management and control of such property, "with the like absolute power of disposition, other than testamentary." Civ. Code, § 172. From the provisions of the Code thus adverted to, it follows that the appellant had the legal right to sell the property without the acquiescence or consent of his wife. This proposition being true, he had the right to authorize another, without the consent of his wife, to sell the property for him in consideration of any compensation which might be satisfactory to him and his agent. This course he appears to have adopted, and the next question to be considered is whether the commission agreement pleaded in the complaint is materially different from the one proved.

As seen, the pleaded agreement purports to have been executed by both defendants, but the evidence shows and the court finds that, while the appellant signed said agreement, the defendant Minnie McClellan did not, and upon this, as before stated, it is claimed that a variance between the pleading and proof as to that instrument arises, and that the findings, conforming to the evidence adduced in proof of the pleaded agreement, describe a different agreement from the one set out in the complaint.

The learned counsel for the appellant cites many cases in which the rule relating to the doctrine of variance is clearly expounded and well applied. See *McCord v. Seale*, 56 Cal. 264; *Stout v. Coffin*, 28 Cal. 65; *Stearns v. Martin*, 4 Cal. 227; *Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725. It is not, however, considered important to review those cases here. It is enough to say that, while no fault can be found with the conclusions therein arrived at or the reasoning leading thereto, they are not deemed to be in point in this case. The said agreement, as pleaded, provides that "We or either of us agree to pay Farrington & Hubbard," etc.; and thus it appears that upon its face or in form it created a joint and several obligation, and would have bound both parties jointly or either severally, if both had signed it. But, as the evidence shows it to have been made,

the agreement is solely that of the appellant, and by it, obviously, he as effectually bound himself to its terms as though in form of language it imposed or created or purported to create none other than a several liability or obligation against him. See *Melander v. Western National Bank*, 21 Cal. App. 462, 471, 132 Pac. 265; 9 Cyc. p. 656.

[4] The remaining question is whether the plaintiffs performed the contract to sell the property, and are therefore entitled to be paid for their services in so doing according to the terms of said contract.

Relative to contracts whereby real estate brokers are authorized to sell property for others on commission, the following well-settled rules may be stated:

"If, within the time limited, the broker has produced a purchaser who is ready, willing, and able to purchase upon the terms prescribed, the principal cannot evade the payment of the broker's commission by then refusing or neglecting to consummate the sale, or by changing the terms, or by selling the property to another, or by so negligently dealing with the proposed purchaser as to lose the benefit of the sale." *Mechem on Agency*, § 967.

And it has been held that, where the broker has performed his part of the contract, "he will be entitled to his commission, although the sale is not consummated because the principal's title proves defective (*Hamlin v. Schulte*, 34 Minn. 534, 27 N. W. 301; *Goodridge v. Holladay*, 18 Ill. App. 363; *Gonzales v. Broad*, 57 Cal. 224; *Knapp v. Wallace*, 41 N. Y. 477; *Doty v. Miller*, 43 Barb. [N. Y.] 529; *Sibbald v. Bethlehem Iron Works*, 83 N. Y. 378, 38 Am. Rep. 441), or because the principal's wife refuses to join in the conveyance (*Clapp v. Hughes*, 1 Phila. 382), or because the purchaser refuses to complete the sale on account of false representations made by the principal" (*Glentworth v. Lenther*, 21 Barb. [N. Y.] 145). See, also, *Justy v. Erro*, 16 Cal. App. 519, 522, 117 Pac. 575, where the cases just mentioned are cited.

Under the principles thus stated, the rule as to contracts of the character of the one under consideration may be reduced to this simple formula: That the procurement and production by the broker of a purchaser at all times ready, willing, and able to purchase the property at the price fixed by the owner will entitle the broker to the stipulated commission, even though, through no fault of the broker or the proposed purchaser, the sale be not consummated. It follows, therefore, that whether there be a variance between the contract between the brokers and the owner of the property for the sale thereof, or, indeed, whether the proposed purchaser entered into any such written contract with the seller at all, is immaterial, so far as the issue involved here is concerned. Thus the sole proposition in this case is finally reduced to the single question whether the plaintiffs, in pursuance of their contract with the appellant, procured and produced, within the time limited by said contract, a purchas-

er ready, willing, and able to purchase said property. That they did do so, it seems to us, there can be no manner of doubt under the evidence. As seen, they, within the time specified in the contract with the appellant, not only found and produced a purchaser ready, willing, and able to purchase the property at the price specified in the contract, but did all that lay within their power to actually consummate the sale at said price. They paid to the appellant a deposit of \$250 made by the purchaser upon the purchase price of the property, and thereafter caused to be tendered to the appellant the balance of the purchase price. And there can be no possible doubt that the purchaser produced by the plaintiffs was not only ready, willing, and able to purchase the property, but that it was anxious to do so, for it appears that the purchaser deposited the balance of the purchase price in a Stockton bank to the account of the defendants, and thereafter, upon the refusal of the defendant to convey the property to it, brought and sustained an action, in the superior court of San Joaquin county, against the appellant for the specific performance of his agreement so to convey.

We have discovered no just reason for disturbing the judgment, and it is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

26 Cal. App. 344

NELSON v. EAST SIDE GROCERY CO.
et al. (Civ. 1415.)

(District Court of Appeal, First District, California. Jan. 18, 1915. Rehearing Denied by Supreme Court, March 18, 1915.)

1. PARTIES — 66—DEFENDANTS — CONSTRUCTION OF COMPLAINT.

Under a complaint, the caption of which named the "East Side Grocery Company" as the sole defendant, but the body of which alleged that three individuals had associated themselves and transacted business under such common name, and that such persons individually and as such association bought the goods for the purchase price of which the action was brought, praying a judgment against them as individuals, the association and such individuals were all parties defendant.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 108, 110; Dec. Dig. 66.]

2. VENUE — 17—RESIDENCE OF DEFENDANT—WAIVER—STATUTES.

Const. art. 12, § 16, provides that a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation of liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is located. Code Civ. Proc. § 395, declares that actions, other than those excepted, must be tried in the county in which the defendants or some of them reside at the commencement of the action. Plaintiff, suing upon a contract of sale made in and to be performed in the county of San Francisco where the breach occurred, made an association and the individuals composing it parties defendant. *Held*, that plaintiff had waived his constitution-

al privilege to have his action against the association tried in the county where the breach occurred, and that the individual defendants were entitled to a change of venue to the county of their residence.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 28-31; Dec. Dig. 17.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by A. N. Nelson against the East Side Grocery Company, etc., and A. A. Jacobs and others. From an order granting a change of venue, plaintiff appeals. Affirmed.

E. B. Mering and J. W. McCaughey, both of San Francisco, for appellant. Webster, Webster & Blewett, of Stockton, J. M. Thomas, of San Francisco, and Lafayette J. Smallpage, of Stockton, for respondents.

PER CURIAM. Plaintiff brought this action in the city and county of San Francisco to recover upon a contract for the sale of merchandize. In the caption of his complaint the defendant is named as "East Side Grocery Company, also known as Central Grocery Company." The complaint in its body alleges that three certain persons—Jacobs, McMeniman, and Frenzi—associated themselves together for the purpose of carrying on the retail grocery business in the city of Stockton; that said business was at first transacted under the name of "East Side Grocery Company," which was later changed to "Central Grocery Company"; that the merchandize for the value of which this suit is brought was sold and delivered to said persons and said company, and was not paid for. In the prayer of his complaint the plaintiff prays for judgment against the alleged association and also against each of the persons named as composing it, for the full amount of the claim. Service of summons was made upon the individuals alleged to have thus associated themselves together under the common name. These appeared individually and moved for a change of place of trial to the county of San Joaquin, their residence. Thereupon the plaintiff presented an affidavit, showing that the contract sued upon was made and was to be performed in the city and county of San Francisco, and that there its breach occurred. This was not denied by the moving parties. The court ordered the place of trial of the action changed to the county of San Joaquin. The plaintiff appeals.

In support of his appeal the appellant cites article 12, § 16, of the Constitution, which provides that:

"A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated."

Counsel for the appellant relies upon the case of Kendrick v. Diamond Creek Mining Co., 94 Cal. 137, 29 Pac. 324, for the inter-

pretation to be placed upon the term "association" as used in this section of the Constitution, and has evidently drawn his pleading with the language of the decision in that case in view. It does not appear from anything the defendants present by way of affidavit that they are anything other than the sort of association which the plaintiff asserts them to be, but they insist that, having been sued as individuals as well as under their associate name, and a personal liability having been alleged and a personal judgment sought against each of them they are entitled under section 395 of the Code of Civil Procedure to have the action tried in the place where they reside. To this contention the appellant opposes the case of *Kendricks v. Diamond Creek Mining Co.*, supra, as holding that the association under the common name of which the respondents are found to have transacted business, out of which the appellant's chose in action arose, is such a one as is contemplated by the terms of article 12, § 16, of the Constitution, and that the plaintiff has therefore the right to have the action tried in the place where he alleges the obligation was to be performed and where its breach occurred.

[1] The first question to be determined is as to who the parties defendant in this action are. It is true that the plaintiff in the caption of his complaint has named as the sole defendant "East Side Grocery Company, also known as the Central Grocery Company"; but in the body of the complaint it is alleged that the three individuals, Jacobs, McMeniman, and Frenzi, not only associated themselves together and transacted business under the aforesaid common name or names, but it is also averred that these three persons individually and also as such association bought the goods for the purchase price of which this action is brought, and it further appears that a several judgment is prayed for against each of these individuals for the full amount of the plaintiff's claim.

[2] It should require no argument to sustain the view that, in determining who the parties to an action are, the whole body of the complaint is to be taken into account, and not the caption merely. This being so, it must be held that Jacobs, McMeniman, and Frenzi are as fully parties defendant in this action as though their names had appeared in the caption of the complaint, and hence that this is in form and substance an action not only against the association, but also against the three individuals who are alleged to compose it. In other words, the plaintiff herein has not been satisfied to sue the associates under their common name, and to seek by his judgment to bind their joint property held under such common name, but he is also seeking to make the individual members of the association parties to the action and to obtain a personal judgment enforceable against the individual property

of each of them. Having done this, the plaintiff must be held to have waived the privilege accorded him by the terms of article 12, § 16, of the Constitution under the authority of the case of the *Griffin & Skelly Co. v. Magnolia, etc., Co.*, 107 Cal. 378, 40 Pac. 495. That was an action against a corporation and also against a stockholder thereof, wherein the plaintiff sought to recover judgment against the corporation upon an alleged liability, and also sought to recover a personal judgment against the stockholder for his proportionate share of such liability. The stockholder moved for a change of venue to the place of his residence. The Supreme Court, in holding him entitled to have his motion granted, and in construing the foregoing provision of the Constitution, says:

"The provision of the Constitution is in entire harmony with the provisions of the Code of Civil Procedure, and raises no conflict therewith. The plaintiff may at all times avail himself of the privilege given by the section if the only defendant in the action is the corporation; but, if he chooses to join as defendants in the action others whose residence is in a different county, he waives the benefit of the provision."

This ruling has direct application to the facts of the case at bar; the plaintiff having seen fit in substance to make the persons composing the alleged association parties defendant, and having averred a personal liability and demanded a personal judgment against each of them individually, he must be held to have waived his constitutional privilege to have his action against the association tried in the county where the obligation arose and where its breach occurred.

It follows that the motion for a change of venue herein was properly granted. The order is affirmed.

26 Cal. App. 371

BAKER v. EILERS MUSIC CO. (two cases).
(Civ. 1520, 1521.)

(District Court of Appeal, Second District,
California. Jan. 18, 1915.)

1. LANDLORD AND TENANT ⇐109—TERMINATION—SURRENDER.

A lease may be terminated by the surrender of the leased premises and the lessor's acceptance and acquiescence.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 350-360, 363-365, 368-371; Dec. Dig. ⇐109.]

2. LANDLORD AND TENANT ⇐194—SURRENDER—ACTION FOR RENT.

A lessor, who unqualifiedly takes possession of property delivered to him by his tenant, thereby releases the tenant from liability for rent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 788, 789; Dec. Dig. ⇐194.]

3. LANDLORD AND TENANT ⇐194—SURRENDER—ACTION FOR DAMAGES.

A landlord may accept possession of the property for the benefit of the tenant and relet it, in which case he has no action, except one for damages for the difference between what he

was able in good faith to rent the property for and the rental fixed by the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 788, 789; Dec. Dig. § 104.]

4. APPEAL AND ERROR §934—PRESUMPTIONS—FINDINGS—CONSTRUCTION.

Findings of fact must be resolved so as to sustain the judgment, if they are susceptible of such construction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.]

Appeals from Superior Court, Los Angeles County; J. P. Wood, Judge.

Two actions by R. M. Baker against the Eilers Music Company. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 24 Cal. App. 804, 141 Pac. 396.

Lucius M. Fall, of Los Angeles, for appellant. Frank Bryant, of Los Angeles, for respondent.

JAMES, J. This is an appeal from a judgment entered against the plaintiff and is presented on the judgment roll. Two actions were brought, each being to recover a sum of money alleged to be due under the terms of a certain lease affecting real property in the city of Los Angeles. It was stipulated at the trial that both actions should be tried together and but one judgment rendered. The appeal is presented in the same way, although the actions are separately entitled.

By the findings of fact it appears that appellant, as lessor, on the 8th of October, 1910, entered into a lease contract with respondent, whereby he let to it certain premises situated on South Broadway street in Los Angeles city for a term of two years and six months for a gross rental of \$12,000, which was made payable in sums of \$400 on the 9th day of each and every month; that possession was given of the leased premises to respondent; and that it continued to occupy the same and to pay the rental specified up to the 9th day of January, 1912. It is further found that, after respondent had taken possession of the premises, it permitted the lessor to use a space along the north wall of the building, where there were located windows used for the purpose of admitting light and air. Just when this permission was given does not appear. It was further found that no written agreement was made permitting such use of said space, and that on the 5th of July, 1911, the lessee, by notice in writing, demanded that the lessor redeliver the portion of the premises then being used by him, which demand was refused. On the 21st of July, 1911, a written notice was served upon the lessor by which the lessee gave notice that it rescinded the lease contract. Six months later the lessee vacated the entire premises, as appears by finding IX of the trial judge, which is as follows:

"That defendant vacated the portion of said premises theretofore occupied by it, and redeliv-

ered the same to plaintiff on the 8th day of January, 1912, and that on the 30th day of January, 1912, the plaintiff took possession of the said premises and offered them for rent to others."

As a conclusion of law the court found that there had been an eviction suffered by the lessee, and that there could be no recovery of any rental. It should be mentioned that the money claimed in suit was for rental of the premises for the months of March and April, 1912, all of which would have accrued, if at all, subsequent to the time that it is found by the court the lessor took possession of the premises and offered them for rent to others. The court found also the fact to be that a part of the consideration for the making of the lease was an agreement on the part of the lessor, which was consummated, to loan to the lessee the sum of \$30,000, which was secured by collateral.

It is argued on the part of appellant that the defense of respondent was based upon an alleged rescission of the lease contract, which rescission was invalid and of no effect for two reasons: First, because it was not shown that the lessee restored to the lessor, or offered to restore to him, the amount of money loaned, which was made a part of the consideration for the lease; second, that by remaining in possession of the premises and continuing to pay rent according to the stipulated terms of the lease for six months after serving its notice of rescission, the lessee waived its right to effect a rescission and by its act revived the contract in its full force. Both of these contentions would seem to be well founded, if the facts as found by the court were such as to exclude consideration of any defense except that of rescission. We need not determine as to whether the court was right in its conclusion that there had been an eviction by the lessor of his tenant. It is alleged by the respondent in its answer, and found to be true by the trial court, that the premises were redelivered to the lessor on the 8th day of January, and that thereafter during the same month the lessor took possession of the same and offered them for rent to others.

[1] A lease may be brought to an end by the surrender of the leased premises and the acquiescence in such surrender by the lessor. Such acquiescence is perhaps best evidenced by his taking possession of the property and assuming again all of the authority over it of an owner in possession. It is immaterial whether it be said in this case that the lessor acquiesced in the rescission attempted to be made by the lessee, or that the parties voluntarily brought their contract relationship to a close by the one delivering up the property to the other and the latter accepting it and proceeding to find another tenant. The same result follows. The contract would come to an end, and the relationship of landlord and tenant would cease. The action was

brought to recover rent under the lease contract, and not for damages.

[2, 3] A lessor, who takes possession of property delivered to him by his tenant, and does so unqualifiedly, thereby releases his tenants. He may accept possession of the property for the benefit of the tenant and relet the same; in the latter case he has no action, except one for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement. *Bradbury v. Higginson*, 162 Cal. 602, 123 Pac. 797; *Oliver v. Loydon*, 163 Cal. 124, 124 Pac. 731.

[4] Findings of fact must be resolved in such a way as will result in the judgment being sustained if they are susceptible of a construction to that end. For the reasons stated, we think the judgment is supported by the findings and should be sustained.

The judgment is affirmed.

The same order will be made in the other case, No. 1521.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 367

NELSON v. F. & A. LEVY & CO. (Civ. 1436.)
(District Court of Appeal, First District, California. Jan. 18, 1915. Rehearing Denied Feb. 17, 1915.)

CONTRACTS ⇨ 333—ACTIONS FOR BREACH—COMPLAINT—"STREET WORK."

In an action for breach of a provision in a contract for the sale of lots, whereby the seller agreed to do the street work on an abutting street, a complaint was demurrable where it neither alleged that the parties at the time of the execution of the contract had by some sort of an agreement arrived at an understanding as to the amount, kind, and detail of the street work to be done, nor that the expression "street work" had any defined meaning in common usage, or in the charter, ordinances, or other regulations of the city, relating to the improvement of streets, as the allegation that such term contemplated curbing, paving, grading, and guttering presented no issuable fact.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1196, 1640-1657, 1659; Dec. Dig. ⇨ 333.

For other definitions, see *Words and Phrases*, First and Second Series, *Street Work*.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by John A. Nelson against F. & A. Levy & Co. From an order sustaining a demurrer to the complaint, and from the judgment thereon, plaintiff appeals. Affirmed.

R. W. Gillogley and Sylvain J. Lazarus, both of San Francisco, for appellant. Herbert Choyanski and James Raleigh Kelly, both of San Francisco, for respondent.

PER CURIAM. This is an appeal from an order of the court sustaining the defendant's demurrer to plaintiff's third amended complaint, and from a judgment based there-

on, the plaintiff having declined to further amend.

The action is for damages for the alleged breach of one of the provisions of a contract for the sale from the defendant to the plaintiff of certain lots in a larger tract of land bounded by Day, Diamond, Thirtieth, and Castro streets in the city and county of San Francisco. The contract of sale contained the following provision: "The party of the first part agrees to do street work on Day street on or before November 1, 1909." It is this clause in the contract which the plaintiff avers that the defendant has failed to perform, and out of its alleged failure this cause of action arises.

We think the demurrer to the plaintiff's third amended complaint was properly sustained. The clause in the contract counted upon is too hopelessly uncertain to base an actionable breach upon. It could only have been made definite by averments showing that the parties to the contract at the time of its execution had by some sort of an agreement arrived at an understanding as to just what amount and kind and detail of street work was to be done by the seller upon the street in question. There is no averment of any such agreement or understanding in this complaint. The statement therein that the term street work "contemplates curbing, paving, grading, and guttering" presents no issuable fact; nor is it made to appear either in the plaintiff's pleading or argument that the expression "street work" has any defined meaning either in common usage or in the charter, ordinances, or other regulations of the city of San Francisco relating to the improvement of streets. This being so, we think that the third amended complaint of the plaintiff was fatally defective, and that the demurrer was properly sustained.

Judgment affirmed.

26 Cal. App. 361

SIMEN v. SAM AFTERGUT CO. (Civ. 1429.)

(District Court of Appeal, First District, California. Jan. 18, 1915. Rehearing Denied Feb. 17, 1915; Denied by Supreme Court March 18, 1915.)

1. LANDLORD AND TENANT ⇨ 157 — AGREEMENT AS TO TENANT'S IMPROVEMENTS—CONSTRUCTION.

A lease required that the lessee, in lieu of payment of the rent reserved for the first year of a term, improve the premises "by moving and erecting thereon such improvements as it shall see fit, to revert to the lessor as hereinafter provided," and that, if the lessee elected to vacate at any time during the term, he might on payment of \$100 bonus terminate the lease and relieve itself from obligations thereunder, and that, as a condition precedent to such election, the lessee should have moved to or erected upon premises improvements valued at \$360, to revert to the lessor. Civ. Code, § 1636, requires contracts to be construed in their entirety so as to give effect to the manifest intention of the parties; section 1642 requires that the several

clauses and covenants must, if not absolutely repugnant, be considered conjunctively; section 1643 requires interpretation to make an instrument definite and reasonable; section 1649 requires a construction in the sense in which the promisor believed that the promisee understood it; section 1654 requires a construction against the party causing the uncertainty who is presumed to be the promisor; and Code Civ. Proc. § 1864, requires a construction most favorable to the party in whose favor a covenant is made. *Held*, that the covenant required the lessee to move to, or erect on, the leased premises improvements of a certain value, but of such a kind or character as he saw fit.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 571, 572, 574-582, 584-600, 602-607; Dec. Dig. ☞157.]

2. LANDLORD AND TENANT ☞160 — ACTION FOR WASTE—PETITION.

A petition alleging that during the lessee's occupation he injured the premises by destroying certain improvements thereon was sufficient; it not being necessary to affirmatively allege that their destruction was not caused by wrongful use and wear or the elements within the terms of the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 612-626; Dec. Dig. ☞160.]

3. EVIDENCE ☞461 — PAROL EVIDENCE — TERMS OF LEASE.

In a lessor's action for damages for breach of covenant to erect improvements in lieu of first year's rent, where the terms as to the value of the improvements were unambiguous, parol evidence to show understanding of the parties as to the value of the improvements was inadmissible to vary the terms of the lease.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2129-2133; Dec. Dig. ☞461.]

4. LANDLORD AND TENANT ☞160 — ACTION FOR BREACH OF COVENANTS—ISSUE AND EVIDENCE.

In such action, where the question whether damage to the improvements resulted from use or from the elements was not put in issue by pleadings or defended upon that theory, the trial court was not required to find what part of the damage resulted from reasonable use and damage by the elements.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 612-626; Dec. Dig. ☞160.]

5. APPEAL AND ERROR ☞1011—FINDINGS—CONCLUSIVENESS.

A finding upon conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. ☞1011.]

6. LANDLORD AND TENANT ☞160—ACTION FOR BREACH OF COVENANT—DEMAND.

Where the terms of a lease evidenced an intent that improvements should be erected on the premises in lieu of the first year's rental some time before the expiration of the three-year term, the lessor, suing for breach, was not required to plead and prove a demand upon the lessee to perform.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 612-626; Dec. Dig. ☞160.]

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by Frederick Simen against the Sam Aftergut Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hankins & Hankins, for appellant. P. B. Nagle and James L. Nagle, both of San Francisco, for respondent.

PER CURIAM. The plaintiff's complaint separately stated two causes of action against the defendants; one for damages for the alleged breach of a covenant to erect improvements in lieu of the first year's rent reserved in a contract of lease; and the other for damages for the alleged destruction by the defendant of certain improvements which were part and parcel of the leased premises. Judgment was entered for the plaintiff upon the first cause of action in the sum of \$110, and upon the second cause of action in the sum of \$250.

The lease in question, which was pleaded in *hæc verba*, contained the usual covenants of a contract for the letting of real property, and, in addition, provided and required that the lessee, the defendant herein, should, in lieu of the payment of the rent reserved for the first year of a three-year term, improve the leased premises "by moving and erecting thereon such improvements as it shall see fit, to revert to the lessor as hereinafter provided." This covenant of the lease evidently referred to, and was related to, a following clause of the lease, which provided that:

"* * * If at any time during the term herein created said lessee shall elect to vacate said premises, it may, upon payment to the lessor of one hundred (\$100) dollars in United States gold coin as a bonus, at its option, quit and surrender the same, and this lease shall thereupon terminate, and the parties hereto shall be relieved from all further obligations hereunder, provided, however, and as a condition precedent to the exercise of such option, that said lessee shall have removed to or erected upon said premises improvements of the reasonable value of three hundred and sixty (\$360) dollars, to revert to said lessor."

The plaintiff's complaint in the first cause of action alleged that:

The defendant "has failed and refused and still refuses to make any improvements on said premises or to move to or erect thereon any improvement or improvements whatsoever as agreed in said lease, or to improve the premises in any manner whatsoever."

The defendant's demurrer, which was general in so far as it concerned the sufficiency of the facts stated to constitute a cause of action, was overruled.

[1] The demurrer upon this ground was directed apparently to the point that the plaintiff did not have a cause of action for damages because of the defendant's failure to make any improvements upon the leased premises, for the reason, as is contended, that the covenant of the lease covering the placing and erection of such improvements did not require the defendant to provide them unless he saw fit to do so. Standing alone and literally construed, the covenant in controversy would perhaps mean no more than is contended for by the defendant; but a lease, like every other contract, must be

considered and construed in its entirety so as to give effect, if possible, to the mutual and manifest intention of the parties (Civ. Code, § 1636); and in so doing its several clauses and covenants must, if not absolutely repugnant, be considered conjunctively (Civ. Code, § 1642).

Considered in conformity to these general principles, it is apparent that the lease in the present case contemplated that the lessor was to receive remuneration of some kind for the first year's use of the demised premises. While the covenant concerning the placing and erection of improvements upon the leased premises, standing alone, is undoubtedly ambiguous, that construction must be given to it which will be most favorable to the party in whose favor it was made. Code Civ. Proc. § 1864. Manifestly it was the purpose of the covenant in controversy to contract for and cover "the payment of the rent for the first year," and, this being so, it was undoubtedly made and intended to favor the lessor, and not the lessee; and of the two different constructions of which it is susceptible the one "most favorable to the party in whose favor the provision is made" (Code Civ. Proc. § 1864) would be that which would result in "such an interpretation that will make it lawful, definite and reasonable" (Civ. Code, § 1643). The construction contended for by the appellant, that it as lessee was not required to move or erect on the premises any improvements at all, unless it saw fit to do so, is obviously in conflict with the very apparent intention of the parties, as indicated by a consideration of the lease in its entirety; and such a construction plainly would be antagonistic to the interest of the lessor, who was the party primarily to be benefited by the covenant in controversy. On the other hand, the construction adopted by the trial court that this covenant, considered in conjunction with the terms of the lease as a whole, contemplated that the lessee would be required to move or erect on the leased premises improvements of a certain value, but of such kind or character as it saw fit, was in apparent harmony with the evident mutual intention of the parties, and gives to the plaintiff, the lessor, the benefit of some compensation for the first year's use and occupation of the leased premises. The trial court's conclusion in this behalf is fortified by a consideration and application of those Code provisions which, in effect, declare that, if the terms of a promise are in any respect ambiguous or uncertain, they must be interpreted in keeping with the sense in which the promisor believed that the promisee understood them, and that in the presence of uncertainty the language of a contract must be interpreted most strongly against the party who caused the uncertainty to exist, who in such case is presumed to be the promisor. Civ. Code, §§ 1649, 1654. Thus construed, the covenant in

controversy placed a positive obligation upon the defendant as lessee, the breach of which would constitute a cause of action.

[2] The gist of the plaintiff's second cause of action is to be found in the allegation of the complaint which, in effect, avers that during the defendant's occupation of the leased premises he greatly injured the premises by destroying certain improvements situated upon the demised premises at the time of the execution of the lease. It is the contention of the defendant that this allegation did not state a cause of action for damages for waste, because it was not affirmatively alleged that the destruction of the improvements existing upon the demised premises "was not caused by reasonable use and wear and damage by the elements," which were covered by the terms of the lease. There is no merit in this contention. The evident purpose of the plaintiff was to aver the commission of a willful and an unlawful waste; and he was not required to negatively allege and prove the fact that the waste complained of was not the result of ordinary wear and tear for which there would be no liability under the terms of the lease. If such were the fact, it would have been purely a matter of defense.

[3] There was no error in the ruling of the trial court refusing to permit F. J. Hankins, a witness for the defendant, to testify as to the conversation had between the parties to the lease at the time of its execution. The stated purpose of the proffered testimony was to show the understanding of the parties as to what was to be the value of the improvements to be placed upon the leased premises in lieu of the first year's rental; and such testimony was proffered upon the theory that the covenants as to the improvements were uncertain and ambiguous as to what the value of the improvements should be, and that therefore oral evidence as to the intent and understanding of the parties in that particular was admissible.

Read and construed in its entirety, there was no ambiguity in the terms of the lease as to the intent of the parties upon the subject of what the value of the improvements should be; and therefore the proffered testimony was inadmissible, and rightly rejected upon the ground that it was an attempt to vary the terms of a written instrument by parol evidence.

[4] The question as to whether or not the alleged damage to the improvements was due to depreciation as a result of use and the elements was not put in issue by the pleadings, and the action was not defended upon any such theory. Therefore the trial court was not required to find what portion, if any, of the damage to the improvements was the result of "the reasonable use and wear and damage by the elements."

[5] An examination of the record convinces us that the finding fixing the damage to the

plaintiff for the destruction of the improvements rests upon conflicting evidence, and will not therefore be disturbed by this court.

[6] While it is not clear from the terms of the lease that the parties thereto contemplated that the improvements in question should be erected upon the leased premises during the first year of the life of the lease, nevertheless it is reasonably certain from the terms of the lease as a whole that it was the intent of the parties that such improvements should be erected upon the leased premises in lieu of the first year's rental some time before the expiration of the life of the lease. This being so, and the covenant in controversy not having been complied with during the life of the lease, the plaintiff was not required to plead and prove a demand upon the defendant to comply with the terms of the covenant. "When the time has come for the doing of an act which it is the duty of the defendant to do unconditionally, no demand other than the suit itself is necessary." *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836.

The judgment and order appealed from are affirmed.

26 Cal. App. 357

WILSON v. SADLEIR. (Civ. 1430.)

(District Court of Appeal, First District, California. Jan. 18, 1915.)

1. LANDLORD AND TENANT — 118, 291 — UNLAWFUL DETAINER.

Where, pursuant to the terms of the lease, plaintiff served defendant with notice that he would re-enter for failure to pay rent within 10 days, and where plaintiff at the end of such 10 days did not enter, but gave the 3 days' statutory notice to quit under Code Civ. Proc. § 1161, providing for actions of unlawful detainer, plaintiff's 10 days' notice did not so terminate the tenancy that he could not maintain an action of unlawful detainer under the statutory notice; the previous notice working no such termination of the tenancy under lease as to give rise to a tenancy at will, which can be terminated only by 30 days' notice.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 402-415, 1217-1241, 1243-1269; Dec. Dig. —118, 291.]

2. LANDLORD AND TENANT — 291 — UNLAWFUL DETAINER—COMPLAINT—STATUTE.

In an action of unlawful detainer, where the complaint in one paragraph stated the amount of rent due, and in another paragraph alleged demand for payment thereof, it sufficiently alleged demand of payment of the amount due, within Code Civ. Proc. § 1161, subd. 2, providing that a tenant for a term less than life is guilty of unlawful detainer by continuing in possession without permission after default under his lease, and that he shall be subject to an action of unlawful detainer, upon three days' notice to quit.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1217-1241, 1243-1269; Dec. Dig. —291.]

3. LANDLORD AND TENANT — 291 — UNLAWFUL DETAINER—COMPLAINT—STATUTE.

In an action of unlawful detainer, under Code Civ. Proc. § 1161, specifying that a tenant of real property for a term less than life is guilty of unlawful detainer by continuing in

possession without permission after default in payment of rent on three days' notice to quit, where the complaint did not allege that the amount of rent due was stated in such notice, attachment of copy of the notice containing the statement of such amount to the complaint on filing obviated the defect.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1217-1241, 1243-1269; Dec. Dig. —291.]

4. LANDLORD AND TENANT — 290 — UNLAWFUL DETAINER—GROUNDS OF ACTION.

Under Code Civ. Proc. § 1161, providing that an action of unlawful detainer will lie for violation of any of the covenants or conditions of a lease, breach of a condition that the tenant should pay the amount reserved for the occupation and use, both of the real and personal property described in the lease of a furnished hotel, was sufficient to support an action of unlawful detainer.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1207-1215; Dec. Dig. —290.]

5. LANDLORD AND TENANT — 290 — UNLAWFUL DETAINER—PROPERTY RECOVERABLE.

The action of unlawful detainer was properly brought under Code Civ. Proc. § 1161, providing that it may be maintained after termination, by notice, of tenancy of real property for a term less than life, although the lease was of a furnished hotel covering personal property as well as real; such personal property being a mere incident to the enjoyment of the leasehold interest in the realty.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1207-1215; Dec. Dig. —290.]

Appeal from Superior Court, City and County of San Francisco; George L. Jones, Judge. Action by Alexander W. Wilson against Charles J. Sadleir. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. Hoff Cook, of San Francisco, for appellant. J. C. Campbell, Walter Shelton, and Alexander A. Wilson, all of San Francisco (Weaver, Shelton & Levy, of San Francisco, of counsel), for respondent.

PER CURIAM. Appeal from the judgment in favor of plaintiff and from an order denying defendant's motion for new trial in an action of unlawful detainer.

[1] The complaint shows that, upon the defendant's failure to pay rent for two months, he was served with a notice, pursuant to the terms of the lease, which declared that the lessor elected to consider the lease null and void, and notified the defendant that at the expiration of 10 days the plaintiff would re-enter the premises. The moment having arrived when the plaintiff, under this notice and the provisions of the lease, was entitled to re-enter, and the defendant being still in possession, the plaintiff gave him the statutory notice to quit.

We are unable to agree with the appellant that the demurrer to the complaint, on the ground that it failed to state facts sufficient to constitute a cause of action, should have been sustained. Appellant's theory in this behalf is that the first notice, to wit, the 10

days' notice, terminated the tenancy, and therefore no action under the 3 days' notice can be maintained. The lease seems to contemplate that upon the breach of any of its covenants and after the 10 days' notice the plaintiff may eject the defendant, and take immediate possession, or waive this right, and commence a proceeding in unlawful detainer without giving the usual notice of three days. However, plaintiff abandoned any notion that he may have entertained of proceeding in the manner specified in the lease, and did give the statutory notice to quit. Under these circumstances, we do not see how it can be said with reason that there was a termination of the tenancy such as would make the defendant a tenant at will, and entitled to 30 days' notice as required in such cases. Civ. Code, § 789; *Perine v. Teague*, 66 Cal. 446, 6 Pac. 84; *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729; *Kuhn v. Smith*, 125 Cal. 617, 58 Pac. 204, 73 Am. St. Rep. 79. Finally, however, notwithstanding the service of the notice, the defendant did not surrender possession of the demised premises, and the relation of landlord and tenant still continued (*Kower v. Gluck*, 33 Cal. 401, 406; *Odell v. Buttrick*, 126 Cal. 551, 552, 59 Pac. 133); and the action of unlawful detainer will lie.

[2, 3] Defendant asserts that the 3 days' notice is insufficient as a notice under subdivision 2 of section 1161 of the Code of Civil Procedure, as no amount of rent is alleged to have been specified in such notice. This point is devoid of merit. The complaint in one paragraph states the amount of rent due, and in another paragraph alleges that a demand was made for payment thereof, which, of course, is equivalent to stating that a demand was made for the amount stated to be due. Moreover, even if the complaint proper were defective in the regard suggested, still the point would be unavailing for the reason that a copy of the notice was attached to and made a part of the complaint, and it supplies the claimed defect. *Georges v. Kessler*, 131 Cal. 183, 184, 63 Pac. 466.

[4, 5] The lease being of a furnished hotel and covering real and personal property, defendant contends that the action of unlawful detainer will not lie. It may be that the terms of section 1161, Code of Civil Procedure, are broad enough to cover this point. It will lie apparently if there is a violation of any of the covenants or conditions of the lease, and one of the conditions of this lease is that the tenant shall pay the amount reserved for the occupation and use of both the real and personal property described therein. Subdivisions 2 and 3, § 1161, Code Civ. Proc.; *Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512; *Agen v. Nelson*, 51 Wash. 431, 98

Pac. 1115; *Olson v. Alki Park Co.*, 63 Wash. 521, 115 Pac. 1083, Ann. Cas. 1912D, 365.

This action is based either on a breach of a condition to pay rent, or on the breach of some other condition of the lease; and comes therefore under either subdivision 2 or 3 of said section 1161.

But even if this were not true, the payments reserved in the lease would constitute a reservation of rent arising out of realty in the technical sense of the word; and the failure to make such payments would be regarded as a default in the payment of rent within the meaning of said subdivision 2, and the personal property and the board furnished as part of the consideration for the payments reserved in the lease are merely incidents to the enjoyment of the leasehold interest in the realty. There are no California cases on this point, but the principle is well established in other jurisdictions, where the summary remedies lie only for the nonpayment of rent as distinguished from the breach of other covenants or conditions. *Toler v. Seabrook*, 39 Ga. 14. In this last-mentioned case the court says:

It is held that where "there is a contract for rent of real estate, it is none the less a renting, that it is agreed that the tenant may have a lease of the mules, tools, gin and other personal property actually on the place, * * * and a distress warrant will be for the whole sum agreed upon. It is said: 'The main thing is the rent, and the use of the other things are mere incidents. It is still rent, and a distress warrant will lie.'"

In the case of *Armstrong v. Cummings et al.*, 58 How. Prac. (N. Y.) 331, 334, where the court passed upon a similar state of facts, it is said:

"Generally speaking, the rent issues of the whole premises demised, but if a house and furniture be comprised in a lease, the rent will issue out of the lands or house only; and the lessor may declare, as on a demise of the land or house, without noticing the goods, * * * 'Rent cannot be reserved out of chattels personal. If such chattels are demised with the land, at an entire rent, the rent issues out of the land only.' * * * If this were not so, the statute would have no application to furnished tenements, hotels, manufactories, or sawmills, because they contained furniture or steam power. It would have no application to any house wherein the landlord owned the gas fixtures, portable heaters or wash tubs, and let them with the premises. Indeed, the statute would have such a limited application that its usefulness would be destroyed and further legislation required."

See, also, *Stein v. Stely* (Tex. Civ. App.) 32 S. W. 782; *Peddicord et al. v. Berk*, 74 Kan. 236, 86 Pac. 465; *Dimmett v. Appleton*, 20 Neb. 208, 29 N. W. 474; *Weatherford v. Union Pac. R. R. Co.*, 5 Neb. (Unof.) 464, 98 N. W. 1089.

The judgment and order appealed from are affirmed.

26 Cal. App. 348

PEOPLE v. TALMAN. (Cr. 280.)

(District Court of Appeal, Third District, California. Jan. 18, 1915.)

1. LARCENY — §65 — PROSECUTION — SUFFICIENCY OF EVIDENCE.

In a prosecution for grand larceny of a horse, evidence held amply sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 160; Dec. Dig. § 65.]

2. CRIMINAL LAW — §627½ — TRIAL — PROCEEDING PRELIMINARY TO TRIAL — CONSULTATION WITH WITNESS.

One charged with the crime is not entitled to have the sheriff conduct him to other parts of the state so that he might interview witnesses whose names he did not know by whom he expected to prove an alibi, his remedy being to procure subpoenas for them accompanied by such description as will enable their attendance to be procured.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1431, 1434, 1435; Dec. Dig. § 627½.]

3. CRIMINAL LAW — §1170½ — APPEAL — HARMLESS ERROR — CROSS-EXAMINATION OF DEFENDANT.

Error, if any, in permitting the district attorney to cross-examine defendant as to a previous statement made by him and taken by a stenographer, by reading the questions and answers therefrom to the defendant, and asking him about them without first showing him the paper, is harmless, where the witness' attention was properly directed to all the circumstances under which the statement was taken, and there was no showing that the district attorney did not correctly read the questions and answers or that defendant's counsel did not have a full opportunity to examine the paper and cross examine in reference to it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Harry Talman was convicted of grand larceny, and he appeals. Affirmed.

John R. Cronin, of Stockton, and C. W. Gillespie, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1] Appellant was convicted of grand larceny for having stolen a sorrel mare belonging to Charles and Alice Dreyer. There is no merit in the claim of the insufficiency of the evidence to support the verdict. The possession of the stolen property, a few days after the theft, by defendant and one Allen Dodge, who were jointly charged with the crime, the flight of the accused, they having been arrested 150 miles from the scene of the offense, their presence in the immediate neighborhood at or near the time the animal was stolen, their abandonment, near the place from which said sorrel mare had been taken, of an emaciated and exhausted horse which they had been driving, furnish abundant inculpatory circumstances to warrant the conclusion of the jury. It may be added that the conviction of the guilt of de-

fendant is greatly strengthened by the contradictory and unreasonable explanation made by himself and his associate in the crime of their possession of the mare and of their peregrination through the country. Indeed, one can hardly read the entire record without an abiding conviction of the guilt of defendant, and any other verdict would have resulted in a miscarriage of justice.

Some contention is made that the district attorney was guilty of misconduct in his address to the jury. The objection is hardly specific enough to merit attention, but we have examined the record of his remarks and find nothing outside of the legitimate range of argument or to which exception could justly be taken.

[2] Appellant complains that the sheriff refused to conduct him to certain parts of the state that he might interview parties whose names he did not know, but by whom he expected to prove an alibi. The law confers upon a defendant no right to make such demand. It is, perhaps, needless to add that such practice, if permitted, would be likely to lead to great abuse without any compensating benefit. It would encourage simulated defenses, entail grievous trouble and expense, and afford additional opportunities for a defendant to escape from the custody of the officer. The law is ample, in this matter, to protect the interests of one charged with a crime. Defendant could have obtained a subpoena for his witnesses, and he should have been able so to identify them that their attendance could have been secured.

[3] The only question about which there can be any serious controversy grows out of the district attorney's effort to lay the foundation for the impeachment of appellant and his codefendant. It seems that after their arrest they were questioned in the county jail by the district attorney in the presence of the sheriff and a stenographer, and by the last-named the whole proceeding was taken down in shorthand and afterward transcribed. On cross-examination, at the trial, the district attorney, reading from this transcript, interrogated the witness as to certain questions and answers therein appearing. Objection was made upon the ground that the writing should be shown to the witness before he could be required to answer. This position was taken by reason of section 2052, Code of Civil Procedure, providing:

"A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and, if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

But the Attorney General contends in effect that the last clause of this section confines it to "written statements" of the wit-

ness. "If the statements (of the witness) be in writing," in other words, means, "If the statements have been made in writing." In such case it is highly proper that they should be shown the witness. But there would seem to be no reason for requiring the writing to be exhibited to the witness where he has never had anything to do with the execution of it or even has not seen it before. The inspection by the witness of a typewritten transcript, made by a stranger to him, and which he had never seen before, could not assist the witness in his recollection of oral statements which he may have made. At least, it would afford him no greater aid than to have them fully read to him. And there is no contention that the attention of the witness was not directed to all the circumstances and declarations that had any bearing whatever upon the alleged inconsistent statements. But it is not necessary to decide this question, as there is nothing to indicate that the district attorney did not correctly read said transcript, or that he refused defendant's counsel an opportunity to inspect it, or that the right of cross-examination in reference to it was at all abridged, or that, indeed, the ruling of the court, if technically erroneous, resulted in any prejudice to appellant.

We think he was justly convicted, and the judgment and order denying his motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

26 Cal. App. 334

Ex parte CLIFTON. (Cr. 370.)

(District Court of Appeal, Second District, California. Jan. 15, 1915.)

HABEAS CORPUS ⇨92—SCOPE OF REMEDY.

An indictment charged petitioner with perjury by giving false answers when testifying before the grand jury which was investigating the question of prostitution, which being misdemeanor only was not a subject the grand jury was authorized to consider. *Held* that, as that offense was closely allied with pandering, which was a felony, and of which the grand jury had jurisdiction to investigate, the question whether the indictment stated a public offense would not be determined on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-96; Dec. Dig. ⇨92.]

In the matter of the application of Babe Clifton for writ of habeas corpus. Writ dismissed, and petitioner remanded.

Thomas Scott and J. R. Dorsey, both of Bakersfield, for petitioner. Rowen Irwin, Dist. Atty., of Bakersfield, by J. H. Farraher, of Yreka, for respondent.

PER CURIAM. The ground of the application is that the indictment charging petitioner with the crime of perjury fails to state a public offense. This by reason of the fact that it is alleged in the indictment that the

perjury was committed by petitioner in giving under oath false answers to questions propounded to her by the grand jury, the subject under investigation by said body at the time being "prostitution in the city of Bakersfield"; that, prostitution being a misdemeanor only, it was not a subject concerning which the grand jury was empowered to investigate. Hence, conceding the answers of the witness to have been false, the crime of perjury could not be predicated thereon.

The crime of pandering, an offense which the grand jury might properly investigate, is so closely allied to prostitution that it would be impossible to investigate that subject without considering the question of prostitution; and if the indictment was susceptible of amendment, as no doubt it was, by striking out the subject, "prostitution in the city of Bakersfield," or substituting therefor the offense of pandering, it could not be said the answers given by the witness were immaterial. In our opinion, the case falls directly within the rule laid down by the Supreme Court in *Matter of Ruef*, 150 Cal. 665, 657, 89 Pac. 605; the claim there made being, as here, that the indictment failed to state a public offense, and wherein the court said:

"We think the true rule is that where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus. Here the indictments clearly attempt to charge extortion, a crime defined by section 518 et seq. of the Penal Code, and within the jurisdiction of the superior court."

The indictment under consideration clearly attempts to charge an offense of which the court has jurisdiction, and conceding it to be insufficient for the reasons urged, the attack thereon should be made by demurrer, for which the writ of habeas corpus should not be substituted.

The writ is dismissed, and petitioner remanded to the custody of the sheriff.

26 Cal. App. 339

M. A. NEWMARK & CO. v. SMITH.
(Civ. 1502.)

(District Court of Appeal, Second District, California. Jan. 15, 1915. Rehearing Denied by Supreme Court March 15, 1915.)

1. SALES ⇨82—RIGHTS OF BUYER—INSPECTION.

Under a contract for the sale of "choice, re-cleaned, small white beans," which contained no provision for inspection or fixing of payment, the buyer must pay on delivery, but is entitled to inspect the goods delivered before payment, to ascertain whether they conform to the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 229-233; Dec. Dig. ⇨82.]

2. SALES ⇨82—CONCURRENT PAYMENT AND DELIVERY.

Under Civ. Code, § 1784, providing that a buyer must pay the price of the thing sold on its delivery, delivery and payment are con-

current, if the contract is silent as to time of payment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 229-233; Dec. Dig. § 82.]

Appeal from Superior Court, Santa Barbara County; Robert M. Clarke, Judge.

Action by M. A. Newmark & Co. against George C. Smith. Judgment for the defendant, and plaintiff appeals. Reversed.

H. P. Starbuck and Canfield & Starbuck, all of Santa Barbara, for appellant. B. F. Thomas, of Santa Barbara, for respondent.

SHAW, J. This is an action to recover damages alleged to have been sustained by reason of defendant's partial default in delivering a quantity of beans in accordance with his contract so to do. The verdict of a jury called to try the case was in favor of defendant. Judgment followed in accordance therewith, from which, and an order denying its motion for a new trial, plaintiff appealed.

[1] On July 10, 1911, plaintiff bought from defendant 1,000 bags of "choice, recleaned, small white beans of the crop of 1911," to be delivered in October, f. o. b. cars at Santa Maria, Cal., for which it agreed to pay \$3.21¼ per hundredweight, and on the 18th of the same month bought a further like quantity of the same kind of beans for like delivery at the price of \$3.25 per hundred. These contracts were evidenced by bought and sold notes, whereby the one agreed to buy and the other agreed to sell. In October defendant shipped to plaintiff at Los Angeles two lots of beans, one consisting of 788 sacks delivered, as stated, on account of the first contract, and the other lot consisting of 673 sacks, which shipment was by defendant assigned as delivered under the second contract. Payment for both of these shipments was made by plaintiff by check forwarded to defendant, which the latter accepted in full payment therefor. In delivering the third lot of beans, consisting of 362 sacks, which he shipped about November 20th, defendant changed the mode and plan of delivery by shipping the same to Los Angeles, consigned to himself, and attaching the bill of lading to a draft drawn upon plaintiff for the price thereof, thus making it impossible for plaintiff to examine the shipment or inspect the beans without first paying the draft. Upon presentation of the draft plaintiff, without paying same, wrote defendant on November 21st, asking him to direct the bank to permit an inspection of the beans, in reply to which defendant on the next day wrote plaintiff that "there is nothing in the contract that allows inspection, and delivery of beans in Los Angeles," and declared the contract annulled.

It thus appears that defendant, while retaining title and possession of the goods, and while denying plaintiff's request for an

opportunity to inspect the same for the purpose of ascertaining whether they conformed to the description as specified in the contract, tendered delivery thereof, coupled with the precedent condition that plaintiff pay the purchase price thereof. The sole question, therefore, involved is whether plaintiff, in the absence of a waiver thereof, as to which there is no evidence, was entitled to inspection as a condition precedent to the making of payment. If so, then defendant was not justified in his refusal to comply with the contract.

[2] Section 1784 of the Civil Code provides that "a buyer must pay the price of the thing sold on its delivery"; and, whether delivered at Los Angeles or Santa Maria, defendant was entitled to exact payment for the goods specified in the contract upon delivery thereof to plaintiff. The contract being silent as to the time of payment, the law contemplates that the act of delivery and that of payment shall be concurrent. But defendant was not entitled to payment until he delivered "the thing sold," which in this case was "choice, recleaned, small white beans of 1911 crop." The right of plaintiff to repudiate the purchase and refuse payment because the article delivered failed to conform to the description of the goods purchased must be conceded. Defendant could not, under the guise of delivering beans, have delivered bags of corn and held plaintiff to payment. In no way other than by inspection could plaintiff ascertain whether it was getting the thing purchased and for which it was paying. Hence it must follow, we think, that, as defendant was entitled to and did demand payment upon delivery, plaintiff was entitled to an opportunity to inspect the shipment of beans, and thus, before making payment, ascertain whether or not they were the goods which it agreed to buy and pay for. If they were not, it had the right to reject them and insist upon delivery of goods of the description specified in the contract. In our opinion, the law applicable to the case is as contained in subdivision 2 of section 34 of the English Sale of Goods Act, which is as follows:

"Unless otherwise agreed, when the seller tenders delivery of goods to the buyer he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

See, also, *McNeal v. Braun*, 53 N. J. Law, 617, 23 Atl. 687, 26 Am. St. Rep. 441; *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393; *Hudson v. Germain Fruit Co.*, 95 Ala. 621, 10 South. 920; *Columbian Iron & Dry Dock Co. v. Douglass*, 84 Md. 44, 34 Atl. 1118, 33 L. R. A. 103, 57 Am. St. Rep. 362; Civil Code, §§ 1771, 1785.

The judgment and order are reversed.

We concur: CONREY, P. J.; JAMES, J.





CALIFORNIA REPORTER

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26 Cal. App. 410

SCHUDEL v. HELBING. (Civ. 1453.)

(District Court of Appeal, First District, California. Jan. 25, 1915.)

1. JUDGMENT $\hookrightarrow$ 948—FORMER JUDGMENT AS BAR—WAIVER.

Defendant, intending to rely on the judgment as a bar to an action for malicious prosecution, should have so pleaded in his answer, and his failure to do so was a waiver of such defense under Code Civ. Proc. § 434.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1787-1793; Dec. Dig. $\hookrightarrow$ 948.]

2. JUDGMENT $\hookrightarrow$ 588—BAR—CAUSES OF ACTIONS.

A judgment for plaintiff in a suit to enjoin defendants from further prosecution of certain attachment suits to recover rental, brought on the ground that plaintiff would be greatly damaged by their further maintenance, was not a bar to plaintiff's subsequent action for the malicious prosecution of such suits, as the cause of action for malicious prosecution did not exist until the suit in equity had ended the prosecution of the attachments.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062, 1090; Dec. Dig. $\hookrightarrow$ 588.]

3. APPEAL AND ERROR $\hookrightarrow$ 1031—VERDICT—HARMLESS ERROR.

In an action for malicious prosecution based on five separate counts, wherein the court did not allow the plaintiff to offer any evidence in support of the fifth count and directed the jury to disregard it, it could not be presumed that the general verdict was based on that count, or that defendant could have been injured by the fact that there was no separate verdict or finding thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. $\hookrightarrow$ 1031.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Margaret Schudel against Anna Helbing. Judgment for plaintiff, and defendant appeals. Affirmed.

Otto tum Suden, of San Francisco, for appellant. Aitken & Aitken, of San Francisco, for respondent.

PER CURIAM. This is an action brought to recover damages for the malicious prosecution of certain civil suits against the plaintiff maintained or instigated by the defendant herein. The facts out of which said suits arose were these: In the year 1906 the plaintiff herein rented from the defendant herein certain premises through Louis Helbing, the defendant's husband and agent, the agreement being that a written lease of the premises at a rental of \$30 per month for a three-year term was to be drawn up and executed. After the plaintiff herein had gone into possession of said premises and had incurred considerable expense in fitting them up, the defendant herein undertook to repudiate the acts of her husband and agent, and raised the rent to \$60 a month, and this not being paid she caused to be instituted four successive attachment suits against the plaintiff herein to recover said increased rental, and

was engaged in prosecuting these to the great damage, annoyance, and injury of the plaintiff herein, whereupon the latter began a suit in equity to enjoin the further prosecution of said actions, and to compel a specific performance of the agreement for a lease of said premises. In her complaint in said equitable action the plaintiff averred that she was being and would be greatly damaged and injured by the further maintenance of said civil actions, but did not specifically allege or pray for or prove or receive judgment for any such damages in said equity suit. She did, however, recover a judgment in her favor, enjoining the defendant herein from further maintaining or prosecuting said civil actions, and for the specific performance of her contract for a lease. After the entry of this judgment in the equity suit plaintiff commenced the present action for malicious prosecution of said four civil suits by the defendant, and also for the malicious filing and prosecution of a cross-demand by the defendant in the equity case involving the gist of said civil suits. The defendant by her answer in this case specifically denied that the plaintiff had suffered any of her alleged damages by reason of the defendant's malicious prosecution of her former suits, or by reason of the presentation of her cross-demand in the equity case; but the defendant did not, in her answer herein, present, either in form or substance, a plea in bar; that is to say, she did not plead that the plaintiff in this action was barred from maintaining it by the fact of the former adjudication. Notwithstanding this, it is the main contention of the appellant here that the former suit in equity of the plaintiff and the judgment rendered therein were and are a bar to the present action.

[1] We cannot give our support to this contention for two reasons: The first is that if the defendant intended to rely on the judgment in the former action as a bar to the present one, she should have presented a plea to that effect in her answer herein; and her failure to do so must be held to constitute a waiver of that defense. Code Civ. Proc. § 434; Schermerhorn v. L. A. P. R. Co., 18 Cal. App. 454, 123 Pac. 351.

[2] The second and more substantial reason is that the institution and prosecution to judgment of the equity case by plaintiff did not, in our opinion, operate as a bar to the present action. The former action was a suit in equity to compel the specific performance of a contract for a lease, and to restrain the defendant therein from maintaining certain civil suits based upon the attempted repudiation of said contract. The averment in that case of the plaintiff's present and impending damage arising and likely to arise from the further prosecution of said suits was merely incidental to the main relief sought. The plaintiff in that action could not

have joined the present action for the malicious prosecution of said former suits on the part of the defendant for obvious reasons, the chief of which is that a cause of action for the malicious prosecution of other suits cannot arise until the determination of said suits alleged to be maliciously maintained. This condition did not exist until the judgment in the suit in equity had put an end to the further maintenance of said former actions. It is plain, therefore, that the institution of that suit and the judgment obtained therein could not constitute a bar to the present action.

[3] The only other point made by the appellant is that the verdict is against law, because it is in the form of a general verdict in a case in which there are five separate counts. As to the first four counts it may be said that the objection should have been made when the verdict was rendered unless it can be shown that as to any one of these counts it would be an improper verdict. There is no such contention here. The appellant, however, claims that she was entitled to have the jury return a verdict in her favor upon the fifth count or cause of action. The record in that respect, however, shows that the court did not permit the plaintiff to introduce any evidence in support of that count in her complaint; nor was there any such evidence presented in the case; and the court expressly charged the jury that the fifth count was to be eliminated from further consideration, and that they were to disregard it in their verdict. Under these circumstances there can be no presumption that the verdict of the jury was based in any degree upon that count, or that the defendant could, in any way, have been injured by the fact that no separate finding or verdict of the jury was made upon it.

We discover no error in the record.

The judgment and order are affirmed.

26 Cal. App. 318

SLAUGHTER v. GOLDBERG, BOWEN & CO. et al. (Civ. 1228.)

(District Court of Appeal, Third District, California. Jan. 14, 1915. On Petition for Rehearing, Feb. 13, 1915. Rehearing Denied by Supreme Court March 15, 1915.)

1. DEATH 11, 31—ACTIONS FOR WRONGFUL DEATH—RIGHT TO RECOVER.

The action for death is statutory, and the personal representatives of the deceased, being mere trustees for the heirs, cannot maintain it in the absence of heirs.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 10, 15, 35, 37-46, 48; Dec. Dig. 11, 31.]

2. DEATH 49—ACTIONS—COMPLAINT.

A complaint in an action for wrongful death, brought by a personal representative, must allege the existence of heirs, in order to state a cause of action.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 64-66, 69; Dec. Dig. 49.]

3. APPEAL AND ERROR 1170—REVERSAL—TECHNICAL ERROR.

The complaint, in an action by a personal representative for wrongful death of her intestate, did not allege that there were any heirs. Defendant's general demurrer was overruled, and the proof showed that the deceased left heirs. Code Civ. Proc. § 475, requires the disregarding of errors, unless there has been a substantial injury which would probably change the result. *Held*, that the defect was cured by the proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. 1170.]

4. APPEAL AND ERROR 231—OBJECTIONS AT TRIAL—GENERAL DEMURRE—EFFECT.

Where the complaint, in a suit for wrongful death, did not allege there were heirs, a general demurrer does not sufficiently apprise plaintiff of the defect, so as to relieve defendant of the necessity of objecting to evidence of heirship.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. 231; Pleading, Cent. Dig. § 1439.]

5. MUNICIPAL CORPORATIONS 706—STREETS—INJURIES.

In an action for the death of plaintiff's intestate, who, while riding on a bicycle, was run down by defendant's wagon and thrown under the wheels of another vehicle, an instruction that, when vehicles meet, the driver of each must turn seasonably to the right, and that the rule applies when a wagon meets a bicycle, merely declared the statutory law of the road, and could not have been understood by the jury as declaring that in no case would a driver be justified in turning other than to the right.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. 706.]

6. MUNICIPAL CORPORATIONS 705—STREETS—INJURIES—ACTIONS—NEGLIGENCE.

As a general rule, for the driver of a vehicle to violate Pol. Code, § 2931, requiring drivers, when vehicles meet, to turn to the right, is negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. 705.]

7. MUNICIPAL CORPORATIONS 705—STREETS—INJURIES.

Where the driver of a vehicle on the wrong side of the street fails to see a cyclist approaching him in plain view, and runs into him, it is negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. 705.]

8. TRIAL 243—USE OF STREETS—NEGLIGENCE—INSTRUCTIONS—CONFLICT.

In an action for the running down of plaintiff's intestate, instructions that in exceptional cases the driver is justified in violating the rules of the road are not in conflict with plaintiff's instructions announcing the customary rules of the road.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. 243.]

9. TRIAL 296—INSTRUCTIONS—CONSTRUCTION TOGETHER.

No one instruction can declare all the law, and the fact that particular instructions omitted matters presented in others was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. 296.]

10. MUNICIPAL CORPORATIONS $\hookrightarrow$ 705—INJURIES TO PERSONS ON STREETS — PRESUMPTIONS.

A traveler on a street is entitled to presume that a driver will obey the rules of the road.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. $\hookrightarrow$ 705.]

11. MUNICIPAL CORPORATIONS $\hookrightarrow$ 706 — USE OF STREETS — CONTRIBUTORY NEGLIGENCE — ACTS IN EMERGENCIES.

That plaintiff's intestate, in an emergency, chose the more dangerous course in an endeavor to escape, will not preclude recovery for defendants' negligence, as a matter of law, even though intestate was not wholly without fault in getting into danger, but the question of proximate cause is for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. $\hookrightarrow$ 706.]

12. DEATH $\hookrightarrow$ 99—ACTIONS—DAMAGES.

Deceased, who was in good health and was 23 years old, having an expectancy of over 40 years, earned between \$10 and \$16 a week. He contributed his earnings to the support of his mother. *Held*, that an award of \$10,000 in her favor could not, on the face of it, be held excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. $\hookrightarrow$ 99.]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Rhoda R. Slaughter, as administratrix of the estate of George V. Slaughter, deceased, against Goldberg, Bowen & Co. and another. From a judgment against the named defendant, it appeals. Affirmed.

Goodfellow, Eells & Orrick, of San Francisco, for appellant. Henry H. Hart and Aitken & Aitken, all of San Francisco, for respondent.

CHIPMAN, P. J. The action is for damages resulting from the death of plaintiff's intestate, alleged to have been caused by defendants' negligence.

The complaint alleges:

The appointment of the plaintiff as administratrix of the estate of the deceased; that on August 5, 1910, the date of the accident, the deceased was riding his bicycle along a public street in the city of Oakland; that, at the same time, the defendants' wagons were being driven along the same street; and that the driver of the Goldberg, Bowen & Co. wagon "so carelessly and negligently drove and managed said horses and wagon that, by reason of his carelessness and negligence, said horses and wagon struck said George V. Slaughter and his bicycle and overthrew the same, throwing the said George V. Slaughter directly in front of the above-mentioned wagon driven by said employé of the Ransome-Crummey Company, and said employé of said defendant Ransome-Crummey Company so carelessly drove and managed said wagon and draught animals driven by him that the wheels of said wagon so driven by him passed over the body of the said George V. Slaughter."

It is then alleged that, by reason of the matters just stated, the plaintiff, as administratrix, has sustained damages in the sum of \$25,000; and the prayer is that judgment be awarded her for such amount.

Both defendants demurred generally, and

defendant Goldberg, Bowen & Co. demurred specially on the sole ground that it cannot be determined from the complaint "in what defendant's alleged negligence consisted." The demurrers were overruled, and defendant Goldberg, Bowen & Co. answered, denying the averments of negligence, and alleging that plaintiff's intestate was guilty of contributory negligence.

Inasmuch as no verdict was rendered against defendant Ransome-Crummey Co., reference hereinafter will be to defendant Goldberg, Bowen & Co., unless otherwise noted.

The accident occurred at about 10 o'clock on the morning of August 5, 1910, in the city of Oakland. On that morning a heavily loaded wagon belonging to defendant Ransome-Crummey Co. was being driven slowly in a southern direction, towards Oakland, along the westerly or right-hand side of San Pablo avenue, and eight or ten feet from the curb, as testified by the driver of the wagon. A double-track street railroad runs along the middle of this avenue. The distance from this westerly car track to the curb is 24 feet 2 inches. The avenue is 64 feet wide, and is crossed by Isabella street, and Athens street, between which, on San Pablo avenue, the block is 230 feet long. The driver of the Ransome wagon testified that the accident occurred about 150 feet from Athens street. No other team and no cars were passing at the time, and no obstructions of any kind prevented a clear view for the entire block on San Pablo avenue.

Witness Annie Krohne testified:

That she was standing in front of her store on the west side of San Pablo avenue and about 40 feet north from the corner of Isabella street, and was looking north towards Athens street; that she saw the deceased riding on a bicycle about 60 or 70 feet from her and about 4 feet away from the curb and ahead of the Ransome wagon; that, at the same time, defendant's wagon passed her going north near the curb—she thought closer to the curb than the Ransome wagon and "on the same side of the street that the Ransome-Crummey wagon and the boy were. * * * When the Goldberg, Bowen Company wagon passed me going in the direction of the Ransome-Crummey wagon, it went pretty fast. The horses were galloping."

She testified:

"When the Goldberg, Bowen Company wagon reached the place where the boy was riding, I saw one of the Goldberg-Bowen horses touch his bicycle. That threw the boy off under the wheels of the Ransome-Crummey wagon. I saw one of the wheels of the Ransome-Crummey wagon pass over the boy's chest. I ran into the store then."

Witness Emma Bankhead was standing about 25 feet south of Isabella street in front of a plumbing shop on San Pablo avenue. She testified:

That the Goldberg-Bowen wagon came along, San Pablo avenue, turned into Isabella street, and shortly afterwards came back into San Pablo avenue, and "went north on the west side of the street * * * up towards Athens street. Q. Which side of San Pablo street was it? A.

On the wrong side. On the west. The Ransome-Crummey wagon was going toward Oakland on the west side of the street; on the same side with the Goldberg-Bowen Company wagon. I also saw a boy riding a bicycle on San Pablo. He was a little in front of the horses of the Ransome-Crummey wagon, riding at a moderate speed towards Oakland, going in the same direction as the Ransome-Crummey wagon. The Goldberg-Bowen Company wagon hit his wheel. I could not say what part of the wagon hit him."

She testified that she could not say whether it was the horses or the wagon hit the boy but that the bicycle was struck and she saw the boy fall. She testified:

"When I saw the Goldberg-Bowen wagon going up San Pablo avenue, after it came back from Isabella street, just before the boy was struck, it was going fast."

The theory of the defendant was that after its wagon had come alongside of the Ransome wagon, between it and the curb, the boy suddenly came from behind the Ransome wagon and tried to pass between the two wagons, but became confused and ran his wheel into the defendant's wagon, and was thrown under the Ransome wagon. This theory was supported by the testimony of defendant's driver, Bert Call, and some other witnesses, but manifestly was not accepted by the jury. Call testified:

"I first saw the boy when the two wagons were about opposite each other. When I had come in between the Ransome company wagon. I didn't see him when I was out by the track." He was asked how far away from him the boy was when he first saw him. "A. When he was about 100 feet behind the wagon."

He testified:

"He was coming up on the pedals—riding on the pedals, with his head down. He would look down a while, while he was riding, off from the seat, and he would look to see where he was going. When I turned to see how close to the curb I was getting, I was going to stop right there. All of a sudden I seen him dart from behind the Ransome-Crummey wagon; and of course when I saw him coming I saw he was confused. He ran into my wagon, and it threw him under the Ransome-Crummey wagon. I turned around just in time to see the wheel pass over his body."

He testified that he had a delivery to make on Athens street, and he went to the westerly side of San Pablo avenue on his way because he had an inquiry to make on his own account at a furniture store on that side of the avenue. The jury, no doubt, believed that the driver saw the deceased as he testified, but that it was when the deceased was riding his wheel in advance of and not behind the Ransome-Crummey Wagon.

The issues of fact were tried by a jury, and a general verdict rendered in favor of plaintiff against defendant, assessing the damage at \$10,000, and judgment was accordingly entered. A motion for a new trial was denied, and the appeal is from the judgment and order.

[1, 2] Passing the special demurrer without discussion, appellant urges with much confidence that the general demurrer should have been sustained for the reason "that the com-

plaint utterly failed to show the existence of any heirs." That the action for death is statutory, that the personal representative of the deceased is permitted to bring the action merely as a statutory trustee for the benefit of the heirs, and that, in the absence of heirs, no action lies, is not disputed and is well settled. *Munro v. Dredging Co.*, 84 Cal. 522, 24 Pac. 303, 18 Am. St. Rep. 248; *Redfield v. Oakland, etc., Ry. Co.*, 110 Cal. 290, 42 Pac. 822, 1063; *Salmon v. Rathjens*, 152 Cal. 294, 92 Pac. 733. It is equally well settled that the existence of heirs is an essential element in the cause of action for death, and must be alleged in the complaint, failing in which no cause of action would be stated. *Webster v. Norwegian Mfg. Co.*, 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; *Ruiz v. Santa Barbara, etc., Co.*, 164 Cal. 188, 128 Pac. 330. Appellant not only relies upon these propositions, but it contends that, without such averments, the complaint will not sustain a judgment in favor of plaintiff, and furthermore that the defect is not cured by the verdict.

[3] Respondent replies: First, that the complaint, aided by the answer, was sufficient, for the reason that defendant denied that plaintiff had sustained damage "as administratrix or otherwise," thus raising an issue as to plaintiff's having been damaged personally as an heir; that, as no one but an heir can sustain damage, an allegation of damage to plaintiff necessarily implies that plaintiff is an heir, in the absence of a special demurrer; second, that the admission of evidence without objection cured the omission of the allegation. Upon this latter point, plaintiff testified without objection that deceased was her son; that she had a husband, father of deceased; that deceased, at the time of his death, was contributing of his earnings to the support of his parents, and for several years prior thereto had been doing so, and many other facts as to his relationship to the family.

It seems to us that respondent's second point in reply to appellant's contention must be sustained. We have examined the California cases on which appellant relies, and find that in none of them does it appear that proof of the omitted essential averment was made without objection. They are cases in which the question arose on demurrer, plaintiff declining to amend and judgment against him on the demurrer, or cases of appeal on the judgment roll alone, or on judgment upon the verdict where the evidence upon which the verdict was rendered was not brought up or did not affirmatively show that proof of the omitted averment was made without objection. In some of the cases the rule is stated as broadly as contended for, but an examination will show that the facts did not warrant it. The cases cited in the opening brief and relied upon by defendant are *Buckman v. Hatch*, 139 Cal. 55, 72 Pac. 445; *Bane v. Peerman*, 125 Cal. 220, 57 Pac. 885;

Hurley v. Ryan, 119 Cal. 71, 51 Pac. 20; Cameron v. Ah Quong, 8 Cal. App. 312, 96 Pac. 1025; Carpenter v. Sibley, 153 Cal. 215, 94 Pac. 879, 15 L. R. A. (N. S.) 1143, 126 Am. St. Rep. 77, 15 Ann. Cas. 484; Wells Fargo Co. v. McCarthy, 5 Cal. App. 301, 90 Pac. 203; Burke v. Maguire, 154 Cal. 456, 98 Pac. 21; Alexander v. McDow, 108 Cal. 25, 41 Pac. 24.

We do not feel disposed to examine the numerous cases cited by the parties. It seems to us that the reformed procedure would receive a decided shock if a defendant should be permitted to stand by and without objection allow an issue to be tried as though properly presented by the pleadings and on appeal escape the consequences by claiming that the complaint failed to present such issue. If there ever was a case where section 475 of the Code of Civil Procedure was intended to apply, this, it seems to us, is one. In *Texas & Pac. Ry. Co. v. Lacey*, 185 Fed. 226, 107 C. C. A. 332, the action was similar to the one here, and the statute gave the right to the parents only if the deceased left no widow or minor children. The complaint was silent as to the existence of heirs, as is the present complaint. After stating that an amendment would no doubt have been allowed in the lower court had the objection been there presented, the court said:

"The point, if it occurred to counsel—and it probably did not—was held in ambush till the case reached this court, when it came out in the open. We think it is too late to present that defense. * * * If there were no statutes or local decisions to sustain the view, we would hold, nevertheless, that a defendant would not be permitted to successfully urge the alleged defect in this court after entering a general denial and trying the case on the merits in the lower court and having failed to suggest the alleged defect in that court."

[4] Nor do we think it can be said that the general demurrer sufficiently apprised plaintiff of the defect and relieved defendant from the necessity of objecting to the evidence. In *Henderson v. Sizemore* (Ky.) 104 S. W. 722, it was said:

"It would be trifling with justice to hold at this late stage of the proceeding that the judgment should be reversed for the error in failing to sustain a demurrer to the petition. Especially in view of section 134 of the Civil Code of Practice, providing that the court must in every stage of any action disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party."

See *Abner Doble Co. v. Keystone, etc., Co.*, 145 Cal. 490, 495, 78 Pac. 1050; *Carroll v. Briggs*, 138 Cal. 452, 455, 71 Pac. 501.

In the case here the trial proceeded in all respects as though the pleadings sufficiently presented the issue as to there being heirs and precisely as it would had the complaint contained the allegation which it is insisted it should have contained. Why, then, should the case go back to have the complaint amended, as it is manifest that the proofs would be the same? How can it be said that

defendant has sustained "substantial injury and that a different result would have been probable if such error * * * or defect had not occurred"? Code Civ. Proc. § 475; section 4½, art. 6, Const., as recently amended.

[5, 6] Appellant claims error in the giving of plaintiff's instructions numbered XXIII and XXIV on the "law of the road":

"If the driver of the Goldberg-Bowen wagon could have turned seasonably to the right of the center of the highway so as to pass the Ransome-Crummey wagon without interference, and did not do so, he should have done so, so far as the rights of decedent were concerned, and was guilty of negligence toward George V. Slaughter, the deceased, if said Slaughter was then riding on the right of the center of the road.

"The rule that, when vehicles meet, the driver of each must turn seasonably to the right of the center of the highway applies when a wagon meets a bicycle. If the deceased was riding in front of the Ransome-Crummey wagon, and the driver of the Goldberg-Bowen wagon could have turned to the right of the center of the highway when he met him, and did not do so, that in itself was negligence on the part of said driver."

It is contended that these instructions permitted of no excuse or extenuation by defendant, and "in effect told the jury to find the issue of negligence against the defendant, for it was never denied that defendant's wagon was on the left of the center of the street." We do not think the court intended to say that, under all conceivable circumstances, it would be negligence for a vehicle meeting another to turn to the left or omit to turn to the right. Circumstances might be such, as appellant well suggests, when this might cause collision rather than avoid it. What the court intended to say, and what the jury was authorized to interpret the court as saying, was what the statute lays down as the rule:

"When vehicles meet, the drivers of each must turn seasonably to the right of the center of the highway, so as to pass without interference." Pol. Code, § 2931.

It was not intended, nor do we think the jury could have so understood the court, that the failure of defendant's driver to turn to the right determined all questions of negligence against defendant. Other instructions given by the court show plainly that this must be so. Upon the general proposition that a violation of a statutory requirement constitutes negligence, the instructions were correct. Where the plaintiff was injured by a runaway horse, left unfastened in the street in violation of an ordinance, it was said the court might have instructed that the proof established negligence. *Siemers v. Eisen*, 54 Cal. 418. It was said in *Fenn v. Clark*, 11 Cal. App. 79, 81, 103 Pac. 944, 945:

"It has been repeatedly declared by the Supreme Court of this state that the failure to perform a duty imposed by statute or municipal ordinance constitutes negligence."

See *Besee v. L. A. Tr. Co.*, 149 Cal. 131, 139, 85 Pac. 152, 5 L. R. A. (N. S.) 1059.

Instructions were given upon the question

of the alleged contributory negligence of deceased and upon the circumstances immediately attending the accident, showing that all these matters were to be considered by the jury. We do not think there can be any doubt that these vehicles were "meeting," in the sense of the statute. Defendant's wagon was traveling on the same side of the street at a fast gait, in close proximity to and facing the Ransome wagon and the bicycle ridden by deceased.

[7] The jury were authorized to believe that defendant's driver saw deceased and the Ransome wagon as he approached them. If he did not see them it was gross negligence not to have seen them, as he was directly in front of them and on the side of the street which called for vigilance and circumspection on his part.

[8, 9] It is contended that the instructions above referred to were in conflict with certain instructions given at defendant's request. If our view of plaintiff's instructions is correct, we see no necessary conflict between them and defendant's instructions, which informed the jury that the mere fact of passing on the left did not constitute negligence; that a driver may use any part of the street when necessary, and, whether on one side or the other, the question of negligence depends on the circumstances. These directions were favorable to defendant, but the question was still left with the jury whether or not the driver could have turned to the right or was negligent in not turning to the right or in failing to do so or to stop when he saw the position of deceased. It will be observed that plaintiff's instructions relate, at least in part, to defendant's duty toward deceased, whose position, as the evidence warranted the jury in finding, was in the space between the Ransome wagon and the curb or in front of it as defendant approached. As to defendant's criticism that the instructions did not take into account that the question of proximate cause of the injury was involved, this may be said: No single instruction can embody all the law. There were full instructions upon the question of defendant's alleged negligence being the proximate cause of the injury. *Stein v. United Railroads*, 159 Cal. 368, 372, 113 Pac. 663.

[10] Error is predicated of the following instruction numbered plaintiff's XXV:

"If the deceased was behind the Ransome-Crummey wagon and saw the Goldberg-Bowen wagon coming, before it reached the Ransome-Crummey wagon, he had a right to presume that the Goldberg-Bowen wagon would pass to the east of the Ransome-Crummey wagon, provided it was possible for it to do so; and, if he himself attempted to pass the Ransome-Crummey wagon on the west, he is not chargeable with negligence, unless he knew, or should have known, that the driver of the Goldberg-Bowen wagon would not or could not turn to the right. And if deceased was in front of the Ransome-Crummey horses, and saw the Goldberg-Bowen wagon coming, he had a right to

presume that the Goldberg-Bowen wagon would pass to the east of him."

It is claimed that upon the authority of *Hutson v. Southern, etc., Ry. Co.*, 150 Cal. 701, 89 Pac. 1093, this instruction requires a reversal of the judgment. The objection is to the last paragraph of the instruction. We do not see that the case cited is at all controlling in this case. It deals with the case of a driver of a team of horses approaching a railroad track and his duty to stop and listen, even though he does not hear a bell ringing or see the coming cars. The instruction objected to is no more than a statement that the deceased had a right to presume that defendant's driver would obey the law, especially under the circumstances shown, that the deceased was rightfully pursuing his course in a position of safety. The rule as applicable to this case is more correctly given in *Medlin v. Spazier*, 23 Cal. App. 242, 137 Pac. 1078.

[11] Error is assigned in giving the following instruction:

"Plaintiff's VIII. When a person is in imminent danger, he is not called upon to exercise that intelligence and judgment he would be expected to exercise were he not in danger. So if a party in imminent danger has two ways open to him, but has not the time to stop and investigate and determine which is the right or safe way and which is the wrong or unsafe way, his choosing the latter is not, under the circumstances, negligence on his part. So if you should find from the evidence in the case that deceased found himself in imminent danger or had reasonable ground to believe that he was in such danger, and had not time to stop and consider and determine the better course to pursue, then you are instructed that his choosing to turn one way instead of the other in such emergency was not negligence on his part, even though, in so doing, he may have ridden right against the approaching team or wagon instead of away from it."

The criticism is that:

"This rule has no application where the person injured has placed himself in the position of danger; in such case the confusion of mind obviously arises out of his own act."

In *Harrington v. L. A., etc., Ry. Co.*, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85, deceased was admittedly negligent in placing himself in a position of danger, and such also was the situation as to plaintiff in *Kramm v. Stockton Elec. R. Co.*, 3 Cal. App. 615, 86 Pac. 738, 903; *Id.*, 22 Cal. App. 737, 136 Pac. 523. The jury were fully and quite favorably instructed by the court, at defendant's request, upon defendant's theory that deceased "voluntarily placed himself in a point of danger" by riding into the space between the two wagons. The jury, by their verdict, found that this theory was untenable, and that deceased was not in a dangerous position through his own fault. But, had he been, the rule in this state does not preclude recovery. The jury were to decide, in view of all the circumstances, at whose door must rest the charge of proximate cause for the injury.

It is further contended that the instruc-

tions upon the last clear chance doctrine were outside the issues, and therefore erroneous. Under the allegations of negligence found in the complaint and the issues raised by the answer, it was proper, as was done, to inquire into all the circumstances surrounding the accident. Defendant alleged contributory negligence of deceased which presupposed negligence of defendant. *Linthorpe v. S. F. Gas, etc., Co.*, 156 Cal. 58, 66, 103 Pac. 320, 19 Ann. Cas. 1230. The evidence, we think, shows that the instruction was proper. Besides, we cannot see that it was harmful.

There are two other assignments of error which we do not deem of sufficient importance to require notice.

[12] It is finally contended that the verdict of \$10,000 was excessive. Mrs. Slaughter, mother of deceased, and plaintiff, testified:

That he was 23 years old at the time of his death; that he "graduated from the grammar school when he was 15 years old," at Marysville; that he worked after school in the canneries and during vacations; was for two years janitor of the Episcopal Church; worked in a furniture store; agent for the Tribune after they moved to Oakland. "He was my main support." She was asked when he began to work and contribute to the support of the family. "A. Just as soon as he left school, and before he left school he used to deliver papers after school. When he took the papers after school, it was a small amount monthly, but after he quit school, from 16 years on, regularly I could depend on, I had a regular salary, because he was an ambitious boy. He always averaged \$10 and more, never less than \$10 a week. In the cannery, of course, he used to average about \$14 or \$16. The boy's condition of health was fairly well. He was always at home with me. He never was a boy to run around or dissipate or get in bad company. I could depend upon him night and day when he was not at work. He was not married."

It was admitted by defendant that, according to the American table of mortality, the expectancy of life of a person 23 years old is 40.2 years.

There is no evidence, aside from the amount of the damages, from which it can be inferred that the jury were actuated in the slightest degree by passion, prejudice, or by corrupt motives. The amount in itself is not such as "to suggest, at first blush, passion, or prejudice or corruption on the part of the jury." *Hale v. San Bernardino, etc., Co.*, 156 Cal. 715, 106 Pac. 84; *Bond v. United Railroads*, 159 Cal. 286, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. This subject has been so frequently discussed by our appellate courts and under so many different conditions of facts that it would be difficult to throw any additional light upon it. We can discover no rule of law which would warrant our holding the verdict in the present case to be excessive, and we content ourselves with referring to some of the cases, in addition to the two above cited, which we think fully justify our conclusion: *Redfield v. Oak-*

land Con. Co., 110 Cal. 285, 42 Pac. 822, 1063; *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233, 73 Pac. 163; *Skelton v. Pacific Lumber, etc., Co.*, 140 Cal. 507, 74 Pac. 13; *Bowen v. Sierra Lumber Co.*, 3 Cal. App. 313, 84 Pac. 1010; *McGrory v. Pac. Elec. Co.*, 22 Cal. App. 671, 136 Pac. 303.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

On Petition for Rehearing.

PER CURIAM. We are asked to grant a rehearing in order that we may reconsider the single question: Did the evidence that deceased left heirs, offered and admitted at the trial without objection, cure the failure to allege the fact in the complaint? Whatever answer to this question may be found in the decisions of our Supreme and appellate courts (and it must be admitted that in some of them a negative answer finds support), we are satisfied that the rule should be as we have held. If we have erred appellant has a speedy means of redress by petition for hearing in the Supreme Court.

Inasmuch as section 4½, art. 6 of the Constitution, as recently amended, was not referred to in the briefs, and its effect, in cases of this character, has not been passed upon, so far as we are advised, we withdraw the citation and all reference to it as authority for our decision.

The petition is denied.

26 Cal. App. 385

PEOPLE v. CAMP. (Cr. 287.)

(District Court of Appeal, Third District, California. Jan. 21, 1915.)

1. CRIMINAL LAW ⚡507—ACCOMPLICE—CAPACITY—STATUTES.

A boy under 14 years of age, whose assent to the offense of lewd and lascivious conduct with a boy under the age of 14 years, denounced by Pen. Code, § 288, was passive, rather than an intelligent and voluntary choice characterizing actual consent to the crime and criminal participation therein, and as to whose knowledge of its wrongfulness there was no proof, could not be an accomplice, since the statute expressly declares that all persons are capable of committing crimes, except children under the age of 14, in the absence of clear proof, that, at the time of committing the act charged against them, they knew its wrongfulness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082–1096; Dec. Dig. ⚡507.]

2. CRIMINAL LAW ⚡814—PROSECUTION—INSTRUCTION—SUPPORT IN EVIDENCE.

In a criminal prosecution, where there was complete corroboration of the testimony of the prosecuting witness, defendant's requested instruction on the theory that there was no corroboration was properly refused as without basis in the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. ⚡814.]

3. CRIMINAL LAW 476—EVIDENCE—EXPERT TESTIMONY.

In a prosecution under Pen. Code, § 288, for lewd and lascivious conduct with a boy under the age of 14 years, expert medical evidence as to what effect such acts would have in "arousing the feelings or gratifying the lust or passions of sexual desires of the man in the case" was properly admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1062; Dec. Dig. 476.]

4. CRIMINAL LAW 1169—HARMLESS ERROR—ADMISSION OF EXPERT TESTIMONY.

Error, if any, in admitting such expert testimony was without prejudice, where no other inference than the one stated in such testimony could possibly be drawn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. 1169.]

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Charles Camp was convicted of lewdness, and he appeals. Affirmed.

Charles A. Tuttle, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Appellant was convicted, under an indictment, of the offense denounced by section 288 of the Penal Code, of lewd and lascivious conduct with a boy under the age of 14 years. It is not claimed that the evidence is insufficient to support the verdict, or that there was any irregularity in the trial, except in two particulars.

In the first place, complaint is made that the court refused to give the following instructions requested by defendant:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof;" and "you are instructed that (prosecuting witness) is an accomplice in this case, if you believe from the evidence that he consented to the act charged, and in that event his testimony must be corroborated as I have instructed you in the last instruction."

On these proposed instructions the trial court made the following indorsement:

"Refused; no question of accomplice mentioned; not applicable to facts."

[1] There seem to be two sufficient reasons for the action of the trial court. One is that there was no substantial showing that the prosecuting witness was an accomplice. He could not be an accomplice unless he understood and appreciated the wrongfulness of the act and consented to its perpetration. As to his knowledge of the nature of the offense, the law prescribes the same test as it does for a principal. And the statute has provided a rule to be applied to the case of minors as follows:

"Who Are Capable of Committing Crimes. All persons are capable of committing crimes except those belonging to the following classes:

1. Children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness. * * *

The prosecuting witness being under the age of 14, the aforesaid presumption would apply, and "clear proof" that he knew the wrongfulness of the act was required before it could be said that he was an accomplice. Not only is there an absence of such "clear proof," but no attempt seems to have been made to show that he understood the nature of the act. He was not interrogated concerning his knowledge of good and evil or his capacity to discern the moral quality of defendant's said conduct. Neither was any other witness examined as to the mental capacity or moral development of the victim of the outrage. For aught that appears to the contrary, he may have been mentally weak even for one of his age and entirely incapable of distinguishing between right and wrong. At any rate, no showing was made by defendant to rebut the presumption that he was incapable of committing the crime or of being an accomplice in its commission, and therefore neither of said instructions was pertinent to any rational view of the facts in the case. It may be said, also, as to the apparent acquiescence of the prosecuting witness in the lewd act of the defendant, that it appears to have been a mere passive assent rather than an intelligent and voluntary choice that characterizes actual consent to the crime and criminal participation in its perpetration. The difference between these two mental attitudes is clearly set forth in *People v. Dong Pok Yip*, 164 Cal. 147, 127 Pac. 1031, to which reference may be had for a further discussion of the subject.

[2] In addition, it may be suggested that there was complete corroboration of the testimony of the prosecuting witness. Another boy of about the same age testified positively to the lascivious acts set forth in the indictment. He claimed to have been an eyewitness, and upon his testimony alone the jury would have been justified in finding a verdict of guilty. The said instructions were not addressed to the contingency that the testimony of the other witness might be false or unworthy of belief, but they were based upon the hypothesis that the prosecuting witness was not corroborated. He was undoubtedly fully corroborated; hence, in that respect, there was no basis for the theory suggested by said proposed instructions.

[3] The other objection of appellant relates to a question addressed to an expert as to what effect such acts charged against defendant would have in "arousing the feelings or gratifying the lust or passions or sexual desires of the man in the case." This seems to be a matter of expert testimony. A peculiar knowledge of the human system is requisite to answer the question intelligently.

It would be a reflection upon the average and normal man to hold that such expert assistance is not needed. The normal man, it may be assumed, has no such knowledge nor experience as would qualify him to determine, without the aid of an expert, the neurotic or orgastic effect of such indecent acts.

[4] On the contrary, if it should be conceded that the objection to the question addressed to the physician should have been sustained, it would follow that the error was without prejudice, for the reason that we must assume no other inference than the one embraced in said opinion can possibly be indulged. Whether a matter of expert or of common knowledge, in other words, we must hold, there can be no dissent from the conclusion that such acts would have such effect upon the lustful desires of one bestial enough to be guilty of such conduct.

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

26 Cal. App. 413

PEOPLE v. VALENZUELA. (Cr. 358.)

(District Court of Appeal, Second District, California. Jan. 26, 1915.)

1. CRIMINAL LAW §1159 — VERDICT — CONCLUSIVENESS.

A verdict on conflicting evidence, and sustained by evidence and corroborating circumstances, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.]

2. CRIMINAL LAW §1172 — INSTRUCTIONS — REASONABLE DOUBT.

Where the proof of a murder did not rest wholly on circumstantial evidence, but there was an eyewitness testifying to the killing, and the court sufficiently charged as to the effect of circumstantial evidence and gave the long approved instruction on reasonable doubt, refusal to give an elaboration of the general principle in the instruction on reasonable doubt was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.]

3. CRIMINAL LAW §1166½ — MISCONDUCT OF TRIAL JUDGE — INSTRUCTIONS.

The misconduct of the trial judge in so referring to the testimony of a witness as to indicate that in his mind weight should be given to the testimony was not prejudicial, where on objection the court directed the jury not to consider its remarks on the subject.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Epitacio Valenzuela was convicted of manslaughter, and he appeals. Affirmed.

A. Orfila, of Los Angeles, and Finley & Kolb, of Santa Ana, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Appellant was charged with the crime of murder, and upon being found guilty of manslaughter was sentenced to serve a term of 10 years imprisonment in the state prison. He appeals from the judgment and from an order denying his motion for a new trial.

[1] A young man named Delbert D. Wardlow was shot on the evening of March 19, 1914, at the house of appellant at Talbert in Orange county. Several gunshot wounds were inflicted upon his body, after which Wardlow mounted a horse and rode to a nearby store, where he died. Death was caused by the loss of blood from a wound in the thigh where a bullet had severed the femoral artery. Appellant is a Mexican and was engaged as a common laborer near the place of his residence, and occupied a small frame building with his family, which consisted of a wife and children. At his house he served boarders other than members of his family, and also sold liquor to persons who might come there for it. On the date mentioned young Wardlow and a man named Stafford rode up to the house of appellant and purchased some beer, which they drank on the premises. At that time appellant was away at his work and his wife furnished the liquor to Wardlow and his companion. While the two men were still in the house, the father of Wardlow joined them, and together the three drank more beer, which they purchased from the wife of appellant. Toward evening appellant with a man named Vasquez returned to the house. Appellant was well acquainted with the Wardlows, and the men were apparently friends. Young Wardlow, however, sought to quarrel with Vasquez, who was not offending him at the time, and either struck or pushed Vasquez about in the dining room, where the four men then were. Appellant remonstrated with the elder Wardlow, and thereupon the latter became abusive also, but soon desisted from any offensive action. Meanwhile appellant retired to an adjoining room and Vasquez made his way past Stafford, who was holding a door to prevent him from going out of the room. Stafford testified that he heard young Wardlow's voice, as he apparently addressed appellant in the other room, saying to the latter, in substance, "You dare not shoot." Stafford further testified that the two men went outside, young Wardlow following appellant; that he next saw appellant fire twice at Wardlow, and at the same time Vasquez approached from the rear and fired three shots at the deceased; that Wardlow called to the witness and stated that they (meaning the Mexicans) "had got him," and asked Stafford to get his horse. Stafford brought one of the horses to young Wardlow, who mounted the same and rode in the direction of the store, where he died shortly afterward. Appellant, testifying on

behalf of himself, denied that he had fired any shots, but, of course, the question as to the sufficiency of the evidence was a matter solely for the jury to determine in the face of the conflict presented. There was other corroborating evidence, such as the finding of empty cartridge shells in the vault of the water-closet, and testimony that appellant had purchased loaded shells of the same character some days before at the country store.

[2] The claim for reversal hangs upon very slender threads. The argument in support thereof may be briefly summarized and the case as briefly disposed of. The court gave the long-approved instruction upon the question of reasonable doubt, and the mere fact that the defendant's counsel desired an elaboration of the general principle announced therein furnishes no reason for saying that the court committed prejudicial error in refusing to give the additional instruction. The proof of the charge did not rest wholly upon circumstantial evidence, but there was the testimony of an eyewitness as to the killing. However, the court did give sufficient instructions as to the effect of proof of circumstances where such is relied upon in establishing a criminal charge. Taken together, the instructions seem to have very fairly and fully presented all matters of law to the jury which were pertinent to the case and entitled to be considered by them.

[3] Misconduct on the part of the trial judge is charged, but, conceding that there was error in the reference made by the court to the elder Wardlow as a witness, which might be taken as indicating that in the judge's mind weight was to be given to the testimony of the witness referred to, however, when appellant's counsel made objection, the court set aside his ruling upon the objection then under discussion, and directly told the jury that the remarks made by the court were not for their consideration. The conduct of the judge did not amount to prejudicial error. *People v. MacDonald*, 167 Cal. 546, 140 Pac. 256.

We find no error in the record warranting the conclusion that appellant has been prejudiced in his right to a fair and impartial trial.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 392

POST v. BECKER et al. (Civ. 1312.)

(District Court of Appeal, Third District, California. January 23, 1915.)

1. MORTGAGES 408 — FORECLOSURE — WAIVER.

A right to foreclose a mortgage securing all claims of the mortgagee is not waived by action to enforce a materialman's lien not included in the action to foreclose.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1172-1176; Dec. Dig. 408.]

2. MORTGAGES 489 — FORECLOSURE — JUDGMENT.

Where the complaint in foreclosure demanded a judgment for \$3,000 and the bill of particulars and the testimony showed a balance due of \$3,155.45, a finding for \$3,000 was authorized.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1425-1430, 1470; Dec. Dig. 489.]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by Sarah A. Post against Adolph Becker and others, in which T. B. Hubbard filed a cross-complaint. From a judgment for defendant Hubbard on his cross-complaint, defendant Adolph Becker and another appeal. Affirmed.

L. S. Melsted, of San Francisco, for appellants. Beggs & McComish, of San Jose, for respondents.

CHIPMAN, P. J. Plaintiff commenced the action to foreclose a mortgage upon the real property in question, given to secure the payment of a promissory note executed by defendants Beckers to plaintiff. Hubbard was made a party defendant as having an interest in the property. Plaintiff's rights in the action are not disputed and need not be considered. Hubbard answered by way of cross-complaint, seeking to foreclose what he claimed to be a second mortgage upon the property. This document was in form a grant, bargain, and sale deed of the premises, dated October 9, 1905, and was duly recorded, February 10, 1906. It was alleged, in an amended cross-complaint, filed before the trial, that this deed was intended as a mortgage to secure the indebtedness then (at its date) due from the Beckers to the firm of Hubbard & Carmichael Bros.; also to secure Hubbard against any liability that might arise out of a certain bond, in the sum of \$500, given by him as security for Becker in an action about to be commenced by him against one Mrs. Schmidlin, for slander; also to secure all other indebtedness that might thereafter (after October 9, 1905) become due from the Beckers to T. B. Hubbard, or Hubbard & Carmichael Bros.; "that at the time of the filing of this cross-complaint, to wit, on September 6, 1910, there was and still is due, owing, and payable and unpaid from the said Adolph Becker and Amanda Becker, his wife, to the said T. B. Hubbard, the sum of \$3,000." It was further alleged, and the court so found, that the claims of Hubbard & Carmichael Bros. were assigned to Hubbard before the action was commenced. The Beckers answered and alleged that, at the time of the execution of the deed, October 9, 1905, Will M. Beggs was their attorney and also the attorney of Hubbard and Hubbard & Carmichael Bros., and that in his capacity as such attorney he represented to the Beckers that the deed was given as security to in-

dennify Hubbard against any liability under said bond above referred to, in which said suit against Schmidlin the said Beggs was Becker's attorney, and that all liability incurred by Hubbard on said bond has been paid. Section 337 of the Code of Civil Procedure was pleaded in bar of the action, but is not now urged. It was further answered:

"The cross-complainant and Hubbard & Carmichael Bros. have, at different times during two years last past, waived any and all rights they or either or any of them might have had under said alleged mortgage, and said T. B. Hubbard and Hubbard & Carmichael Bros. have, at different times during two years last past, instituted and carried to judgment certain actions in the superior court of the state of California, in and for the county of Santa Clara, for the recovery of certain amounts of money alleged to be due from said Adolph Becker to said T. B. Hubbard and the firm of Hubbard & Carmichael Bros., and that there is now pending in the said superior court of the state of California, in and for the county of Santa Clara, certain actions in which said T. B. Hubbard or the firm of Hubbard & Carmichael Bros. are plaintiffs against said Adolph Becker as defendant for the recovery of certain sums now alleged to be due to said Hubbard & Carmichael Bros. or T. B. Hubbard from said Adolph Becker. That none of the actions mentioned in this paragraph are or were actions to foreclose the alleged mortgage mentioned in said cross-complainant's cross-complaint."

The court made findings that the deed of October 9, 1905, was executed for the purposes alleged in the cross-complaint, and that there remained due and owing to Hubbard the sum of \$3,000, and is not barred by the statute of limitations; that Becker could neither read nor write except to sign his name; that it is not true that the Beckers signed said instrument in complete or any reliance on the statement of Will M. Beggs, but that they, with full knowledge of the contents and purport of said instrument, signed the same to secure T. B. Hubbard and Hubbard & Carmichael Bros. against any indebtedness or loss which might then be, or thereafter become, "due from said Beckers or either of them," to either "T. B. Hubbard or Hubbard & Carmichael Bros."; that "said Hubbard expended \$500 under said bond, no part of which has been paid; that neither T. B. Hubbard nor Hubbard & Carmichael Bros. has at any time waived all or any rights they or either of them might have under said mortgage," or by the institution of any action or actions in said superior court; "that it is true that there are now pending in the superior court of the state of California, in and for the county of Santa Clara, certain actions in which T. B. Hubbard is plaintiff against Adolph Becker and others as defendants for the recovery of certain sums alleged to be due to said T. B. Hubbard from said Adolph Becker; that each of said actions was instituted to foreclose a mechanic's lien upon the property of third parties for materials furnished to Adolph Becker for the improvement of the property of said third parties; that in two of said actions, judg-

ment has been rendered against T. B. Hubbard, and he has recovered nothing in either or any of them; and that neither of said judgments are now final." As conclusions of law the court found that said deed was intended as and for a mortgage to secure the indebtedness referred to in said cross-complaint, of which there remained unpaid the sum of \$3,000, and that cross-complainant is entitled to have said deed foreclosed as a mortgage and the property sold according to law. Judgment passed for cross-complainant accordingly, and the appeal is from this judgment. No motion was made for a new trial.

It is not disputed that the deed of October 9, 1905, was intended as a mortgage. The only question raised at the trial as to the intention of the parties was whether it was given for the sole purpose of securing Hubbard against any liability that might arise upon the indemnity bond given by him for \$500, or whether it was to secure the indebtedness of Becker to Hubbard and to Hubbard & Carmichael Bros. then due or to become due. Becker testified that the deed was given for the purpose first above mentioned and no other; that he did not read the deed, for he could neither read nor write, except to write his own name, and that it was not read over to him; that it was prepared by Attorney Beggs, who was then the attorney of both parties. On the other hand, Mr. Beggs testified that while he did not read it to Becker and his wife, he did, however, fully explain to them that the deed was to be given as security covering the indemnity bond and also the claims of Hubbard and Hubbard & Carmichael Bros., to whom Becker was then indebted and with whom he was doing business and expected to incur other indebtedness. It was shown that subsequently, to wit, on February 12, 1906, Becker and his wife signed a written agreement in which it was stated that the real property was conveyed "as security for the sums which the parties of the first part [Becker and wife] or either of them may now owe to either the said T. B. Hubbard or Hubbard & Carmichael Bros., it being understood and agreed that the said T. B. Hubbard shall have a lien upon the said real property for such sums owing to either himself or the said Hubbard & Carmichael Bros." There were circumstances shown also which tended to justify the finding of the court upon this issue of fact. The deed was made to T. B. Hubbard as grantee. The indebtedness claimed by cross-complainant was fully shown, and consisted of a promissory note and book accounts aggregating a balance of \$3,000, as found by the court, including \$500, which Hubbard paid under the indemnity bond. It appeared by the evidence that certain actions had been commenced by Hubbard to enforce a materialman's lien for materials furnished Becker by Hubbard & Carmichael Bros. in constructing certain buildings, and that the

deed was intended to include these as well as other claims. It also appeared that in two of these cases judgment was against Hubbard, and the third had not reached final judgment.

[1] Appellants' contention is that the commencement of these actions operated as a waiver of the right to foreclose the mortgage on any of the claims intended to be covered by the deed given as a mortgage (citing section 726, Code Civ. Proc., and Commercial Bank v. Kershner, 120 Cal. 495, 52 Pac. 548). If the foreclosure action, as presented by the amended cross-complaint, had included the claims in the lien actions above referred to, and if Hubbard had recovered judgment in the latter actions, appellants' point might find support in the case cited. But the bill of particulars, showing the items of Hubbard's claims, as alleged in the amended cross-complaint, does not include the claims previously included in the actions to enforce certain liens. As we understand the evidence, the actions commenced to enforce mechanics' liens related to claims omitted from the amended cross-complaint, although they were secured by the deed given as a mortgage. The doctrine discussed in the case cited does not therefore apply to the claims now involved. The fact that the deed was given to secure *all* of the Hubbard and Hubbard & Carmichael Bros. claims would not prevent their proceeding to foreclose the mortgage as to claims not involved in any of the actions previously commenced. Furthermore, in two of those actions, judgment went against Hubbard, and in the third no final judgment has been rendered.

[2] Appellants say, in concluding their brief: "How the amount of Becker's liability was fixed at \$3,000 defies all mathematics." The amended cross-complaint asked for a judgment for \$3,000. The bill of particulars in support of the claim and testified to by witnesses as showing the balance due from Becker totaled \$3,155.45. This justified a finding in favor of cross-complainant for \$3,000, which was all he prayed for, and probably it was all the court felt authorized to award on the pleadings.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

26 Cal. App. 397

DEYOE v. PAONESSA. (Civ. 1511.)

(District Court of Appeal, Second District, California, Jan. 23, 1915.)

BROKERS $\hookrightarrow$ 43 — RIGHT TO COMPENSATION — CONTRACTS IN WRITING — STATUTES.

Under Civ. Code, § 1624, subsec. 6, providing that "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" shall be invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent, an oral contract for the sale of street

improvement contracts to enable the contractor to obtain money was a contract for the sale of personalty, and valid; and the circumstance that the principal subsequently accepted real property in consideration of the contracts did not change the terms of plaintiff's employment.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. $\hookrightarrow$ 43.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Augusta E. Deyoe, as executrix, etc., of C. P. Deyoe, against George C. Paonessa. From an order denying a new trial, plaintiff appeals. Reversed, with directions.

Murphey & Poplin, of Los Angeles, for appellant. George H. Kelch, of Los Angeles, for respondent.

CONREY, P. J. The appellant C. P. Deyoe having died pending this appeal, the present appellant has been substituted in his place as plaintiff and appellant. The appeal is from an order denying plaintiff's motion for a new trial.

The second count of the complaint alleges that the plaintiff, at the special instance and request of the defendant, rendered services to the defendant in procuring for the defendant a purchaser for certain personal property amounting in value to the sum of \$20,000, and that for said price defendant sold, traded, and exchanged said property to a purchaser, and in consideration thereof the defendant agreed to pay plaintiff a commission, which amounted to the sum of \$1,000. The answer denies these allegations, "except as hereinafter alleged," and then sets forth that the alleged agreement "was one purporting to authorize or employ the plaintiff as a broker to purchase real estate for a compensation; that said alleged agreement is not, and was never, in any writing subscribed by the defendant or his agent, and that there is not now, nor was there ever, any note or memorandum thereof subscribed by defendant or by his agent; that said alleged agreement is invalid under section 1624, subsec. 6, of the Civil Code." The plaintiff was engaged in the business of buying and selling real estate on commission, and it was a part of his business to sell stocks and bonds on commission. The defendant, being the owner of certain street improvement contracts on which he was to receive money thereafter to become due, informed plaintiff that he had this amount of \$20,000 in contracts, and that he would like to make some sort of a deal whereby he could get the money, and orally promised to pay the commission. After sundry negotiations, which are described in the evidence, the plaintiff brought about a transaction whereby the defendant received certain real property in exchange for said contracts. The transaction was based upon the stated valuation of \$20,000 for the contracts. These facts being in evidence, the court granted defendant's motion for a nonsuit on

the ground that the evidence "failed to substantiate the allegations contained in the complaint." According to the provisions of section 1624 of the Civil Code, subdivision 6, "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is included among the contracts which are invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent. It must be conceded that the oral agreement shown by the evidence is enforceable unless it comes within the classification of subdivision 6 as above quoted. The evidence clearly tends to show, however, that the employment of the plaintiff was for the selling of personal property and not for the purchase of the real estate. When the contract of employment was made, the expressed desire of the defendant was to sell his contracts for money, or to exchange them for any kind of property acceptable to him. The circumstance that subsequently he did accept real property as a consideration in disposing of the contracts did not change the terms or nature of plaintiff's employment. It is conceded that the evidence was sufficient to sustain the findings of the court on the allegations of the first cause of action stated in the complaint. The court erred in granting the motion for nonsuit as to the second cause of action.

The order denying plaintiff's motion for a new trial is reversed, with directions to the lower court that the action be tried anew with respect to said second cause of action.

We concur: JAMES, J.; SHAW, J.

26 Cal. App. 400

ASHCROFT ESTATE CO. v. NELSON et al.
(Civ. 1435.)

(District Court of Appeal, First District, California. Jan. 25, 1915. Rehearing Denied by Supreme Court March 25, 1915.)

CHATTEL MORTGAGES ⇨255—FORECLOSURE—RIGHT TO MAINTAIN ACTION—"ACTION FOR THE RECOVERY OF ANY DEBT."

Under Code Civ. Proc. § 726, providing that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage on real or personal property, a lessor who had recovered a judgment in unlawful detainer for restitution of the premises, forfeiture of the lease, and for the rent due, might maintain an action to foreclose a chattel mortgage given by the tenant to secure performance of the covenants and conditions of the lease, and containing an express waiver of any defense as to plaintiff's right to maintain such action; since the action of unlawful detainer was to recover possession of real property, the part of the judgment forfeiting the lease and awarding damages being incidental, and was not an "action for the recovery of any debt," and since the former judgment could not affect the issue in the foreclosure suit.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 517; Dec. Dig. ⇨255.]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by the Ashcroft Estate Company against August Nelson and others, and William Henderson, sued as John Doe, who filed a cross-complaint. Judgment for plaintiff, and from the judgment and an order denying a new trial, Henderson appeals. Judgment and order affirmed.

J. G. Reisner, of San Francisco, for appellant. Frank J. Hennessy, of San Francisco, for respondent.

PER CURIAM. This is an action to foreclose a chattel mortgage. The plaintiff and defendants were respectively lessor and lessees of premises under a written instrument for the performance of the conditions of which the chattel mortgage was given as security. The defendant W. Henderson, who is the appellant here, held a second mortgage on the personal property forming the subject of the chattel mortgage involved in this action. The court gave judgment foreclosing both chattel mortgages, and found that appellant's mortgage was subordinate to that of the plaintiff. The appeal is from the judgment and from the order denying appellant's motion for a new trial.

The sole question in this case is whether a lessor may maintain an action for the foreclosure of a chattel mortgage given to secure the faithful performance of the covenants and conditions of a lease, where prior to the institution of such action the lessor has recovered a judgment in an unlawful detainer proceeding for restitution of the premises, forfeiture of the lease, and for the sum of \$416, the actual amount due for the rent of the premises involved, and where this breach of the lease, viz., the nonpayment of rent, is the basis of both actions.

Section 726 of the Code of Civil Procedure provides, in part, that:

"There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property."

If the unlawful detainer action may be regarded as one for the recovery of a debt, then plaintiff, under this section of the Code, must be held to have waived the security of the chattel mortgage. It seems clear, however, from the authorities, that an action of unlawful detainer must be regarded as having for its purpose primarily the recovery of the possession of real property, and that the part of the judgment recovered therein declaring the lease forfeited and awarding damages is merely incidental, so that such action cannot be classed as one for the recovery of a debt. *Toplitz v. Standard* (App.) 143 Pac. 52; *Arnold v. Krigbaum*, 146 Pac. 423, decided by the Supreme Court January 19, 1915. The right's determined in an unlawful

detainer suit are entirely different from those litigated in a suit to foreclose a chattel mortgage; and, as both remedies may not be embraced in one action, it would seem to follow that separate actions to enforce the different rights may be maintained. Especially is that true in this case; for here the mortgagor in express terms in the mortgage waived the very defense here interposed. In the case of *Ely v. Williams*, 6 Cal. App. 455, 92 Pac. 393, the chattel mortgage by its terms gave to the mortgagee the right to take possession of the mortgaged property upon default in the payments therein provided to be made; and the court held:

That a prior action to foreclose the mortgage was not a bar to an action in claim and delivery; that the provisions of section 726, Code of Civil Procedure, "must be construed to have reference to the enforcement of those rights only which are necessary to the recovery of the debt and the foreclosure of the lien given to secure it, and not to any collateral contract in the mortgage which does not affect the interests of the parties in the mortgaged property."

Continuing, the court says:

"The judgment in the replevin action will in no way affect the issues tried in the foreclosure proceeding, and, if in favor of the plaintiff, will only operate to aid in the proper execution of the decree rendered in that proceeding."

The same in a measure is true here. The judgment in the unlawful detainer action can in no way affect the issue in this case, and will operate only as an aid in compelling performance of the covenants of the chattel mortgage. In that case, too, as in this, the defense interposed was waived by express provision of the chattel mortgage. Other cases bearing on the point are *Schehr v. Berkeley et al.*, 166 Cal. 157, 135 Pac. 41; *Harper v. Gordon*, 128 Cal. 489, 61 Pac. 84; *Ludlum v. Rothschild*, 41 Minn. 218, 43 N. W. 137; *Mohegan Athletic Club v. Eberhart* (Sup.) 135 N. Y. Supp. 1093.

The judgment and order are affirmed.

26 Cal. App. 413

PEOPLE v. WEBBER. (Cr. 561.)

(District Court of Appeal, First District, California. Jan. 26, 1915.)

1. HOMICIDE — 300 — SELF-DEFENSE — EVIDENCE — INSTRUCTIONS.

Where accused showed that decedent was the aggressor, and made an unlawful assault on him such as to put him, as a reasonable man, in fear of his life, or great bodily harm, the court should charge that, if the jury believed the evidence, accused was not bound to retreat, but could stand his ground, and a charge that, if accused could have withdrawn from the danger, it was his duty to retreat, and that between his duty to flee and his right to kill he must retreat, was insufficient, especially where accused was on his own premises.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. —300.]

2. HOMICIDE — 117 — SELF-DEFENSE — DUTY TO RETREAT.

Though a killing must be under an absolute necessity actual or apparent to show self-de-

fense, yet, as a matter of law, the necessity exists when an innocent person is placed in such sudden jeopardy as to put him, as a reasonable man, in fear of his life or of great bodily harm, in which case his right to stand his ground is an element of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 164-167; Dec. Dig. —117.]

3. WITNESSES — 372 — CROSS-EXAMINATION — BIAS.

The court may permit on the cross-examination of a state's witness a question asked to call the jury's attention to the bias of the witness, though it assumes an immaterial fact.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. —372.]

4. WITNESSES — 372 — CROSS-EXAMINATION — BIAS.

Question asked a state's witness as to whether since the offense he had not stated to different people that accused ought to be hung is not objectionable as calling for the impeachment of the witness without a foundation being laid therefor, but is proper to show bias of the witness, if answered in the affirmative, and, if answered in the negative, accused is bound thereby, unless a proper impeaching question is asked.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. —372.]

Appeal from Superior Court, Fresno County; *Geo. E. Church*, Judge.

Nicolas Webber was convicted of manslaughter, and he appeals. Reversed and remanded for new trial.

Johnston & Jones, of Fresno, for appellant. *U. S. Webb*, Atty. Gen., and *John H. Riordan*, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged by information with the crime of murder. He was convicted of manslaughter, and sentenced to ten years' imprisonment. The appeal is from the judgment and from the order denying defendant's motion for a new trial.

[1] The testimony in this case introduced on behalf of the defendant tended to show that the deceased was the aggressor, and made an unlawful assault upon the defendant of such a character as to put him, as a reasonable man, in fear of his life or of great bodily harm. The jury should therefore have been instructed, as requested, that, if they believed this evidence, the defendant was not bound to retreat, but that he had a lawful right to stand his ground. The only instruction given on the subject, however, was as follows:

"If he [defendant] could have withdrawn from the danger, it was his duty to retreat. Between his duty to flee and his right to kill, he must fly, or, as the books have it, he must retreat to the wall."

This was part of the instruction on the subject of self-defense, and the instruction in full is precisely the same as that given in the case of *People v. Lewis*, 117 Cal. 186, 191, 46 Pac. 1088, 59 Am. St. Rep. 167; and there, on account of the part here quoted, it was held to be error which must have resulted in

prejudicial injury to the defendant. In that case the court said:

"In *People v. Hecker*, 109 Cal. 451 [42 Pac. 307, 30 L. R. A. 403], where the right of self-defense is considered at some length, it is pointed out that our law nowhere imposes the duty of retreat upon one who without fault himself is exposed to a sudden felonious attack, and that the duty of withdrawal or retreat is imposed upon him alone who is the first aggressor, or who has joined in a mutual combat; and it is further said that, while at common law there was a contrariety of opinion upon the part of the writers as to the duty of retreat, which contrariety has found its way into the differing decisions of our state courts, this state has upheld a defendant's right to stand his ground and meet by force a sudden and violent attack."

[2] So that, while the killing must be under an absolute necessity, actual or apparent, as a matter of law, that necessity is deemed to exist when an innocent person is placed in such sudden jeopardy. The right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense. It may be added that the defendant in this case, as in the case of *People v. Lewis*, was upon his own premises.

In the case of *People v. Maughs*, 149 Cal. 253, 259, 86 Pac. 187, 190, the court gave the following instruction:

"No man has a right to kill another in self-defense unless such killing is really or apparently necessary for such defense. Before a person can justify taking the life of a human being on the ground of self-defense, he must, when attacked, employ all reasonable means within his power, consistent with his safety, to avoid the danger and avert the necessity for the killing."

Commenting upon this instruction the higher court said:

"No exposition is necessary to show that the giving of this instruction, which imposed upon the defendant the duty of flying, and forbade him the right to stand his ground, was error and of such gravity as to demand a reversal."

In the *Maughs Case* the man who was killed was in his own house, and the defendant was an employé, so that it follows that no matter where a person may be, if he has a right to be there, if he is wrongfully attacked he may stand his ground, and in necessary self-defense slay his assailant where, as a reasonable man, he has grounds to apprehend he is in danger of losing his life or suffering great bodily injury at the hands of his assailant. This doctrine is also announced in the following cases: *People v. Baldocchi*, 10 Cal. App. 42, 101 Pac. 28; *People v. Cytz*, 11 Cal. App. 702, 106 Pac. 257.

That the error was prejudicial in this case is emphasized by the fact that the prosecution, it appears, tried the case in part on the theory that it was the duty of the defendant to flee, even if the deceased was the aggressor.

[3, 4] Carl Paaske, the principal witness for the prosecution, was asked on cross-examination a number of questions, which were intended to show hostility on his part to the defendant. It is elementary that the

defendant was entitled to ask such questions; and it was a matter of no little consequence to him to bring out the fact, if it were a fact, that the witness was biased and prejudiced against him, in order that the jury in weighing his testimony might take that circumstance into consideration. *People v. Thomson*, 92 Cal. 506, 28 Pac. 589. Objections to those questions were sustained on the ground, as to one of them, that it assumed a fact not in evidence, and, as to the others, they were impeaching questions, and, being such, that no foundation was laid.

As to the first of these objections, we do not see that the question to which it was directed was open to this objection, but, even if it were, the fact assumed was wholly immaterial, and has no bearing on the issues of the case; and, as the sole purpose of the question was to call the attention of the jury to the bias of the witness, we think the question might well have been permitted. As to the other objection, it is true that the question did not include the circumstances of time, place, and persons present. But it does not appear that it was intended to be an impeaching question. The witness might have answered in such a way as to show animus to the defendant. For example, to the last of these questions, "Now, isn't it a fact that since this shooting occurred you have stated to different people out there in the neighborhood, referring to Mr. Webber [the defendant], that 'the damned son of a bitch ought to be hung'?" the witness might have answered in the affirmative. Defendant's counsel might have been satisfied with such answer as proving their contention of bias. On the other hand, the witness might have answered, "No," and the defendant would then be bound by the answer owing to the form of the question, unless followed by a proper impeaching question.

It was error to exclude the proffered testimony. In *People v. Jones*, 160 Cal. 358, 117 Pac. 176, a witness had testified that he did not know a man when he fell, but did know him when he arose, and was asked this question:

"Did you not testify that you did not know the man until later at the preliminary examination?"

An objection was made that no foundation was laid, and the objection was sustained. In considering this the court says:

"A misconception seems to exist upon the subject of the permissibility of inquiries such as this. To such a question the objection here stated is usually interposed, and usually the objection is sustained upon the ground that the question is intended to impeach, and, being intended to impeach, the 'proper foundation' of time, place, circumstances, and persons present is not laid, because these matters have not been called to the attention of the witness. It is true that, when a question is asked for the purpose of impeachment, its 'foundation' must be laid, to the end that the witness' attention may be called to every circumstance which will tend to refresh his memory and prevent him from falling into error. But it by no means

follows that every such question is, or is meant to be, an impeaching question. Frequently such questions may be properly asked upon collateral matters where the answer would bind the questioner without right to impeach. Frequently they are designed to test the recollection of the witness, and frequently, as in the instance before us, the question is proper, though ultimately, and according to the answer which may be made, it will or will not be followed by a strictly impeaching question. Thus it was proper to ask the witness if he had so testified. His answer might have been that he did not, when an impeaching question would properly follow. His answer might have been that he did so testify, with explanation of the variance between his answers, in which case no impeaching question would be necessary; and it is an unwarranted curtailment of legitimate cross-examination to exclude such questions, as was here done, upon the ground that they are necessarily impeaching questions and the proper foundation for them had not been laid." *People v. Brilliant*, 58 Cal. 214, 217; *People v. Hart*, 153 Cal. 261, 94 Pac. 1042; *People v. Jones*, 160 Cal. 358, 117 Pac. 176; *Doudell v. Shoo*, 20 Cal. App. 424, 129 Pac. 478; *People v. Costa*, 142 Pac. 508.

For the errors above pointed out, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: LENNON, P. J.; RICHARDS, J.

26 Cal. App. 403

PISTOLESI v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 1587.)

(District Court of Appeal, First District, California. Jan. 25, 1915.)

1. JUSTICES OF THE PEACE ⇐167—APPEAL—DELAY IN PROSECUTING—DISMISSAL.

Code Civ. Proc. § 890, subd. 1, providing that judgment of dismissal without prejudice to a new action may be had when the plaintiff voluntarily dismisses the action before it is finally submitted, or fails to prosecute the action to judgment with reasonable diligence, provided a counterclaim has not been made, or affirmative relief sought, etc., does not apply, where petitioner was sued in a justice's court and set in judgment, and appealed to the superior court, which denied his motion to dismiss for want of prosecution, after answer was filed, to give the appellate court jurisdiction to issue a writ of mandate to force the superior court to such action, the statute applying to an action pending in the justice's court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 647-651, 654; Dec. Dig. ⇐167.]

2. JUSTICES OF THE PEACE ⇐167—DISMISSAL—DELAY IN PROSECUTING APPEAL.

Whether an action pending on appeal to the superior court from the justice's court shall be dismissed for lack of diligence in its prosecution does not depend on what the law is as to actions pending in the justice's court, but must be determined under Code Civ. Proc. § 980, prescribing the powers of the superior court on appeal.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 647-651, 654; Dec. Dig. ⇐167.]

3. JUSTICES OF THE PEACE ⇐167—DISMISSAL—DELAY IN PROSECUTING APPEAL—STATUTE.

Code Civ. Proc. § 583, providing that any action commenced shall be dismissed by the court in which the same shall have commenced,

or to which it may be transferred, on motion of the defendant after due notice to the plaintiff, or by the court of its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, etc., is not applicable to a case where defendant in a justice's court appealed from an adverse judgment to the superior court, and the plaintiff failed for more than five years to prosecute the appeal or bring it on for trial after answer, the action having been neither commenced in, or transferred to, the superior court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 647-651, 654; Dec. Dig. ⇐167.]

4. JUSTICES OF THE PEACE ⇐167—DISMISSAL—DELAY IN PROSECUTING APPEAL—POWER OF SUPERIOR COURT.

Where defendant, after an adverse judgment in a justice's court, appealed to the superior court, and eventually moved such court for dismissal of the action for plaintiff's failure to prosecute it or bring it on for trial for more than five years, the superior court could resort to its inherent power to pass on the motion to grant or deny it without the aid of statutory authority.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 647-651, 654; Dec. Dig. ⇐167.]

Petition for writ of mandate by G. Pistolesi against the Superior Court of the City and County of San Francisco and others. Writ denied.

O. F. Meldon and L. C. Pistolesi, both of Sausalito, for petitioner. Samuel M. Samter, of San Francisco, for respondents.

KERRIGAN, J. This is a petition for a writ of mandate to compel defendants to dismiss an action pending in said superior court. The sole question involved is: Does section 583 of the Code of Civil Procedure apply to actions pending in the superior court on appeal thereto upon questions of fact from the justice's court?

The essential facts are these: On the 22d day of November, 1904, the action out of which this proceeding grows was commenced. Within the time prescribed by law the answer of the defendant therein was filed, and on the 2d day of May, 1905, judgment was rendered in favor of the plaintiff therein, W. P. Johnson, against the defendant, G. Pistolesi (who is the petitioner here), for a certain sum, together with interest and costs. From that judgment Pistolesi perfected an appeal to the superior court, stating that such appeal was taken upon questions of both law and fact; and the papers in the action were accordingly, as required by law, transmitted to the superior court. The case has never been tried in the superior court, and on the 27th day of December, 1913, the defendant, Pistolesi, served the plaintiff, Johnson, with a notice that he would move the superior court for an order dismissing the action because of the plaintiff's failure for more than five years to prosecute it or bring it on for trial after answer filed. This motion was made and denied.

It is conceded that, if the superior court was vested with discretion as to whether or not the motion should be granted, this court cannot interfere with that court's conclusion. But it is claimed by petitioner, as before stated, that, more than five years having elapsed after the commencement of the action, the mandatory provision of subdivision 2 of section 583 applies, and that therefore the superior court should have dismissed the action. Respondent, on the other hand, insists that section 583 is inapplicable to a case brought to the superior court on appeal from a justice's court, and that the granting or denying of a motion to dismiss such appeal, when it is taken on questions of both law and fact, is a matter resting within the sound discretion of the superior court, citing subdivision 1 of section 890 of the Code of Civil Procedure.

[1] We think that neither this subdivision nor section 583 is applicable to this case. The former provides when a justice's court may dismiss an action pending before it for failure to prosecute the same to judgment, and makes the granting or denying of the motion a matter of discretion. We think this section applies to an action pending in the justice's court, and not to an appeal pending in the superior court in such an action.

[2] The case of *Hubbard v. Superior Court*, 9 Cal. App. 166, 98 Pac. 394, is not in conflict with this position. There the summons had not been served within three years after the action was commenced; and all this court held was that the subdivision of section 581 of the Code of Civil Procedure, which is now section 581a of that Code, did not apply to actions commenced in the justice's court, but that the case was controlled by section 890. Whether or not an action pending on appeal to the superior court shall be dismissed for lack of diligence in its prosecution does not depend upon what the law is as to actions pending in the justice's court (section 980), and there is nothing in the case referred to holding to the contrary.

[3] Nor do we think section 583, Code of Civil Procedure, is applicable to this case. It reads as follows:

"* * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motions of the defendant, after due notice to the plaintiff or by the court of its own motion, unless such action is brought to trial within five years after the defendant has filed his answer. * * *"

This action was not commenced in the superior court, nor can it be regarded as having been "transferred" to that court "on motion of the defendant"; the latter language aptly describing only an action transferred to a court of identical jurisdiction in another county.

[4] Although it appears to us plain that neither of the sections referred to applies to

this case, the superior court could yet, as it did, resort to its inherent power to pass on the motion and grant or deny it. "It is settled by numerous decisions in this state that the superior court, without the aid of statutory authority, has the power to dismiss an action because of the failure of the plaintiff to prosecute it with reasonable diligence." *Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002. There it was held that, if only a demurrer, and not an answer, was filed, the provisions of section 583, Code of Civil Procedure, did not apply, but that the court under its general jurisdiction might dismiss the action for failure to prosecute it with reasonable diligence, and would be limited in so doing only by a sound discretion.

The court in the present case denied the motion; and it is not claimed, if this is a case for the exercise of discretion, that there has been any abuse thereof.

It follows from what has been said that the writ should be denied; and it is so ordered.

We concur: LENNON, P. J.; RICHARDS, J.

26 Cal. App. 406

PEPPER v. VEDOVA. (Civ. 1445.)

(District Court of Appeal, First District, California. Jan. 25, 1915.)

1. CANCELLATION OF INSTRUMENTS $\S$ 37—RESCISSION FOR FRAUD—INTENT—PLEADINGS.

In an action to rescind a sale on the ground of fraud, where the complaint averred that misrepresentations concerning the essential qualifications of the chattels sold were false, were known to be false by the vendor, and were willfully, falsely, fraudulently, and deceitfully made, sufficiently charges an intent to defraud the person to whom they were made, and who relied upon them.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. $\S$ 66-80; Dec. Dig. $\S$ 37.]

2. CANCELLATION OF INSTRUMENTS $\S$ 53—RESCISSION FOR FRAUD—INTENT—FINDINGS.

In an action to rescind a sale of horses for fraud and misrepresentations, a finding of the court, which set forth specifically the representations, recited the elements of their falsity, and then stated that such representations were willfully, falsely, and fraudulently made, sufficiently responded to the issue of fraud, as presented by the case.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. $\S$ 109-111; Dec. Dig. $\S$ 53.]

3. SALES $\S$ 120—BREACH OF WARRANTY—STATUTE.

Under Civ. Code, $\S$ 1786, providing that breach of warranty entitles the buyer to rescind a contract of sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition, the question may be determined by the essential nature of the warranties themselves, and if the false representations went to the essence of the value of the property the warranty was an essential condition to the sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. $\S$ 294; Dec. Dig. $\S$ 120.]

4. SALES — 120 — RESCISSION — BREACH OF WARRANTY — SALE OF HORSES.

Where the warranty was that a pair of farm horses were a well-matched team, would work together under harness for farm work, were not balky, had no bad habits, and were physically sound and without fault, blemish, disorder, or disease, the warranty was such in its nature as to form a condition of the contract, justifying rescission for breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 294; Dec. Dig. — 120.]

5. SALES — 38 — BREACH OF WARRANTY — RESCISSION — GROUNDS — KNOWLEDGE OF VENDOR.

Under Civ. Code, § 1786, providing that a breach of a warranty entitles the buyer to rescind a contract of sale, but not an executed sale, unless the warranty was intended to operate as a condition, whether the seller knew the falsity of his representations, or intended to commit a fraud in making them, is immaterial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65-77, 85; Dec. Dig. — 38.]

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by Lewis G. Pepper against G. Vedova. Judgment for plaintiff, and defendant appeals. Affirmed.

Martinelli & Greer, of San Rafael, for appellant. Frederick L. Berry, of San Francisco, for respondent.

PER CURIAM. This is an action to rescind a contract for the purchase of a team of horses. The plaintiff alleges that the defendant willfully, falsely, fraudulently, and deceitfully stated and represented to the plaintiff the said team of horses of which he was then and there possessed "to be a well-matched team, to work together under harness for wagon and general farm work, not balky, no bad habits, physically sound and without fault, blemish, disorder, or disease"; that the plaintiff, not being a horseman, nor experienced in horses or in their purchase, relied and depended upon the defendant's aforesaid representations, knowing nothing to the contrary regarding said team; that the representations of the defendant were false in a number of essential particulars set forth in the complaint, of all of which the defendant had full knowledge at the time the representations were made. The complaint was otherwise sufficient in point of form as to the requisites of an action for rescission. The defendant did not demur to the complaint, but answered, specifically denying its averments, and the cause went to trial upon the issues thus presented.

The court found that the defendant, being possessed of the team of horses, "willfully, falsely, and fraudulently stated and represented said team to be then and there a well-matched team, to work together under harness, a true pulling team under harness for wagon and general farm work, not balky, and physically sound, no bad habits, without fault, disorder, or disease." The court also found that the plaintiff had relied upon

these representations of the defendant, and had been deceived thereby in purchasing said team, and also specifically found that the horses were defective in the particulars set forth in the complaint, and judgment was thereupon rendered in favor of the plaintiff for the rescission of the sale. The appeal is from this judgment, and is presented upon the judgment roll alone.

The two main contentions of the appellant are: First, that the complaint is insufficient in the respect that it does not contain an allegation that the representations of the defendant upon which the plaintiff relied were made by the defendant with intent to defraud; and, second, that the findings do not respond to the issue of fraud presented by the pleadings in the respect that they do not set forth the facts constituting the fraud.

[1, 2] We do not think that the contention of the appellant in either of these respects can be sustained. The case as presented by the pleadings has two aspects. It may be treated as an action to rescind a contract on the ground of fraud; and viewed from this aspect we think that a complaint which avers that representations, such as those made respecting the essential qualities of the property involved in this action, were false and were known to be false by the persons making them, and were willfully, falsely, fraudulently, and deceitfully made, sufficiently avers an intent to defraud the person to whom they were made, and who relied upon them in purchasing the property. *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011. We think, also, that the findings in the case, viewed from this aspect, which set forth specifically the representations made, and also specifically recite the elements of their falsity, and which then proceed to find that these representations were willfully, falsely, and fraudulently made, sufficiently respond to the issue of fraud presented by this aspect of the case.

[3-5] The other aspect in which the pleadings present this cause is that of an action to rescind a contract for the breach of an essential warranty as to the quality of the property sold. Viewing the case from this aspect, the complaint and findings amply set forth the specific terms of the warranty, the fact of its falsity, and the specific nature and extent of its breach. The contention of the appellant that an action cannot be brought to rescind an executed contract for the breach of a warranty of the kind in question here, under the terms of section 1786 of the Civil Code, cannot, we think, be sustained. That section of the Code provides that:

A "breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition." Civ. Code, § 1786.

Whether the parties to an executed contract of sale intended that its warranties

should operate as a condition may be determined from the essential nature of the warranty; and if, as in this case, the false representations as to the quality of the property go to the essence of its value, and render it useless, and hence valueless, to its purchaser, it would follow necessarily that the warranty was an essential condition of the sale, and that upon the discovery of its breach the purchaser would have a right to rescind his contract under this section of the Code. *Stockton Sav. & L. Soc. v. Giddings*, 96 Cal. 84, 30 Pac. 1016, 21 L. R. A. 406, 31 Am. St. Rep. 181; *Hoult v. Baldwin*, 67 Cal. 610, 8 Pac. 440; *Merrifield v. McClay* (Or.) 142 Pac. 587.

From this aspect of the case it would be entirely immaterial whether the defendant knew or did not know the representations to be false, or did or did not intend to commit fraud in making them. It is not necessary to either plead or prove an intent to deceive in making such representations. *Spreckels v. Gorrill*, supra. The proof of their falsity, and of their essential nature as a vital element entering into the contract of sale, would be sufficient to entitle the purchaser to rescind. Both of these elements fully appear in the complaint and in the findings of the court. In all other respects the findings are sufficient to sustain the judgment.

Judgment affirmed.

26 Cal. App. 74

CAMOZZI v. COLUSA SANDSTONE CO.
(Civ. 1299.)

(District Court of Appeal, Third District, California. Nov. 30, 1914. Rehearing Denied by Supreme Court Jan. 23, 1915.)

1. PLEADING — CERTAINTY — DUPLICITY.

That the complaint in a single count charges several acts of negligence does not render it uncertain, where the several acts are clearly specified.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 39, 64; Dec. Dig. —18.]

2. NEGLIGENCE — PROOF — VARIANCE.

Where the complaint in a single count charged several acts of negligence, plaintiff may rely upon any one of the several acts, or may show that all of the acts concurrently caused his injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. —119.]

3. PLEADING — DEFECTS — WAIVER.

Under Code Civ. Proc. § 431, the defect in a complaint which united in one count several causes of action is waived, where not attacked by special demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. —406.]

4. LIMITATION OF ACTIONS — AMENDMENTS — EFFECT.

The original complaint in one count charged three grounds of negligence, the negligent operation of the machine by which the injury was inflicted, the employment of an incompetent operator, and negligence in failing to instruct and warn plaintiff. The amended complaint, filed after the limitation period had run, consisted of two counts. The first charged gen-

eral negligence, and the second alleged incompetency of the operator of the machine. *Held*, that the amended complaint did not state a cause of action different from that stated in the original complaint.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. —127.]

5. MASTER AND SERVANT — INJURIES TO SERVANT — ACTIONS — EVIDENCE — SUFFICIENCY.

In a personal injury action by a servant, evidence held to warrant a finding that his injuries resulted from the negligence of a fellow servant, whose incompetency was known to the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. —279.]

6. MASTER AND SERVANT — INJURIES TO SERVANT — NEGLIGENCE OF MASTER — PRESUMPTION.

While it is presumed that an employer has performed his duty in selecting competent fellow servants, the incompetency of a servant may be of such a character as to rebut the presumption.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. —265.]

7. MASTER AND SERVANT — INJURIES TO SERVANT — ACTIONS — EVIDENCE.

In a personal injury action, evidence held sufficient to sustain a finding that plaintiff's injuries resulted from the negligence of the operator of a crane.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. —276.]

8. MASTER AND SERVANT — INJURIES TO SERVANT — JURY QUESTION.

In a personal injury action by a servant, the question of his contributory negligence held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1080, 1090, 1092-1132; Dec. Dig. —289.]

9. TRIAL — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

Where the evidence of the incompetency of a fellow servant was sufficient to go to the jury, instructions on that issue were warranted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 594-612; Dec. Dig. —252.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Emerico Camozzi against the Colusa Sandstone Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

C. H. Wilson, of San Francisco, for appellant. James Boyer, of San Francisco, for respondent.

HART, J. The plaintiff brought this action to recover damages for personal injuries sustained by him, so it is alleged, through the negligence of the defendant. The trial was by jury, who awarded the plaintiff the sum of \$4,525; the court entering a judgment accordingly. The defendant brings the case here on appeal from said judgment and the order denying its motion for a new trial.

The first assignment of error presented for consideration is that the plaintiff in amending his complaint under leave to do so granted by the court, set up a new cause of action, which was barred by the statute of limitations. The original complaint was in one count, and alleged that the accident by which the plaintiff received the injury for which he seeks by this action to recover reparation by way of damages was proximately caused by the defendant by three different forms of negligence, viz.: (1) The negligent and careless operation of the machine by which the injury was inflicted. (2) By the employment of an incompetent and inexperienced person to operate the machine, and who was operating it at the time the accident occurred. (3) That the plaintiff was inexperienced in the duties in connection with said machine which he was required to perform, and which he was engaged in performing when the accident resulting in his injury occurred, that he was therefore unfamiliar with the risks and dangers incident to the discharge of said duties, and that he was not instructed or warned of such risks and dangers by the defendant.

The defendant demurred to said complaint on general and special grounds; the special ground being that the complaint was, in certain particulars pointed out therein, uncertain. The court overruled the demurrer, and when the cause was called for trial, and after the impanelment of the jury, counsel for the defendant moved the court for an order requiring the plaintiff to elect upon which of the several causes of action so alleged in the complaint he intended to rely for a recovery. The court denied this motion. After some other proceedings and discussion bearing upon the averments of the complaint, and after the court had ordered stricken from the complaint the third cause of action stated therein, based upon the inexperience of the plaintiff in working on or about the machinery which was responsible for the accident, etc., the trial was proceeded with.

After the plaintiff had rested his case, he having presented testimony in support of the allegations of the complaint, counsel for the defendant moved for a nonsuit on the ground, generally stating it, that the evidence wholly failed to support the averments of the complaint in any essential particular. The court denied the motion. Thereafter the court granted a motion by counsel for the defendant to discharge the jury and for a trial *de novo*, and at the same time granted, over objection by the defendant, the plaintiff permission to amend the complaint. In due time the amended complaint was filed and served on the defendant.

We are not prepared to assent to the proposition that each of the several alleged acts of negligence charged in the original complaint against the defendant constitutes a separate and distinct *cause of action*. This point is not here discussed, however, and, as

it is unnecessary to consider it here, we shall assume, for the purposes of this case, that they are different causes of action, and, according to the rules of good pleading, should have been separately stated.

[1, 2] The original complaint in one count clearly alleged sufficient facts to state a cause of action on each of the alleged acts of negligence of the defendant, and, notwithstanding that said several causes of action were not separately stated, the pleading was not, as to any of the causes of action so stated, obnoxious to the objection raised against it by the general demurrer. *Estate of Ricks*, 160 Cal. 467, 473, 117 Pac. 539. Nor was the original complaint amenable to the objection that it was uncertain, the sole special ground of the demurrer. The allegations of the complaint clearly and distinctly disclosed three separate causes of action or acts of negligence. No uncertainty could arise from the complaint in that regard. And the plaintiff had the right to reply upon any one of the alleged acts of negligence as the proximate cause of his injury, or upon all said acts as operating together or concurrently in so causing the damage. "It can make no difference which of those acts caused the injuries, or whether both, operating together, caused them. The result is the same, so far as fixing the liability upon the defendant is concerned." *O'Connell v. United Railroads*, 19 Cal. App. 36, 47, 48, 124 Pac. 1022, 1027; *Worley v. Spreckels Bros. Com. Co.*, 163 Cal. 60, 69, 124 Pac. 697. And obviously evidence was admissible to prove either of the several pleaded acts of negligence as the proximate cause of the injury, or all as concurring directly to bring about the disastrous result of the accident.

[3] If the original complaint was faulty in form, because the several causes of action were not therein separately stated, the defendant, if it desired a reform of the pleading in that regard, should have specially demurred to it on that ground. Having failed to do so, the court was authorized to disregard that fault in the pleading. Section 431, Code Civ. Proc.

[4] The amended complaint, however, is not susceptible to the construction given it by the defendant. It sets up and separately states two causes of action, so to speak—the one based upon general negligence and the other upon the alleged incompetency of Minchin, an employé of the defendant, to operate the electric crane, the manipulation of which by him, it is alleged, caused the accident whereby the plaintiff was injured. In substantially the same language both said causes of action were set out in the original complaint. Whatever difference exists between the averments of the two pleadings, if any, in stating the two causes of action referred to, so far as the language thereof is concerned, is merely verbal, and not substantial, and the only distinction between them, so far as the form of stat-

ing said two causes of action is concerned, is, as stated, that in the amended complaint, unlike the original, said causes are separately set forth. In other words, the plaintiff, by his amended complaint, introduced into the case neither a new cause of action nor any issues different from those tendered by his original pleading.

[5] The next assignment is the asserted insufficiency of the evidence to sustain the verdict. The misadventure, whereby the plaintiff received injuries which resulted in the severing of his left arm between the wrist and elbow, occurred on the 14th day of September, 1909, at the stoneyards of the defendant, in the city of San Francisco. The plaintiff, at the time of the accident, was about 20 years of age, and was then, and had been for a period of 3 months prior thereto, in the employment of the defendant as a common laborer in and about its stoneyards. The remaining general facts, concerning which there is no dispute, may be stated as they are detailed in the brief of counsel for the plaintiff as follows:

"In said yards, and 16 feet above the ground, were two electric cranes, used for the purpose of transporting heavy blocks of stone over the heads of the workmen, from one end of the yard to the other. Each crane was incased in a house or cab, resting on two parallel beams, supporting iron rails, along which the cab and crane were propelled by electric power. This cab, crane, and these parallel beams, with their equipment, were called 'the traveler.' To each end of these parallel beams wheels were attached, which ran along iron rails adjusted to the top of other beams running at a right angle to the cross-beams upon which the crane and cab rested. The operator of the crane occupied a position in the cab, and could simultaneously cause the crane to operate along the cross-beams upon which it rested and the traveler to run up and down the yard. This crane and traveler were manipulated by means of three levers, a brake, and a controller bar, and contained besides a motor, friction clutch, and an arrester, drop chain, sheaves, and other complex machinery, the whole weighing about 40 tons."

It appears that Minchin, heretofore mentioned, an employé of the defendant, was placed in charge of the smaller of the two cranes on the day of the accident. He attempted to operate it, and, encountering difficulty in causing the cranes to move over the tracks, he asked the foreman of the yards to send some one up the ladder to oil the tracks over which the crane ran.

"The foreman," proceeds the brief of counsel, "directed the plaintiff and another laborer, Wilhoff, to perform this task. They ascended the ladder, used for that purpose, to the roof of the pumphouse, shown on the diagram, and in the presence and under the direction of Minchin oiled and wiped the tracks on the cross-beams. When plaintiff was in the act of descending, and had one foot on the top rung of the ladder, and was steadying himself with one hand, while holding cotton waste in the other, Minchin, suddenly and without warning, started the traveler in motion, and ran one of the wheels thereof over the left arm of plaintiff, crushing it to ribbons and forcing him off the ladder, and holding him by the torn ligaments of his arm, suspended in the air, 3 feet from the ladder and 16 feet above the broken boulders below."

One of the claims made by the defendant, and which is pleaded in its answer, is that the plaintiff's injuries were directly received by him through his own inexcusable carelessness, or, to put it more concisely and in strictly legal nomenclature, the defense of contributory negligence is set up in the answer.

The plaintiff testified that, when he reached the top of the pumphouse, against which the ladder by which he ascended was leaning, Minchin directed him and Wilhoff to oil the tracks over which the cab and crane were propelled.

"I took the left track, on which rested the crane house," said the plaintiff, "and oiled the entire track, working easterly on the north track. When I began working, the crane house rested on cross-tracks at the easterly end, and it was moved to the middle portion of the cross-tracks while I was working on the north cross-track. Then some one called for the oil can which Wilhoff had. He was working with me on the south track and had the oil can, so he took the oil can down, and I finished his work of oiling and wiping the rails with waste. In the meantime Minchin came across from the other crane. He was in the other crane, and he came across there, and he crossed in front of me; and he says, 'As soon as you get done the oiling, here is some dry waste; start to clean it at the top.' I started off on the other end again, and started to do the cleaning. After Minchin said that to me, he went right inside the crane house. * * * When I started to oil, the crane house was nearly all on the other end—the eastern end—the furthest away from where I came up the ladder. When I finished oiling, the crane house had been shoved over about the middle, in the middle of the place. * * * I finished Wilhoff's work for him on the south rail, and so when I was through I went to the other one and finished. Minchin said to me: 'As soon as you get through, hurry up; we have got lots of work to be doing to-day.' I started down on the slanting ladder. I had some waste in my hand. I got my left hand on the rail. The waste was in my right hand. In fact, I had hold of the rail with both hands; the waste being held all the time in the right hand. I had one foot, the left, already on the first ladder rung. I was looking below, and was placing the right foot on the ladder below me. My hand caught in the meantime. Then I left go the right one, and I jumped and got hold of the beam. I got hold of the beam, and was intending to pull it out, trying to pull it out as hard as I can. The crane was on my hand. Up to and prior to the time this accident happened, the crane had not been in motion for about 20 minutes, I mean it was 20 minutes since the traveler was in motion. Altogether I was up there about 15 minutes, and while I was up there the traveler had been still and quiet. When I got caught, the traveler dragged me 3 feet off the ladder. I was suspended there. My arm was like a piece of rag. I do not know how the traveler came to get on my arm."

When the traveler struck the plaintiff's arm, he uttered a loud yell, and the machine was thereupon stopped. The plaintiff further testified that he had seen Minchin operate the crane on but one other occasion previously to the time of the accident.

The witness Wilhoff corroborated the plaintiff as to the occurrences prior to the time when he descended the ladder for the purpose of returning the oil pot to the workmen

on the ground. He testified that, in order to go down the ladder from the tracks over which the traveler passed, it was necessary to "kneel down on the beam" and "take hold of the big rail to catch the ladder. I think the top round was about two feet below the shed roof." He said that, during the two or three years that he was employed at the defendant's yards, he personally knew of only one other occasion than that on which the accident to plaintiff occurred when Minchin had operated the crane.

Grover C. Braddock was the engineer of the defendant when the accident occurred. He testified that at that time he was operating the large crane, and in the cab thereof, and about 30 feet distant from the spot where the plaintiff was injured.

"I happened to look out," he said "and saw Camozzi caught. I could see Minchin in his cab at the levers at that time."

The witness halloed at Minchin to draw his attention to the situation of the plaintiff, and told him to back up the machine. Minchin was standing and looking out of the window on the north side of the cab, and did nothing toward removing the machine from the arm of the plaintiff.

"I jumped out of my cab," continued the witness; "walked along the travelers and rail beam from my cab to Minchin's. * * * I took hold of the crane. By that time I halloed for help. Several boys came up the ladder, and by that time they got hold of Camozzi, and they halloed to move the crane, and I took hold of it and moved it."

Frank Donald, who had worked for the defendant in its stoneyards as a laborer and sort of messenger for about a year prior to the date of the accident, testified that during all the time he was so connected with the defendant Minchin was acting as timekeeper for the corporation. He stated, however, that he had seen Minchin operate the crane that injured the plaintiff on three or four different occasions within the year during which he (witness) worked for the defendant; that he had also seen Minchin doing some repair work on said crane "once or twice before the accident."

Upon the close of the case for the plaintiff, the jury, under an order of the court, viewed the premises where the accident occurred, and inspected and examined the machine by which the plaintiff was injured.

Minchin, testifying for the defendant, said that his duties as employé of the defendant were those of a "bookkeeper, engineer, general repair man, and mechanic of all kinds." He stated that the small crane (the one which produced the plaintiff's injury) was not operated "steadily, but intermittently, as it was used only to load cars." He testified that he had operated said crane "altogether over a period of about eight months next preceding the accident. Being run intermittently," he continued, "I probably ran the small crane, altogether, two weeks steady time." On be-

ing cross-examined, however, Minchin testified as follows:

"I worked for defendants about three years, and while there was, in part capacity, their bookkeeper. Prior to my employment with defendant, I was assistant general manager of the Madera Sugar Pine Company for ten months. Prior to that I was station agent and night telegraph operator for the Southern Pacific Company at Madera continuously for eleven years. Prior to that I was a student in the Polytechnic High School in San Francisco. I never worked for any person, firm, or corporation as a machinist or electrician at any time. I have done no other work since I left school than that which I have just detailed. The officers of the defendant knew of my past occupations and experience. The president, secretary, and vice president knew of my past occupations and experience."

Minchin further testified, on cross-examination, that he could see the plaintiff from his position in the cab.

"Q. Did you look to see Camozzi? A. No, sir. Q. Made no attempt to look? A. No, sir. * * * The last I saw of Camozzi before the accident was as he stood, just about over the pumphouse, on the main axle beam."

Again, on re-direct examination, the witness testified that he did not, after he went into the cabhouse, look to see if Camozzi—

"was on the crane or any part of the appliance. I did not consider it necessary," he proceeded, "to say anything more to Camozzi after telling him that I was through with him and that he could go down. I went into the cab, knowing that it was necessary that we get immediate action. The work was piling up all the time. *I considered that he had ample time to get out of the way.* If I had thought for a minute that there was a shortage of time for him to get down, I presume I would have made some effort to look for him."

We have in the above statement given enough of the evidence adduced at the trial to show that the jury, having found it to be entitled to belief, were justified in finding therefrom, not only that the crane was, at the time the plaintiff sustained the injuries complained of, negligently operated by Minchin, but that the latter was incompetent to operate the machine, and that his want of experience and knowledge in that line of duty was, or by the exercise of ordinary diligence could have been, known to the defendant when it assigned him to that employment.

From Minchin's own testimony it is clear that he had had very limited experience in the general handling of machinery, and an equally limited experience in the operation of the machine which produced the injuries received by the plaintiff. His regular duty was not to operate the crane. At intervals he performed that duty, and he figured that, by computing those intervals of time together, he had operated it for a period of perhaps two weeks in about eight months. When the machine struck the plaintiff, Minchin either became confused or was ignorant of the course he should adopt in that contingency, and it was necessary for Braddock, the regular operator of the larger crane, to go to Minchin's assistance, and he was required to

take hold of the levers and move the machine from the arm of the plaintiff. Minchin appeared to be helpless and unable to control the situation. In short, Minchin's conduct from the very beginning—first, in starting the crane without taking the precaution to see whether the tracks were clear; and, secondly, the manner in which he acted when the plaintiff's arm was struck—constituted some evidence upon which the jury could justly have predicated the conclusion that he was without the qualifications and experience essential to the operation of the machine with safety. And we have the right to assume, in support of the verdict so far as it may imply a finding that Minchin was incompetent to operate said machine, that, from their personal inspection and examination of the crane and its necessary appurtenances, whereby they were able to and doubtless did form an approximately accurate judgment as to the qualifications and experience essential to the proper operation of the machine, the jury concluded that the testimony disclosed that Minchin was altogether incapable of properly operating said machine.

At any rate, upon that phase of the case, we do not feel at liberty to declare that the conclusion of the jury is unwarranted. And, Minchin having testified that the officers of the defendant—the president, secretary, and vice president—knew of his “past occupations and experience,” which, until he became connected with the defendant, involved no duty appertaining to the handling of machinery of any kind, it is manifest that the jury were warranted in concluding that the defendant placed him in charge of the crane, knowing him to be incompetent to manage it with that degree of skill absolutely necessary to the operation of it properly or in such manner as that there would exist no unusual dangers or risk to those necessarily engaged in working on, around or about it. If, however, the evidence of defendant's knowledge of Minchin's incompetency be so slight as to make it doubtful whether the jury would have been justified in so finding, it is, nevertheless, true that, as stated, the officers of the defendant knew the nature of his occupations prior to the time he became an employé of the defendant, and knew that such occupations were in no way concerned with the duty of handling machinery.

[6] There is no evidence which discloses that the officers of the defendant made any investigation into the qualifications of Minchin to operate the crane, and, while the presumption is that the employer has done his duty in this regard (*Beasley v. San Jose Fruit, etc., Co.*, 92 Cal. 388, 28 Pac. 485; *Still v. S. F., etc., Ry. Co.*, 154 Cal. 569, 98 Pac. 676, 20 L. R. A. [N. S.] 322, 129 Am. St. Rep. 177), yet “there can be no doubt under the authorities that the incompetency of an employé at the time of his employment may be of such a character that the evidence

showing it will be legally sufficient to rebut the presumption that the employer used the requisite care in his selection, and make the question one for the jury. This is on the theory that the incompetency was of such a nature that a reasonable investigation would have disclosed it, and that, therefore, the employer either knew of it or omitted to make such investigation” (*Still v. S. F., etc., Ry. Co.*, *supra*). The case here clearly comes within the rule as thus stated.

[7] But, under the record, the verdict is not required to rest alone on the negligence of the defendant arising from the incompetency of Minchin. There can be no kind of doubt that the moving of the crane by Minchin, at the time of the accident, under the circumstances as admitted by him, was the grossest kind of negligence. According to his own testimony, he entered the cab of the crane and started the machine without having first looked out to see whether Camozzi was still on or near the tracks, or in a position in which collision with his body would follow the moving of the crane. His excuse that he “considered that he [Camozzi] had ample time to get out of the way” is obviously no excuse at all. He knew when he entered the cab that Camozzi had not descended or attempted to descend the ladder, and it was therefore his duty, before starting the crane, to look and positively ascertain whether the plaintiff had or had not entirely removed himself from the tracks or the course along which the crane would travel.

[8] As to the defense of contributory negligence, it is to be remarked that there is nothing in the testimony upon which this court can justly sustain the proposition that the finding implied from the verdict against that claim is without justification. It is true that Minchin testified that “the plaintiff and I finished wiping the top of the rail off, and I instructed the plaintiff to go down; that I was finished with him and was going to start the crane.” But opposed to this testimony was that of the plaintiff, who said that, immediately upon completing his work, he started down the ladder, and that it was at that time the crane was suddenly started. It was, of course, for the jury to say, assuming that there was any real conflict between Minchin and the plaintiff on that point, whether the plaintiff started to leave the tracks immediately upon finishing the work for the doing of which he had been required to go upon the tracks, or unnecessarily loitered there after finishing his work.

[9] The only fault found with the charge of the court is that that part thereof relating to the question of the alleged incompetency of Minchin was inapplicable, since, so the contention proceeds, there is no evidence supporting that theory of the plaintiff's case. It is not claimed that the instructions do not correctly state the law pertinent to negligence growing out of incompetency. The re-

ply to the above-mentioned criticism of the court's charge is involved in the views we have expressed respecting the evidence.

We think the judgment and the order should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

26 Cal. App. 74

CAMOZZI v. COLUSA SANDSTONE CO.
(S. F. 6504.)

(Supreme Court of California. Jan. 29, 1915.)

MASTER AND SERVANT ⇨279 — INJURY TO SERVANT — NEGLIGENCE IN EMPLOYMENT OF SERVANTS.

Evidence held not to justify a finding of negligence of an employer in employing an incompetent employé to operate a crane.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. ⇨279.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Emerico Camozzi against the Colusa Sandstone Company. A judgment of the District Court of Appeal (147 Pac. 107) affirmed a judgment for plaintiff, and defendant applies for a rehearing in the Supreme Court. Denied.

C. H. Wilson, of San Francisco, for appellant. James Boyer, of San Francisco, for respondent.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal for the Third Appellate District is denied.

In denying such application, we deem it proper to say that we are not satisfied that the evidence was sufficient to sustain a conclusion that the defendant was negligent in the matter of the selection of Minchin to operate the crane, and our denial is not to be taken as an approval of the conclusion of the District Court of Appeal in this respect. As stated in the opinion, the verdict is not required to rest alone on any such negligence, and it is amply sustained by evidence showing negligence on the part of the defendant in the operation of the crane. As we understand the record, no claim was made by the answer that any injury received by plaintiff was caused by the negligence of a fellow servant.

25 Cal. App. 702

FORD v. WEED LUMBER CO. (Civ. 1376.)
(District Court of Appeal, First District, California. Nov. 9, 1914. Rehearing Denied by Supreme Court Jan. 8, 1915.)

1. APPEAL AND ERROR ⇨854—QUESTIONS REVIEWABLE — GRANTING OF NONSUIT — GROUNDS.

The correctness of an order granting a nonsuit generally does not depend on the discussion which the trial court indulged in in the course of granting the order, and, where the order was granted on either or both of the grounds

on which the motion therefor was made, the action of the court will be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. ⇨854.]

2. MASTER AND SERVANT ⇨217—INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé hauling cars over a tramway leading from a lumber yard to railroad tracks knew of the unsafe and insecure condition of the track, and particularly of its frequently recurring state of unrepaired and danger at a particular point where cars were derailed. He had called attention to the particular defect in the track a few days before the derailment, and the employer undertook to repair the defect. The employé saw the repairs made, and knew their extent, and that they were but temporary and insufficient, and that the track would, within a few days at most, be again out of order. Held, that he assumed, as a matter of law, the risk arising from the defect, and he could not recover for injury caused by a derailment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. ⇨217.]

3. MASTER AND SERVANT ⇨235—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where an employé hauling cars over a tramway leading from a lumber yard to railroad tracks could have seen, where a derailment occurred, whether the tramway was in proper condition, but he did not look while driving over the tramway, he was guilty of contributory negligence precluding a recovery for injury by a derailment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. ⇨235.]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Guy Ford against the Weed Lumber Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

E. Lyders, of San Francisco, and Bernard Silverstein, of Oakland, for appellant. Linforth & Herrington, of San Francisco, for respondent.

KERRIGAN, J. This is an action for damages for personal injuries. The plaintiff appeals from an order granting defendant's motion for a nonsuit.

The testimony introduced on behalf of the plaintiff showed that he was employed by the defendant to drive a team hauling cars over the defendant's tramway leading from its lumber yard to the tracks of the California Northwestern Railway Company. In the course of his employment it was the duty of the plaintiff several times each day to haul along the said tramway of the defendant four or five flat cars loaded with lumber, taking them to the track of the railroad company, and returning to the yards of the defendant with a string of empty cars. He had been in the employ of the defendant for about three months, and during all of said time had been daily doing said work. On the day of the accident the plaintiff had taken a load to the tracks of the railway company, and was re-

turning with the string of empty cars when he reached a place along the tramway where a switch goes off into what is called in the record yard No. 2. At this point the first and second of the empty cars being hauled by the plaintiff left the track, and the second car struck him, knocked him down, and caused the injuries set forth in the complaint. The evidence further discloses that the accident arose out of the fact that one of the rails at the point of contact with the switch had slipped from its place, leaving a space of several inches, and causing the car wheel to leave the track. The tramway or track on which the accident occurred appears to have been a sort of wobbly and makeshift affair; the ties being laid practically on top of the ground without ballast, and the rails being held to their place with spikes, which frequently worked loose and caused the track to part in a way similar to that which brought about the accident in question.

These facts were known to the plaintiff, having been within his almost daily observation since his employment began; in fact, within a few days before the date of the accident the cars had become derailed at the same point and for the same cause while the plaintiff was engaged in hauling them, and this had occurred at least four or five times to the plaintiff during the three months of his employment by the defendant. On the last of these occasions prior to the accident the plaintiff complained about the condition of the track to the official of the defendant who had control of the tramway, who promised to have the defect repaired immediately, and, in fact, did so. The repair was made by plugging up the holes in the ties where the old spikes had worked loose and driving in new spikes. The plaintiff saw and knew the nature and extent of these repairs, and knew also that they were temporary in character, and, in the nature of things, but a few days, at most, would pass before the same trouble with the track would be renewed at that point and the same danger of derailment arise.

The foregoing facts were shown during the presentation of the plaintiff's testimony, and when he rested his case the defendant moved for a nonsuit upon the ground that "it affirmatively appears from the testimony offered and without conflict that the plaintiff was hurt through his own negligence; that his own negligence contributed to his injury, and that, if the condition of this track was what he says it was, it was one of the risks that he assumed, and he cannot recover in this action." This motion for nonsuit was granted, and from the order granting the same the plaintiff appeals.

[1] The appellant urges as his first ground for reversal that the motion for nonsuit was granted by the court upon a different ground than those upon which it was made, and in

support of this contention he quotes the language of the court made use of in the course of granting the motion. In view of the fact, however, that the court by its order granted the motion for nonsuit generally, it may not be contended that its order in granting the same is to be limited by the discussion which the court indulged in in the course of granting the order, and, if it appears that the motion for nonsuit should have been granted upon either or both of the grounds upon which the motion for nonsuit was made, then we think that the action of the court in granting the same should be sustained. An examination of the evidence convinces us that the court was not in error in granting the nonsuit.

[2] Upon both of the grounds upon which it was made, without further reviewing the evidence in the case than as above set forth, it seems quite plain to this court that the plaintiff, from the time of the commencement of his employment down to the moment of the accident, was at all times perfectly familiar with the unsafe and insecure condition of the track, and particularly with its frequently recurring state of unrepaired and danger at the particular point where the accident in question occurred, and that under these circumstances it must be held that, in continuing in his employment with this full knowledge of its dangers, he assumed the risk which arose from the aforesaid condition.

It is, however, urged that the plaintiff is to be relieved from his assumption of this risk of his employment by the fact that he called attention to the particular defect in the track a few days before his injury, and that, the defendant having undertaken to repair that defect, plaintiff was warranted in assuming that it would be properly repaired. This might be true were it not for the fact that, according to the plaintiff's testimony, he saw the repairs made and knew precisely their extent, and that they were but temporary and insufficient, and that the track at the particular point of the injury would within a few days, at most, be again out of order, notwithstanding its present repair.

[3] Further than this, the place upon the track where the derailment occurred was clearly within the plaintiff's line of vision while he was hauling the cars along and over that portion of the track. This being so, we think that his act in driving over this particular spot at the time of the accident in question, without employing his faculties of vision to see whether or not the track was in proper condition, was in itself an act of negligence on his part contributing to his injury and sufficient to prevent a recovery in this case.

We think, therefore, that upon both grounds the motion for nonsuit was properly granted. The order is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

FORD v. WEED LUMBER CO. (S. F. 6215.)

(Supreme Court of California. Jan. 8, 1915.)

In Bank. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Guy Ford against the Weed Lumber Company. Judgment for defendant, and plaintiff appeals. Affirmed by District Court of Appeal 147 Pac. 112. Petition for hearing in the Supreme Court denied.

E. Lyders, of San Francisco, and Bernard Silverstein, of Oakland, for appellant. Linforth & Herrington, of San Francisco, for respondent.

PER CURIAM. The petition for a hearing in this court after decision in the District Court of Appeal of the First District is denied. In denying such hearing it is proper to say that we are not satisfied with the conclusion of the District Court of Appeal, that the plaintiff must be held, as matter of law, to have been guilty of negligence contributing to his injury, and we are not to be understood as approving the portion of the opinion so holding.

25 Cal. App. 779

PEOPLE v. PRYAL. (Cr. 544.)

(District Court of Appeal, First District, California. Nov. 17, 1914. Rehearing Denied Dec. 17, 1914. Denied by Supreme Court Jan. 14, 1915.)

1. STATUTES $\hookrightarrow$ 224—**CIVIL AND PENAL CODES**—**INSTRUCTION.**

The various sections of the Civil and Penal Codes are to be read together and harmonized, if reasonably possible.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 300, 302, 306; Dec. Dig. $\hookrightarrow$ 224.]

2. LIBEL AND SLANDER $\hookrightarrow$ 155—**CRIMINAL LIBEL**—**GOOD MOTIVE**—**EVIDENCE**—**STATUTES.**

Under Code Civ. Proc. § 1962, providing that a malicious and guilty intent shall be conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another, and Pen. Code, § 250, providing that the injurious publication is presumed to have been malicious if no justifiable motive in making it is shown, and section 251, providing that in all criminal prosecutions for libel the truth may be shown, and that if it appear that the matter charged as libelous is true and was published with good motives, the party should be acquitted, where the defendant deliberately published a willful defamation admittedly false, he could not put in evidence letters between himself and the libeled party as tending to show good motives, since his acts gave rise to a conclusive presumption of malice under the statutes as construed.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 430-436; Dec. Dig. $\hookrightarrow$ 155.]

3. LIBEL AND SLANDER $\hookrightarrow$ 155—**CRIMINAL LIBEL**—**EVIDENCE**—**CONSTITUTION**—**STATUTE.**

Under Const. art. 1, § 9, and Pen. Code, § 251, both providing that in cases of criminal libel the jury shall have the right to determine the law and the fact, the court is not deprived of its inherent and essential right to exclude evidence from the jury whatever its bearing on the relation of the parties or the circumstances of the publication, so long as it is inadmissible under the general rules of evidence.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 430-436; Dec. Dig. $\hookrightarrow$ 155.]

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Charles L. Pryal was convicted of crime, and he appeals. Affirmed.

Jacob M. Blake, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal from a judgment of conviction in a proceeding against the defendant for a criminal libel. The alleged libel consisted in the writing of a letter by the defendant to one Isabel Abbott, containing a charge of forgery against one John A. Sands, consisting of the statement that "Sands forged both Mrs. Pryal's and my name to certain legal documents." Upon the trial of the case the defendant Pryal not only made no effort to prove the truth of this assertion, but expressly admitted, and upon this appeal concedes, that the charge of forgery was untrue. The defendant, however, upon the trial undertook to offer in evidence a large number of documents, including certain letters which had passed between himself and said Sands while the latter was acting as his attorney in a certain litigation, which letters and documents the defendant contended were admissible as tending to show his intention in uttering this libel, and as proving that it was published with good motives and justifiable ends. The court ruled out this evidence; and it is this ruling of the court that the defendant now chiefly relies upon as error requiring a reversal upon this appeal.

[1, 2] We think the trial court committed no error in refusing to admit the evidence thus proffered by the defendant. The charge against the prosecuting witness of having committed the crime of forgery was made in express and unmistakable terms. That it was false the defendant admits, and that it was made and published willfully and deliberately there can be no question. The defendant was therefore, in uttering this libel, engaged in the deliberate commission of an unlawful act for the purpose of injuring another. The Code of Civil Procedure, in enumerating those presumptions which are deemed conclusive, gives (1) a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another. Code Civ. Proc. § 1962. If this general provision of our law has application to prosecutions for criminal libel, it would necessarily follow that the proffered proof of the defendant was properly excluded by the court. The appellant, however, contends that this rule is modified in its application to trials for criminal libel, by the terms of sections 250 and 251 of the Penal Code. These sections read as follows:

"Sec. 250. An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.

"Sec. 251. In all criminal prosecutions for libel, the truth may be given in evidence to the

jury, and if it appears to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. The jury have the right to determine the law and the fact."

It is a well-known rule of construction that the various sections of our Code are to be read together and harmonized if reasonably possible. When the foregoing sections of the Penal Code are read together in the light of section 1962 of the Code of Civil Procedure, it would seem quite plain that proof of an innocent motive or intent in publishing a willful defamation admittedly false will not be permitted in the face of the conclusive presumption of malice which the latter section of the Code creates, unless such proof shows the publication to be in the nature of a privileged communication, and that this was its nature is not contended for in this case.

It may be further said in this connection that it cannot be reasonably urged that the proofs which the defendant herein presented, and which the court refused to submit to the consideration of the jury, contain within themselves any evidence tending to show that the defendant published this defamation from good motives and for justifiable ends. In point of fact the contrary would seem to be the case, for the offered proof only tended to show that difficulties had arisen between the defendant and Mr. Sands, his attorney, over the latter's conduct during certain legal proceedings, resulting in an effort on the part of the defendant to discharge his counsel. The proofs were offered for the purpose of showing that the client had cause for his dissatisfaction. This sort of evidence, instead of showing that the motive for publishing a willful defamation was an innocent one, would rather tend to strengthen the presumption that the publication was inspired by ill will and was malicious.

[3] Counsel for appellant very strongly contends that the court in excluding this evidence has erred in a more vital respect. He urges in an elaborate brief and extended oral argument that the express provisions of the state Constitution (article I, § 9) and of the Penal Code (section 251) that in the trial of a case of criminal libel "the jury shall have the right to determine the law and the fact" takes away from the court the right to exclude any evidence from the jury which has any bearing whatever on the relation of the parties or the circumstances of the publication; and that in respect to such evidence it is the province of the jury to pass upon the law regulating its admissibility and effect at every stage of the case. We do not understand that the foregoing provisions of the Constitution and statute are to be construed as extending thus far, nor as intended to take away from the court its power and duty to pass upon the admissibility of evidence during the progress of the trial. To

adopt the theory or apply the rule contended for by appellant would be to work a revolution in our American system of procedure, and leave the judge in cases of criminal libel powerless to prevent the influx into the case of all sorts of irrelevant matter having as the only purpose of its introduction the prejudice of the minds of the jurymen to the extent of finding verdicts in favor of or against defendants in utter disregard of both the law and the facts material to the issues in the case. The Supreme Court of this state, in *People v. Seeley*, 139 Cal. 118, 72 Pac. 834, has laid down the rule of construction of the provision of the Constitution and section of the Code under review; and this court is in no position to undertake to overrule that decision and even if it were disposed—which it is not—to disagree with the views of the court as therein exhaustively set forth.

The appellant further contends that the trial court erred in the giving of certain alleged contradictory instructions relating to the power of the jury in its verdict to determine the law and the facts of the case. We do not find, however, upon an examination of the entire body of the court's instructions any sufficient contradiction to warrant a reversal of the case. Neither do we find that there was any misdirection on the part of either the district attorney or of the jury in connection with the return of the latter for further instructions after some hours of deliberation upon the case. The jury apparently desired light upon the question as to what constituted a publication; and the court gave it that light by reading to it section 252 of the Penal Code.

We discover no reversible error in the record. The judgment is affirmed.

25 Cal. App. 779

PEOPLE v. PRYAL. (Cr. 1907.)

(Supreme Court of California. Jan. 16, 1915.)

CRIMINAL LAW §1179—APPLICATION FOR HEARING—DECISION OF COURT OF APPEAL.

The statement in the opinion of the District Court of Appeal, on affirming a conviction for a criminal libel, that the evidence, instead of showing that defendant's motive "was an innocent one, would rather tend to strengthen the presumption that the publication was inspired by ill will and was malicious," justified the denial of his application for a hearing in the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3001; Dec. Dig. §1179.]

In Bank. Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Charles L. Pryal was convicted of a criminal libel, and he appeals. Affirmed by the District Court of Appeal (147 Pac. 114), and application for hearing in Supreme Court denied.

Jacob M. Blake, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal for the First District is denied. The denial of the application is not to be taken as an expression by the members of this court to the effect that evidence tending to show that a publication complained of was published with good motives and for justifiable ends is not admissible in a criminal prosecution for libel or as approving what was said by the District Court of Appeal on this proposition. Upon this question we express no opinion. It further appears on the face of the opinion of the District Court of Appeal that the testimony here offered was of such a nature that it would not have tended to show either that the publication was made with good motives or for justifiable ends, but, as said by the Court of Appeal, instead of showing that the motive for publishing the matter "was an innocent one, would rather tend to strengthen the presumption that the publication was inspired by ill will and was malicious."

This statement sufficiently justifies the denial of the application.

25 Cal. App. 736

PEOPLE v. VAUGHN. (Cr. 535.)

(District Court of Appeal, First District, California. Nov. 12, 1914. Rehearing Denied by Supreme Court Jan. 11, 1915.)

1. CRIMINAL LAW 4137 — ARGUMENT OF DISTRICT ATTORNEY—REVIEW.

Misconduct of the district attorney in his argument will not be considered in the absence of a request to the trial court to admonish the jury to disregard the argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. 1037.]

2. INDICTMENT AND INFORMATION 190 — OFFENSES CHARGED—LARCENY—ATTEMPT TO COMMIT LARCENY BY TRICK.

Where accused would have been guilty of larceny by trick and device, if the transaction had been completed by him by obtaining the money of prosecutor, but accused was prevented from completing the crime, he could be convicted of an attempt to commit larceny.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 596-603; Dec. Dig. 190.]

3. CRIMINAL LAW 1159—EVIDENCE—VERDICT.

A conviction sustained by any evidence on the theory relied on by the prosecution will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. 1159.]

4. CRIMINAL LAW 1158 — IMPOSITION OF SENTENCE—POSTPONEMENT—FINDINGS.

Where, on motion of accused to correct the minutes, the court found on conflicting evidence that the postponement of sentence was had at the request of accused, accused could not complain because sentence was postponed beyond the statutory time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074; Dec. Dig. 1158.]

5. CRIMINAL LAW 413—EVIDENCE—SELF-SERVING DECLARATIONS.

Where the testimony of accused charged with grand larceny by trick and device by obtaining from prosecutor a note negated an intent to procure the note to give it to a club for a legitimate purpose, evidence that accused exhibited the note to the president of the club was properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. 413.]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Mary Vaughn was convicted of an attempt to commit grand larceny by trick and device, and she appeals. Affirmed.

N. C. Coghlan, of San Francisco, Gail Laughlin, of Denver, Colo., and M. A. Ross, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. With reference to the point made upon the sufficiency of the information, we are satisfied that the demurrer was not well taken. The information follows the language of the statute, and therefore, in our judgment, is sufficient.

[1] In regard to the alleged misconduct of the district attorney, we think that, while the comment of that officer upon the conduct and character of the defendant may have been somewhat harsh, nevertheless it was apparently but a deduction from the evidence; and this the prosecuting officer was entitled to make. He had a right to draw any inference from the testimony that in his judgment was logical. Moreover, there was no request to the trial court to admonish the jury to pay no heed to the alleged misconduct. It has been the rule of this court—and we think the settled rule generally—that, even though misconduct be conceded, in the absence of a request to the court to admonish the jury to pay no heed to it, complaint of the same will not be heard in this court.

[2] Coming to the point that the evidence is insufficient to sustain the verdict, we are satisfied that, if the transaction involved in the information and established in evidence at the trial had been completed to the extent of the defendant obtaining the money of the complaining witness and retaining it for her own use, she would have been guilty of the crime of grand larceny by trick and device. The fact that she was prevented from the commission of the crime by any circumstances whatever does not alter the situation; and if upon the completion of the transaction she would have been guilty of the crime of grand larceny by trick and device, then we are of the opinion that the evidence is sufficient to sustain the finding of the jury, implied from their verdict, that she was guilty of an attempt to commit grand larceny by the same means.

[3] It is true that the inference might perhaps be drawn from the evidence that it was the intent of the defendant to get the money of the complaining witness under the pretense that she had some secret influence, and would use it and the money to procure a dismissal of a criminal prosecution then pending against the son of the complaining witness. But, on the other hand, that her intent was to keep the money for herself, rather than to resort to any such course, we think, may be fairly inferred from all of the evidence. True, a verdict of "not guilty" might as well have been founded upon the same evidence; but that was a question for the jury, and not for this court; and if there is any evidence at all to sustain the theory suggested by the people and upon which the case was tried, and the defendant convicted in the lower court, the verdict must stand as far as this court is concerned.

[4] With reference to the contention that a new trial should be had because the sentence of the trial court was postponed beyond the statutory time, that point is answered by the ruling of the lower court, as evidenced by the minutes of the court, and which is conclusive upon that point, particularly in view of the fact that a motion was made to correct the minutes by the defendant. Upon the hearing of that motion evidence was taken as to what was said and done by all of the parties—counsel and court—upon the matter of pronouncing judgment. The court, after hearing the evidence, in which there is some conflict, determined the motion adversely to the defendant, and in effect made an order correcting the minutes, showing that the postponement of the pronouncing of judgment was had at the request of the defendant. That being so, the point cannot be availed of upon this appeal.

[5] Finally, complaint is made of the exclusion of certain testimony proffered for the purpose of showing that the defendant exhibited the note obtained from the complaining witness to one Miss Fairbrother, the president of the Woman's Club, before any trouble concerning the transaction arose. It is argued that such testimony, if admitted, would have tended to rebut the inference resulting from other testimony in the case, that the defendant obtained the note for her own benefit, and that, if such testimony had been admitted, it would have tended to show that the note was obtained for the benefit of the Woman's Political Club, and to be used for legitimate purposes. But there is nothing in the proffered testimony to indicate that it was the purpose and intent of the defendant to transfer the note to Miss Fairbrother, as president of that club, in consideration of the influence of the club to be exercised on behalf of the son of the complaining witness. In other words, it is not apparent to us that the proffered testimony tended in any degree to establish the fact

that the defendant's purpose and intent in procuring the note was to give it to the Woman's Club; but, on the contrary, the testimony of the defendant herself would seem to negative such an intent; and, if that be so, the testimony was immaterial and irrelevant, and to a certain extent a self-serving declaration. Moreover and finally, even if the testimony had been admitted, we cannot see from a reading of the entire evidence that the result would have been any different. We feel convinced from a consideration of the entire evidence that, if the particular evidence, the exclusion of which is now complained of, had been admitted, the verdict might as well have been "guilty." In other words, conceding for the sake of argument the error complained of, it did not contribute to or control the verdict.

The judgment and order appealed from are affirmed.

25 Cal. App. 736

PEOPLE v. VAUGHN. (Cr. 1905.)

(Supreme Court of California. Jan. 11, 1915.)

CRIMINAL LAW $\S$ 1179—REVIEW ON REHEARING.

The Supreme Court will grant a rehearing in a case directly appealable to a District Court of Appeal only when error appears on the face of the opinion of the District Court of Appeal, or when a doubtful and important question is presented on which the Supreme Court desires further argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S$ 3001; Dec. Dig. $\S$ 1179.]

In Bank. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Mary Vaughn was convicted of an attempt to commit grand larceny, and appeals. Affirmed by District Court of Appeal. Application for rehearing denied.

For opinion of the District Court of Appeal, see 147 Pac. 116.

N. C. Coghlan, of San Francisco, Gail Laughlin, of Denver, Colo., and M. A. Ross, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. In denying appellant's application for a hearing in this court, after decision by the District Court of Appeal for the First District, we deem it proper:

First. To again call attention to what we said in *People v. Davis*, 147 Cal. 346, 81 Pac. 718, and in *Burke v. Maze*, 10 Cal. App. 211, 101 Pac. 438, 440, as to the rule governing our action on such applications, in causes which, under the provisions of the Constitution, are directly appealable to a District Court of Appeal, rather than to this court.

Second. To say, in regard to the discussion in the appellate court opinion of the ruling of the trial court in refusing to admit certain testimony offered, that the same does

not show that error was committed in said ruling, and that our action in denying a hearing in this court is had without regard to what is said in the opinion as to the effect of said ruling upon the verdict.

LAWLOR, J., having been trial judge herein, does not participate in the foregoing.

(109 Cal. 466)

ORO ELECTRIC CORPORATION v. RAILROAD COMMISSION et al. (S.F. 6724.)

(Supreme Court of California. Feb. 24, 1915.)

1. RAILROADS ⇨9—FINDINGS OF RAILROAD COMMISSION—CONCLUSIVENESS.

Under Public Utilities Act (St. Ex. Sess. 1911, p. 55) § 67, providing that the findings of the Railroad Commission on questions of fact are final and not subject to review, the Commission's finding of the ultimate fact that public convenience and necessity did not require the exercise of the privileges sought by petitioner precluded consideration of the sufficiency of the evidence or the soundness of the reasoning upon which such finding was based, on application for certiorari to review its orders.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. ⇨9.]

2. RAILROADS ⇨9—RAILROAD COMMISSION—CERTIFICATE OF NECESSITY.

Under Public Utilities Act (St. Ex. Sess. 1911, p. 43) § 50, declaring that no electrical corporation, etc., shall begin the construction of a line or system without first obtaining from the Railroad Commission a certificate that the present or future public convenience and necessity require such construction, the granting or withholding of the certificate is an exercise of the state's power to determine whether the rights and interests of the general public will be advanced by the proposed public service, which is an entirely different question from that of the local control of streets by the power vested with such control.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. ⇨9.]

3. MUNICIPAL CORPORATIONS ⇨58—POWERS—CONSTRUCTION.

Language purporting to define the powers of a municipal corporation is to be strictly construed, and any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 145-147; Dec. Dig. ⇨58.]

4. MUNICIPAL CORPORATIONS ⇨59—POWERS—EXPRESS AND IMPLIED POWERS.

A municipal corporation possesses and may exercise powers expressly granted, powers necessarily or fairly implied in or incident to powers expressly granted, and powers essential to its declared objects and purposes, not simply convenient, but indispensable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 149; Dec. Dig. ⇨59.]

5. MUNICIPAL CORPORATIONS ⇨285—CHARTER POWERS—REGULATION OF PUBLIC UTILITIES—ORDER OF RAILROAD COMMISSION—CONSTITUTIONAL AND STATUTORY PROVISIONS.

The charter of the city of Stockton (St. 1889, p. 577), in effect when Public Utilities Act (St. Ex. Sess. 1911, p. 43) was adopted, as amended by St. 1905, p. 832, provided by sec-

tion 30, p. 859, subd. 3, for the regulation of electric lights, etc., and the use of streets; by subdivisions 46 and 47 it was authorized to make regulations necessary to execute the powers vested by charter or by general laws and enforce all local regulations not conflicting therewith, and by subdivisions 28 and 34 to grant street franchises to steam and street railroads. Const. art. 11, § 19, then in force, authorized any company incorporated therefor to exercise the franchise of a public light company in every city having none, subject to city regulation, and as amended in 1910 declared that cities might operate their own public light plants and that companies operating such plants should be subject to the regulation of charges. The Broughton Act (St. 1905, p. 777) authorized cities to grant franchises for transmitting electric light and power. Petitioner, who had obtained a city franchise to operate an electric light, heat, and power system, with the use of streets, etc., was denied a certificate under Public Utilities Act (St. Ex. Sess. 1911, p. 43) § 50, declaring that no electric company shall construct its system without the Railroad Commission's certificate of public convenience and necessity. *Held*, that the Constitution merely placed utilities under the control provided by charter or organic law, and did not of itself empower cities to regulate public utilities; that the Broughton Act did not authorize any city to grant a franchise; and that its charter provisions gave the city of Stockton no power to grant a franchise to a public electric company, so that the requirement of a certificate of public convenience and necessity did not impair any power of control vested in the city, and the Commission's denial of such certificate was within its jurisdiction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 757; Dec. Dig. ⇨285.]

In Bank. Petition for writ of certiorari by the Oro Electric Corporation, petitioner, against the Railroad Commission of the State of California and John M. Eshleman and others, members thereof, to review certain orders of the Commission. On rehearing. Orders affirmed.

Samuel Knight and Goodfellow, Eells & Orrick, all of San Francisco, and C. L. Neumiller, and E. I. Jones, both of Stockton, for petitioner. Max Thelen and Douglas Brookman, both of San Francisco, for respondents. Chickering & Gregory, of San Francisco, Cummins, Stearns & Milkewitch, of Chicago, Ill., Nutter & Orr, of Stockton, H. H. Trowbridge, O'Melveny, Stevens & Millikin, and Gibson, Dunn & Crutcher, all of Los Angeles, A. H. Sweet, of San Diego, Charles P. Cutten, of San Francisco, and Short & Sutherland, of Fresno, amici curiæ.

SLOSS, J. This is a proceeding in certiorari, to review certain orders made by the Railroad Commission in response to an application of the Oro Electric Corporation for a certificate of public convenience and necessity, authorizing said corporation to construct and operate lines for the transmission and sale of electric current for light and power purposes in the city of Stockton and in certain other parts of San Joaquin county. The certificate so sought is provided for in sec-

tion 50 of the Public Utilities Act (Stats. Ex. Sess. 1911, p. 43). This section declares that no street railroad corporation, gas corporation, electrical corporation, telephone corporation, or water corporation shall begin the construction of a street railroad, line, plant, or system, or of any extension thereof, "without having first obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction."

At the time of its application, the Oro Electric Corporation had not entered the field which was to be covered by the certificate sought. The Western States Gas & Electric Company was occupying that field, and it appeared before the Commission to oppose the granting of the certificate to the Oro Corporation. The Railroad Commission first, on April 29, 1913, made an order in favor of the applicant, so far as concerned the territory outside of the city of Stockton, excepting a described region adjacent to the city. With reference to the city and the excepted adjacent tract, it gave to the Western States Company a period of 90 days within which to complete certain pending work of reconstruction and to present reduced rates that should be satisfactory to the Commission. The order declared that, if these conditions were complied with, the application of the Oro Company would be denied; otherwise it would be granted. After the 90 days had expired, on August 15, 1913, the Commission made its final order reciting that the Western States Company had complied with the conditions of the prior order, and refusing the certificate that public convenience and necessity required that the Oro Corporation be authorized to sell electricity in the city of Stockton and the adjacent territory described in the order of April 29, 1913. It is sought by this proceeding to annul these two orders.

The attack upon the acts of the Commission was, in the opening brief, based upon a variety of grounds. But, as the proceeding progressed through the successive stages leading to final submission, the matter in dispute was virtually narrowed down to the single question whether, under the reservation to incorporated cities of certain powers of control over public utilities, as declared in section 23 of article 12 of the Constitution and section 82 of the Public Utilities Act, the requirement of a certificate of public convenience and necessity was a prerequisite to the right of the petitioner to engage in the business of furnishing electric light and power within the city of Stockton. The other questions originally raised by the petitioner have been, in effect, determined against it by the decision of this court in *Pac. Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, rendered since this proceeding was instituted. In that case the constitutional amendments of 1911, relating to the Railroad Commission and the authority of the Legislature to confer powers upon

such Commission, were carefully considered and analyzed. The members of the court who participated in that decision, while differing on some of the questions presented, united in an interpretation of section 23 of article 12 of the Constitution of the state which cuts the ground from under the petitioner's claims: (1) That section 50 goes beyond the powers of supervision and regulation which the Legislature may, under said section 23, confer on the Railroad Commission; and, (2) that the requirement of a certificate of public necessity and convenience constitutes an improper delegation of legislative functions to the commission.

[1] And the same decision fully answers the argument that, on the merits, the Commission was not justified in denying the requested certificate. The validity of section 67 of the Public Utilities Act, in so far as it limits the scope of review by state courts of the acts of the Commission, must be regarded as finally settled by the Telephone Company Case. By that section, the findings and conclusions of the Commission on questions of fact are made final and not subject to review. Here the Commission found the ultimate fact that the public convenience and necessity did not require the exercise of the privileges in controversy, and neither the sufficiency of the evidence, nor the soundness of the reasoning, upon which that finding was based, can be considered on this proceeding.

We are thus brought to the inquiry, already mentioned, whether the power to grant or withhold a certificate of public convenience, conferred upon the Railroad Commission by section 50 of the act, was inoperative within the city of Stockton by reason of the limitations contained in section 23 of article 12 of the Constitution and section 82 of the Public Utilities Act. Section 23 of article 12 declares that every person or corporation engaged in operating any one of certain enumerated enterprises, including the furnishing of light or power to or for the public, is a "public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature." It goes on to provide that, from and after the passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of counties or municipalities, shall cease so far as they conflict with the powers conferred upon the Commission, "provided, however, that this section shall not affect such powers of control over any public utility vested in any city and county, or incorporated city or town as, at an election to be held pursuant to laws to be passed hereafter by the Legislature, a majority of the qualified electors voting thereon of such city and county, or incorporated city or town, shall vote to retain, and until such election such powers shall continue unimpaired. * * *" Sec-

tion 82 of the Public Utilities Act is in substance identical with the proviso just quoted.

By an act approved January 2, 1912 (Stats. Ex. Sess. 1911, p. 168), the Legislature provided for the elections contemplated by the proviso. No such election has been held in Stockton, and that city has consequently not surrendered any of the powers over public utilities reserved to it by the Constitution and the Public Utilities Act. Did it on December 23, 1911, the date when the Public Utilities Act was approved, or 90 days thereafter, when the act took effect, have any powers which would be impaired by the exercise of the power sought to be exercised by the Railroad Commission in this case?

On December 30, 1912, the city council of Stockton passed an ordinance granting to the Oro Electric Corporation a franchise to construct and operate under and along the streets and public places of the city conduits, poles, wires, and other appliances for transmitting and furnishing electricity for light, heat, and power. It is not necessary to enter into an examination of the scope of the franchise thus actually granted, for, as is pointed out in the briefs, the important consideration is not what the city did, but rather what it had power to do. We must first inquire whether the city of Stockton had power, when the Public Utilities Act took effect, to grant a franchise which would authorize the grantee to engage in and carry on the business of furnishing electricity for light and power within the city. If this question be answered in the affirmative, and in that event only, does it become necessary or proper to inquire whether the exercise of this power in the city is impaired by the provisions of section 50 of the Public Utilities Act?

The present proceeding has been heretofore decided by this court and is now before us pursuant to an order for rehearing. On the original submission the respondents did not question the power of the city to grant franchises for the distribution and sale of electricity. Indeed, the brief filed on behalf of the Commission expressly conceded the existence of such power, and no doubt of the propriety of this concession was suggested by other counsel appearing to oppose the relief sought by the writ. The petitioner, in its opening brief, had claimed that the city possessed this power, both under a freeholders' charter approved by the Legislature on December 20, 1911 (Stats. 1911, Ex. Sess. p. 254), and under the pre-existing charter and other law defining the powers of the city. Under these circumstances, this court did not feel called upon to make a minute examination of the point. Relying upon the concession of the respondents, it contented itself, in the opinion heretofore filed, with a reference to the charter of 1911, stating that:

"It is admitted that this charter conferred upon the city the power to grant franchises to corporations to engage in the business of supplying electricity to the inhabitants of the city

and to erect poles, wires, and conduits in the streets for that purpose. * * *

The other questions in the case were then treated on the assumption that the admission of counsel was based upon a correct reading of the charter.

Petitions for rehearing were filed, and in these petitions it was urged for the first time that the charter of 1911 had no application to the case, for the reason that by section 170 of that instrument (Stats. 1911, Ex. Sess. p. 302) it was provided that, for all purposes other than the nomination and election of officers, and taxation and assessment, the charter did not go into effect until a date later than that upon which the Public Utilities Act became effective. The point was well taken, and, notwithstanding its belated presentation, the court concluded that the public importance of the question demanded a rehearing, without regard to the merit of other grounds of attack upon the decision rendered.

We are now, accordingly, required to examine the various provisions, whether of statute, charter, or Constitution, governing the city of Stockton prior to the adoption of the charter of 1911, and to ascertain whether, under those provisions, the city had any power over electric corporations which would be impaired by the exercise of the power conferred upon the Railroad Commission by section 50 of the Public Utilities Act.

Prior to the enactment of the last-mentioned act, the city of Stockton was governed under a freeholders' charter, approved in 1889 (Stats. 1889, p. 577) and amended in 1905 (Stats. 1905, p. 832). That charter contained the following provisions, some or all of which, according to petitioner's claim, conferred authority to grant a franchise or right to engage in the business of selling electric current to inhabitants of the city of Stockton:

By sections 146 and 147 the department of streets was placed in the control of the city council and was declared to embrace "the control of the streets * * *; of the public grounds; of the lighting of streets and public buildings, and of everything of a public nature pertaining to said subjects. * * *"

Section 30 conferred upon the council power to pass ordinances:

"3. To regulate the laying of telegraph or telephone wires in or upon the public streets, erecting of gas and electric lights therein, * * * the use of streets and sidewalks for * * * telegraph posts, and other purposes."

"5. To provide for and regulate * * * lighting * * * of the streets, avenues, and public places."

"17. To provide for * * * such * * * lights, * * * and other supplies of any kind necessary for the convenient transaction of public business."

"25. To * * * determine the maximum rate or compensation to be charged by any person, company, or corporation supplying gas, electric or other illuminating power in this city. * * *"

"26. To regulate the quality, capacity, and lo-

cation of electric wires, water and gas pipes, mains, and fire-plugs, and to provide for and regulate the construction and repair of hydrants, * * * and such other appliances as may be requisite to utilize the distribution of water, electricity and gas in the streets, public places and public buildings."

"28. To grant franchises permitting any company or corporation to lay and maintain tracks, and to pass, with steam railroads * * * along, upon, and across, * * * any streets of the city. * * *"

"34. To grant franchises for the construction of street railroads on and along the streets of the city."

"46. To make all rules and regulations necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this charter or by general laws in said city."

"47. To make and enforce all such local, police, sanitary, and other regulations as are not in conflict with general laws and the provisions of this charter."

"51. To acquire, construct, purchase, lease, own, control, maintain and operate such public utilities and properties as shall be deemed to be for the best interests of the city."

Section 202 contained a general provision requiring a grant of a franchise to be in specific terms, and declaring a forfeiture for nonuser.

Before proceeding to an analysis of these provisions, it will be well to refer briefly to the distinction, drawn by counsel against the petitioner, between a franchise, or grant of a right, to engage in the business of furnishing electric current, and the narrower grant of a right to occupy the streets of the city in carrying on that business. On the former hearing, it was, as we have already stated, taken as conceded that the city of Stockton had the power to grant franchises "to engage in the business," as well as to "erect poles, wires, etc., in the streets for that purpose." It thus became unnecessary to consider whether section 50 of the Public Utilities Act "impaired" the power of a city, if that power extended merely to control of the use of its streets in connection with a public service; the right to engage in such service being derived from some source other than a grant by the city. If the power of a city were thus limited, we think it is entirely clear that the power would not be impaired by the provision of the Public Utilities Act requiring a certificate of public necessity and convenience as a condition precedent to the construction or extension of the plant or line of a public utility.

[2] The granting or withholding of the certificate is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for the service of the public. See *People v. Willcox*, 207 N. Y. 86, 100 N. E. 705, 45 L. R. A. (N. S.) 629. This is an entirely different question from that of the local control of the streets, and power over the two subjects may well be vested at the same time in different governmental bodies, without the one in any way clashing with or interfering with the other.

The Railroad Commission might grant a certificate authorizing a public utility to engage in its business in a given city, but the certificate would not authorize the use of the streets, unless the right to so use them had been given by the authority vested with the power to grant such right. This is recognized by subdivision "c" of section 50 itself, where we find an express provision that the applicant shall furnish to the Commission evidence that the required local consent, franchise, or permit has been obtained. On the other hand, the fact that a city may, in the exercise of its control over its own streets, give or withhold the right to use its streets, has no direct bearing upon the power to decide whether or not a given business, in the conduct of which the use of the streets may be convenient or necessary, shall be carried on. Where there is this limited control, its exercise is not impaired by legislation under which the state reserves to itself the determination of how far, if at all, the given business may be conducted. The city's powers are fully preserved if its streets are not occupied, except by its consent, given as may be provided by law.

Different considerations might prevail where a city had power to confer the right, not only of using the streets, but of conducting a public utility occupation within the municipal borders. This was the situation which, by reason of the concession of the respondents, we were called upon to consider in our former opinion. But since, as will presently appear, we are now satisfied that the charter and other provisions actually in force at the time when the Public Utilities Act took effect gave the city, at most, the limited power above mentioned (i. e., nothing more than the power to grant to electric corporations the right to use its streets), there is no occasion to reconsider, as we are asked to do, the correctness of the views expressed under the mistaken assumption that the city had power to grant franchises to carry on the business of selling electricity to the inhabitants, as well as to use the streets for that purpose. The impropriety of deciding anything more than is necessary to the decision gains added force, in this instance, from the circumstance that, during the pendency of this case, the proviso to section 23 of article 12 has been altered by constitutional amendment approved in November, 1914.

We return to a review of the provisions of the Stockton charter of 1889.

[3] It is thoroughly settled that language purporting to define the powers of a municipal corporation is to be strictly construed, and that any "fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." 1 Dill. Mun. Corp. § 89. This rule has been clearly announced by this court in various cases, of which it will suffice to cite *Von Schmidt v. Widber*, 105 Cal.

151, 38 Pac. 682, and *Hyatt v. Williams*, 148 Cal. 585, 84 Pac. 41. In the latter case the question was whether, under the very charter we are now considering (as it read prior to the amendments of 1905, by which, among other changes, subdivision 51 was added to section 30), the city of Stockton had power to maintain works for the purpose of supplying the inhabitants of the city with electric light. The application of the rule of strict construction led to a denial of the existence of the power.

[4] In both *Von Schmidt v. Widber and Hyatt v. Williams*, supra, it was declared as a "general and undisputed proposition of law," quoting from 1 Dill. Mun. Corp. § 85m (5th Ed.) § 237, that:

"A municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable."

[5] Using the mode of construction thus indicated, we find in the charter under discussion no language giving power to grant franchises to furnish electric light and power to the inhabitants. Certainly such power is not granted in express terms. Nor can it be said to be either "necessarily or fairly implied in or incident to" the powers expressly granted, or "essential to the declared objects and purposes of the corporation." The charter provisions which we have quoted go no further than to assert the city council's control over the streets, its power to regulate the laying of wires and the erecting of lights in or upon such streets, to provide for the lighting of the streets, and to fix the rates to be charged for lighting.

It may be conceded that the broad grant of power to control and regulate the streets would, if standing alone, be sufficient to confer authority to determine whether or not the streets may be occupied by light or water companies in furnishing service to the inhabitants and to grant franchises authorizing such occupancy. *City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S. 58, 33 Sup. Ct. 988, 57 L. Ed. 1389. So, too, the general grant of authority found in subdivisions 46 and 47 of section 30 of the charter might, if unrestrained by more specific provisions, suffice to empower the city council to grant such franchises to corporations organized to furnish water or light. See *City of Joseph v. Joseph Water Works Co.*, 57 Or. 586, 111 Pac. 864, 112 Pac. 1083; *Andrews v. Nat. Foundry, etc., Co.*, 61 Fed. 782, 10 C. C. A. 60; *Levis v. City of Newton* (C. C.) 75 Fed. 884; *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333. But an entirely different position is presented when it is observed that subdivisions 28 and 34 of section 30 make specific and express provision for the grant of franchises for steam and street railroads. There

is no express grant of power to confer franchises for furnishing light or power, or for any purposes other than the two specified. The case thus falls within the established rule that where a municipal charter "authorizes the enactment of by-laws in certain specified cases, and for certain purposes, and after this specific enumeration a general provision is added, that the corporation may make any other by-laws or regulations necessary to its welfare, good order, etc., * * * the power which the corporation would possess under * * * the 'general welfare clause,' if it stood alone, may be limited, qualified, or, when such intent is manifest, taken away by provisions specifying the particular purposes for which by-laws may be made." 2 Dill. Mun. Corp. (5th Ed.) § 585. Here the power to grant franchises to electric corporations could, at best, be said to be drawn by inference or implication from the general words of the charter touching control of the streets and the making of rules and regulations of a local, police, and sanitary character. Under the rule of interpretation to which we have just adverted, these general words will not be given the effect of extending power over a given subject covered by the charter (i. e., franchises) to a class of cases outside of those embraced within the grant. The principle is well illustrated in *City of St. Louis v. Bell Telephone Co.*, 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370. The city had undertaken, by ordinance, to regulate and limit telephone charges. The charter conferred power to "license, tax and regulate" persons engaged in a large number of specified occupations, "and all other business, trades, avocations or professions whatever." Telephone companies are not included in the enumeration, but telegraph companies are. The court held that such companies are "ejusdem generis" with telegraph companies, and therefore included in the words of the final clause. The opinion then considers whether the power to "regulate" gives the right to fix rates. This question was answered in the negative; the court basing its conclusion upon the fact that the charter gives express power to establish ferry rates, to fix the rates for carriage of persons, and of wagonage, drayage, and cartage of property, to regulate the price of gas, and to regulate and control railways within the city as to their fares, hours, and frequency of trips. "These express powers to fix prices, fares, and charges, in these specified cases," says the court, "are followed by no general words. With this specific enumeration of cases where the city may regulate the compensation to be charged, it impliedly appears that such a power was not intended to be given in other cases." Finally, it is held that the result is not affected by a "general welfare" clause contained in the charter.

In *City of Stillwater v. Lowry*, 83 Minn. 275, 86 N. W. 103, the question was whether

villages having a population of less than 3,000 had power to grant franchises for street railways. The statute conferred upon the councils of such villages authority to lay out, open, or change streets, to prevent the incumbering of streets, to ordain and establish "all such ordinances and by-laws for the good government and order of the village, * * * the protection of public and private property, the benefit of trade and commerce * * * as they shall seem expedient," to make, erect, establish, and control waterworks, also to build and control electric light plants, and to govern the streets, highways, and public places. While conceding that power to control and govern the streets might, in itself, be sufficient to authorize the council to permit the use of streets for street railway purposes, the court concludes that no such authority was given by the particular statute in question, for the reasons: (1) That power to provide for railways is expressly given to other municipalities; and (2)—a ground directly applicable here—that the express grant of power to authorize water and light plants indicates that power to authorize street railways was not intended to be covered by the general grant of power to control the streets.

The view that those who framed and adopted the Stockton charter of 1889, and the amendments of 1905, did not intend to vest in the city power to authorize private persons or corporations to enter into the business of furnishing light to the inhabitants, or even to use the streets for that purpose, is strengthened by a consideration of the constitutional provisions then in force. By section 19 of article 11, as it read when this charter was made, and amended, any individual or company incorporated for that purpose was given the privilege, in cities which had no public light or waterworks, of using the public streets, and of laying down pipes and conduits therein, for the purpose of supplying the city and its inhabitants with light or water. The only limitations upon the privilege were that the city might, through its appropriate officer, have direction of the work in the streets, and might make regulations for damages and regulate charges. Here was a direct grant or offer of a grant by the state, to all who chose to avail themselves of it, of all substantial rights included in a franchise to operate a light or water plant in every city in the state. In *re Johnston*, 137 Cal. 115, 69 Pac. 973; *Stockton Gas & E. Co. v. San Joaquin*, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511; *People v. L. A. Gas Co.*, 150 Cal. 557, 89 Pac. 108; *Ex parte Keppelmann*, 166 Cal. 770, 138 Pac. 346. While this constitutional provision remained in force, its effect could not be destroyed by statute or charter. Indeed, the rights conferred by it, when once vested by an entry upon the streets and the furnishing of light or water, could not be

taken away by amendment or repeal of the constitutional grant. *Ex parte Keppelmann*, supra; *Russell v. Sebastian*, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. Ed. 912, Ann. Cas. 1914C, 1282. There was every reason, therefore, for omitting from the charter any provision authorizing the grant of franchises by the city to light or water companies.

Section 19 of article 11 of the Constitution was amended in 1911 (see St. 1911, p. 2180), and the amended section was in force when the Public Utilities Act took effect. It is contended by the petitioner that, regardless of the Stockton charter, the amended constitutional provision gave to every city the power to grant franchises of the character here involved. The amendment evidenced a change in the policy which the state had declared in adopting the Constitution of 1879; the policy, that is to say, of "making these grants (of franchises to use the streets for distributing water and light) directly through the Constitution itself instead of permitting them to be made by the Legislature or by municipalities acting under legislative authority." *Russell v. Sebastian*, supra. The amended provision, after declaring the right of municipalities to establish and operate their own works for certain public utilities, including light and power, goes on to state that:

"Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof."

The language just quoted has been considered by this court in *Matter of Russell*, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914A, 152. Our judgment in the case was reversed by the Supreme Court of the United States in *Russell v. Sebastian*, supra, but the only question presented to that court was the extent of the right vested in corporations which had occupied the streets of a city prior to the amendment of section 19 of article 11. On the construction of the section, as amended, and its application to utilities which had not undertaken to commence operations while the old section was in force, our decision in *Matter of Russell* remains unaffected by the action of the higher court. The claim of the petitioner in that case was that the new section made a direct grant to persons or corporations of the right to enter upon the streets of a city to operate the works specified in the section, subject only to the power of the city to prescribe conditions relating to the manner of establishing and operating the works. With that interpretation this court did not agree. After reviewing the conditions which had existed before the amendment, we concluded that section 19 of article 11 had been changed for the very purpose of declaring a new policy with respect to public utilities in cities. Instead of seeking, as the old section had done, to destroy the

possibility of monopoly, the new section was adopted under the influence of an opinion, more or less generally held, that public utilities in cities should be conducted either by the municipality or by a properly regulated monopoly. "The amendment," says the court in the Russell Case, "shows an intention to allow this policy to be determined by each city in its own behalf." The intention is found in the provision that the work may be established and operated upon such conditions and under such regulations as the municipality may prescribe. The conditions and regulations are to be such as the municipality may prescribe "under its organic law." It seems clear to us that this language contemplates a power of control exercised either in accordance with conditions and regulations defined in the organic law itself or in accordance with conditions and regulations defined by some municipal agency to which the necessary authority has been given by the organic law of the city. In other words, the section does not, *ex proprio vigore*, give to all cities the power to regulate public utilities operating within their borders; it merely places the utilities under such control as may be provided for by the charter or other organic law of the city. The contrary view was suggested in *Ex parte Russell*, but a positive expression on the point was said to be unnecessary, since in that case the charter of the city in question (Los Angeles) contained adequate provisions respecting the granting of franchises. After a further study of the new section, we cannot believe that the words conferring on cities a power to control certain public utilities "under their organic law" constitute a grant of unlimited or specific power over such utilities (except in the matter of rates) to any city whose organic law contains no provision for the exercise of such power. It would follow, from the foregoing, that the amendment of section 19 of article 11 did not vest in the city of Stockton any power which would be impaired by section 50 of the Public Utilities Act.

Finally, the petitioner claims that the "Broughton Act" (Stats. 1905, p. 777) gave to every city authority to grant franchises for transmitting electric light and power. But we think it clear that this act merely places restrictions upon the granting of franchises, where the power to grant such franchises exists otherwise. As was said in *Sunset Telephone & Telegraph Co. v. Pasadena*, 161 Cal. 265, 272, 118 Pac. 796, 799, the "whole purpose" of the act "was to prescribe the method and conditions upon which the franchises included within its terms might be granted by the legislative body authorized by law to make the grant." The act does not authorize any board or council to grant a franchise.

The result of all that has been said is that,

in our judgment, the city of Stockton did not, when the Public Utilities Act was passed or when it became effective, have power to grant to electric corporations franchises permitting them to furnish electricity to the inhabitants of the city, if, indeed, it had the power to grant the limited franchise or right to use the streets for that purpose. It follows that the requirement of a certificate of public convenience and necessity, contained in section 50 of the act, did not impair any power of control vested in the city. This conclusion disposes of the case, since it compels the holding that the Railroad Commission did not exceed its jurisdiction in taking cognizance of the application of the petitioner for a certificate or in denying such certificate. The orders under review are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

(169 Cal. 483)

Ex parte VAUGHAN. (Cr. 1920.)

(Supreme Court of California. Feb. 26, 1915.)

HABEAS CORPUS $\Leftrightarrow$ 30 — CRIMINAL COMPLAINT—KNOWLEDGE OF COMPLAINANT.

Habeas corpus will not lie to determine whether complainant, in a criminal complaint, had actual knowledge of the facts which he swore to positively in such complaint.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 25; Dec. Dig. $\Leftrightarrow$ 30.]

In Chambers. Petition by E. K. Vaughan to a chief justice for a writ of habeas corpus. Petition denied.

E. R. Vaughan, of Santa Rosa, for petitioner.

ANGELLOTTI, C. J. Petition for writ of habeas corpus, addressed to the Chief Justice.

The petition for writ of habeas corpus states no sufficient ground for the issuance of such a writ. The complaint against petitioner, by which the proceeding under which he is held in custody by the sheriff of Sonoma county was instituted, does not purport to have been made on information and belief, and was sufficient to authorize issuance of the warrant of arrest. Habeas corpus will not lie to inquire into the question whether the complainant had actual knowledge of the matters as to which he swore positively in such a complaint.

Application for writ denied.

(169 Cal. 455)

VICTORIA HOSPITAL ASS'N v. ALL PERSONS, ETC. (S. F. 6176.)

(Supreme Court of California. Feb. 24, 1915.)

1. EXECUTORS AND ADMINISTRATORS $\Leftrightarrow$ 315—DISTRIBUTION OF ESTATE—DECREE—CONSTRUCTION.

A decree of distribution containing a provision that any other property not known or discovered which might belong to the estate or in

which the estate might have an interest is distributed to the residuary legatee and devisee was sufficient to pass title to whatever interest by reversion or otherwise deceased had at the time of her death in property to which she had executed a conveyance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. ☞315.]

2. DEEDS ☞155—CONSTRUCTION—CONDITION SUBSEQUENT.

A deed will not be construed to create a condition subsequent if it will bear any other reasonable construction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. ☞155.]

3. DEEDS ☞155—CONSTRUCTION—CONDITION SUBSEQUENT—FORFEITURE CLAUSE.

It is not essential to the creation of a condition subsequent by a deed that a forfeiture clause should be inserted.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. ☞155.]

4. DEEDS ☞155 — CONSTRUCTION — CONDITIONS—"ON CONDITION THAT"—"ON CONDITION."

While the words "on condition that" are apt and appropriate words both in their technical and popular sense to create a condition in a deed, and generally the words "on condition" are the precise and technical terms by which an estate is created, they do not necessarily create it if the whole deed shows a different intent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. ☞155.]

5. DEEDS ☞155—CONSTRUCTION—CONDITION SUBSEQUENT — "CONDITION" — "CONSIDERATION."

A deed to a corporation chartered "to provide medical attendance and medicines and hospital accommodations" recited that grantor, "for the consideration hereinafter stated," gave, granted, aliened, and confirmed to such corporation, "its successors and assigns forever," the said property, "to have and to hold the said premises under said party of the second part, its successors and assigns forever," and that "this deed is made upon the express condition and for the consideration that the real property hereby conveyed and the income therefrom shall be used by the party of the second part for benevolent purposes and in all respects in compliance with the objects for which said party of the second part is formed," and "it is hereby provided that the hospital to be erected on this land be named the V. Hospital." *Held*, that the deed did not create a condition subsequent, but that the word "condition" was used with the same idea as "consideration," which was that the real property and the income were to be used for the purposes of compliance with the object of the corporation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. ☞155.]

For other definitions, see Words and Phrases, First and Second Series, Condition; Consideration.]

6. TRUSTS ☞31—CREATION BY DEED—CONSTRUCTION.

Such deed did not create a trust for the benefit of the grantor's residuary legatee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 42; Dec. Dig. ☞31.]

7. QUIETING TITLE ☞50—RELIEF GRANTED—SUFFICIENCY OF DECREE.

Where a grantor conveyed land to a corporation chartered to build and maintain a hospital, the right, if any, which the grantor's residuary devisee would have in such property by virtue of the common-law rule that when a

corporation is dissolved its real estate reverts or escheats to the grantor, was only a mere possibility not coupled with an interest, which right would be created by the dissolution of the corporation, and consequently was not such an interest that it was necessary to mention and provide for in a decree in a suit to quiet title brought by the corporation.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 100; Dec. Dig. ☞50.]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action to quiet title by the Victoria Hospital Association against G. A. Wright and others. From a judgment for plaintiff, defendant G. A. Wright appeals. Affirmed.

Olney, Pringle & Mannon and J. R. Pringle, all of San Francisco, for appellant. F. D. Brandon and John L. McNab, both of San Francisco, for respondent.

ANGELLOTTI, C. J. This is an action under the McEnerney act, so called, to establish plaintiff's title to a lot of land, 100 by 100 feet, at the corner of Nineteenth and Valencia streets in the city and county of San Francisco. By the judgment it was decreed that plaintiff is "the sole owner and seised in fee simple absolute" of said property, that its title thereto "is good and valid," that the same "is hereby established and quieted as against all the world" except as to a certain deed of trust to secure a loan, "and that no other person has, holds or is entitled to any mortgage, or other lien, estate, right, title, interest or claim" in and to said property or any part thereof. We have here an appeal upon the judgment roll from said judgment by one G. A. Wright, the only person contesting the claim of plaintiff in the court below.

The findings show the facts relied upon by appellant for a reversal or modification of the judgment.

Plaintiff has only such interest in the property as it obtained by virtue of a deed executed and delivered to it by Mary A. Lapidge, a widow, on February 24, 1908, she being then the owner thereof. By this instrument, "for the consideration hereinafter stated," she gave, granted, aliened, and confirmed to appellant, "its successors and assigns forever," the said property, "to have and to hold * * * the said premises, * * * unto said party of the second part, its successors and assigns forever." The habendum and tenendum clause was followed by this provision, viz.:

"This deed is made upon the express condition and for the consideration that the said real property hereby conveyed and the income therefrom, shall be used by the said party of the second part for benevolent purposes and in all respects in compliance with the objects for which said party of the second part is formed, pursuant to its articles of incorporation, a copy of which was filed in the office of the Secretary of State of the state of California, on the 28th day of November, 1888.

"It is hereby provided that the hospital to be erected on this land be named the Victoria Memorial Hospital."

The objects for which plaintiff corporation was formed, as set forth in its articles of incorporation, were as follows, viz.:

"Second. That the purposes for which it is formed are, to provide medical attendance and medicines, and hospital accommodations, for the sick; to establish and conduct an hospital to be known as the 'Victoria Hospital'; to acquire, buy, sell or encumber real estate or other property in connection with the objects of the association; to take charge of the property thereof; and generally to do and perform, in accordance with the law and the by-laws thereof, all and every act and thing requisite or desirable to carry out the objects of the association."

Plaintiff entered into possession of the property under said deed, and has ever since been in such possession. It is not claimed that plaintiff has ever used or threatened to use said property for any purpose other than the purposes stated in the deed.

[1] Mrs. Lapidge died testate in the year 1909. No mention was made in her will of this property. Appellant was named therein as sole and residuary devisee and legatee. In due course, all the property of her estate was distributed to appellant, this property not being specifically referred to in the decree. The decree, however, contained a provision to the effect that any other property not now known or discovered, which may belong to said estate, or in which the estate may have an interest, is distributed to appellant. This, according to the decisions, was sufficient to pass title to whatever interest deceased had at the time of her death in this property. See *Humphry v. Protestant Episcopal Church*, 154 Cal. 170, 97 Pac. 187.

The act under which this proceeding was brought provides that:

The judgment "shall ascertain and determine all estates, rights, titles, interests and claims in and to said property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, * * * and shall be binding and conclusive upon every person who at the time of the commencement of the action, had or claimed any estate, right, title, or interest in or to said property, or any part thereof."

It is not disputed that the effect of the decree appealed from is to conclusively establish the fact to be that plaintiff is the sole owner, in fee simple absolute, of all the property, and that neither appellant nor any one else has any interest whatever, "legal or equitable, present or future, vested or contingent," therein.

1. It is claimed that the language of the deed creates a condition subsequent, upon the failure to perform which appellant, as successor of Mrs. Lapidge, will become entitled to re-enter and become the absolute owner of the property. It is urged that for this reason the judgment appealed from is erroneous, in that it neither so limits the interest of plaintiff, nor saves the right of appellant.

We are of the opinion that the deed should not be so construed.

[2-4] It is, of course, a familiar principle that such conditions are not favored in law because they tend to destroy estates, and that no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction. As said in *Hawley v. Kafitz*, 148 Cal. 395, 83 Pac. 249, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282:

"There must be language used which is so clear as to leave no doubt that the grantor intended that an estate upon condition subsequent should be created—language which *ex proprio vigore* imports such a condition."

It has, however, many times been held that it is not essential to the creation of a condition subsequent that a forfeiture clause should be inserted, such as that a failure to comply with said conditions will render this conveyance null and void, and said premises shall revert to said first party (see *Papst v. Hamilton*, 133 Cal. 631, 66 Pac. 10, approved in *Fitzgerald v. County of Modoc*, 164 Cal. 493, 129 Pac. 794, 44 L. R. A. (N. S.) 1229; *Quatman v. McCray*, 128 Cal. 285, 60 Pac. 855), though some such clause would appear to be extremely desirable and in some cases absolutely necessary for the purpose of showing clearly and unmistakably the intent of the grantor. As said in *City of Portland v. Terwilliger*, 16 Or. 465, 19 Pac. 90, such provisions "sometimes become very important in construing the language of the conveyance when its meaning would otherwise be left in doubt." As said in *Hawley v. Kafitz*, *supra*:

"While no precise form of words is necessary to create a condition subsequent, still it must be created by express terms or by clear implication."

It is true that the words "on condition that" are apt and appropriate words, both in their technical and popular sense, to create a condition, and it appears to be the generally accepted doctrine that, as the words "on condition" are the precise and technical terms by which an estate or condition is created, such a phrase is sufficient to create a conditional estate, unless there is something else in the deed indicating the contrary. As said in *Guild v. Richards*, 16 Gray (Mass.) 309:

"In such cases, to use the quaint language of the books, 'without any more saying, the feeoffee hath an estate upon condition.'"

See, also, *Clapp v. Wilder*, 176 Mass. 332, 57 N. E. 692, 50 L. R. A. 120.

This is the accepted doctrine in this court (see *Papst v. Hamilton*, *supra*; *Hawley v. Kafitz*, *supra*; *Fitzgerald v. County of Modoc*, *supra*), and such words *ex proprio vigore* import such condition, in the absence of other language inconsistent therewith. But it has never been held here, and we do not understand it to be the rule elsewhere, that, simply because these words are used, we necessarily have an estate on condition. It may freely be conceded that with such words we

have such an estate unless upon consideration of the whole deed a different intent is indicated. As was said in *City Mission v. Appleton*, 117 Mass. 326:

"Although the words 'upon condition,' in a conveyance of real estate, are apt words to create a condition, any breach of which will forfeit the estate, yet they are not to be allowed that effect when the intention of the grantor, as manifested by the whole deed, is otherwise," or when "the intent of the parties as gathered from an examination of the whole instrument" is otherwise. *Stanley v. Colt*, 5 Wall. (U. S.) 119, 18 L. Ed. 502.

They must be given that effect "in the absence of anything appearing in the deed to the contrary." See *Clapp v. Wilder*, *supra*.

[5] Coming to a consideration of the deed here involved: We have as the grantee a corporation, the expressed objects of which, according to its articles of incorporation, are "to provide medical attendance and medicines, and hospital accommodations, for the sick" and "to establish and conduct an hospital to be known as the 'Victoria Hospital.'" The grantor purports, "for the consideration hereinafter stated," to give and grant to this corporation, "its successors and assigns forever," a lot of land 100 by 100 feet. She declares that said corporation, "its successors and assigns," are to have and hold the same forever. Then follows the declaration that the deed "is made upon the express condition and for the consideration," etc. Said "condition" and "consideration" are "that the said real property * * * and the income therefrom shall be used by the said party of the second part for benevolent purposes and in all respects in compliance with the objects for which said party of the second part is formed," according to its articles of incorporation on file, in other words, to assist in providing medical attendance, etc., for the sick, and to assist in establishing and conducting a hospital to be known as the Victoria Hospital. The statement, "It is hereby provided that the hospital to be erected on this land be named the Victoria Memorial Hospital," clearly constitutes no part of the expressed "condition" and "consideration," and indicates nothing more than that it was then contemplated that a hospital would be erected on this property. The "condition" or "consideration" was that the real property and the income thereof were to be used for benevolent purposes, in compliance with the objects for which the corporation was organized.

It is to be observed that there is nothing herein limiting the use to be made by the corporation of this property, so long as such use is for one or more of the objects for which the corporation was formed. There is nothing that can be construed as requiring the property to be used as a site for a hospital. "The said real property," and "the income therefrom," are to be "used" by the grantee for the same purposes, i. e., for any of the benevolent purposes for which the cor-

poration was formed and exists. It could not be held, for instance, that there would be any forbidden diversion of any of the property, corpus or income, if all of the same were devoted by the corporation to the payment of charges incurred by it for medical attendance and medicines and hospital accommodations for the sick, although no hospital was ever established or conducted by it. Such a use would be strictly in accord with the language of the alleged condition or consideration, being one "for benevolent purposes," in all respects in compliance with the objects for which the corporation was formed. The same would be true of an absolute sale of the property with the bona fide intent to devote the proceeds to the objects of the corporation, or of continuing to hold the property as income-producing property, using the income for such objects. It is to be noted that the deed grants the property to the party of the second part and "its successors and assigns" forever, thus implying to some extent at least the right on the part of the corporation to dispose of the property, free of restriction or limitation in so far as the grantee is concerned. The considerations we have referred to materially differentiate the case at bar from those wherein the language was such as to require the property itself to be retained and used for a prescribed purpose, or to require improvements of a certain character to be constructed thereon, etc. The use here prescribed is one that does not necessarily have to do with the land itself at all, being entirely consistent with an absolute disposition thereof free of all claims in the hands of the grantee of the corporation. It is further to be noted that the grant is made "for the consideration hereinafter stated," and that the "consideration" thus referred to is the matter relied upon as expressing a condition. The words "upon the express condition" are followed by the words "and for the consideration that the said real property * * * shall be used," etc., indicating that the words "condition" and "consideration" were used as expressing the same idea. If the words "upon the express condition" be here given the technical effect claimed for them by appellant, they are inconsistent with the words "for the consideration" which simply imply a promise or covenant on the part of the grantee to use the property in the way prescribed, rather than a mere condition having no promissory force. We are utterly unable to read this deed as manifesting an intent on the part of the grantor to express a condition affecting the title to this land, and are of the opinion that, notwithstanding the use of the words "upon the express condition," an examination of the whole instrument fairly indicates the intent on the part of the grantor to convey the property absolutely to the corporation in consideration of its mere promise to use the same for the purposes specified, being all the pur-

poses for which the corporation was organized and exists, with the result that we have nothing more than a covenant on the part of the grantee to the effect that the property will be so used. See *Fitzgerald v. County of Modoc*, supra. In *Papst v. Hamilton*, 133 Cal. 631, 66 Pac. 10, specially relied upon by appellant, the conveyance to certain persons as "joint tenants, with right of survivorship as such," was "upon the conditions, however, that the premises shall be used solely for the purpose of erecting, furnishing, keeping and maintaining thereon an academic or collegiate school" for certain purposes, "and for a residence or residences thereon for the professors," etc., "and for no other purpose whatever," and there was nothing in the deed to indicate any other intent than that manifested by these words. As said in *Fitzgerald v. County of Modoc*, supra, in regard to this, "it was clear that the estate was upon condition."

[6] 2. The claim that appellant has some contingent reversionary interest in this land, based upon the theory that even if it be held that the conveyance was not upon condition, nevertheless a trust was created thereby, cannot, in our opinion, be sustained. Much of what we have already said as to our construction of the instrument is in point here. It appears to be conceded on both sides that the corporation was, as is indicated by the record, one organized and existing purely for certain charitable purposes. The conveyance, as we read it, was an absolute one of all of the interest of the grantor in the land to the corporation, for any and all of said purposes, with the result that the corporation can lawfully use the property in any manner it sees fit for any of the purposes for which it may lawfully use any property owned by it. The conveyance was, in substance, an absolute grant to the corporation for all the purposes of the corporation, in consideration of the implied undertaking on the part of the corporation that it would use the property for such purposes. The use to be made of the property was not so limited by the grantor as to indicate an intent to impose a trust on this land. As is said by counsel for plaintiff:

"The only trust, if it can be so denominated, is one imposed upon the conscience of the grantee and its directors, viz., that the property shall be used for some of the benevolent purposes contemplated by the articles of incorporation. Those articles contemplated sale, incumbrance, and every other beneficial use to which the property or its proceeds might be put."

We think that the cases relied upon by learned counsel for appellant in this regard are all distinguishable from this upon the facts. In our own *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728, relied on by appellant, the conveyance appears to have been specifically made "in trust for the uses and purposes of a cemetery." The cases cited by appellant in this connection involve conveyances dedicating the land itself to some par-

ticular use, for which it is to be kept intact and retained, and express prohibitions as to sale, mortgage, etc., were contained in some of such conveyances.

[7] 3. It is said that the old common-law rule, to the effect that when a corporation is dissolved such real estate as it then has "reverts or escheats" to the grantor or donor, is in force in this state in so far as charitable corporations are concerned. It is consequently urged that appellant, as the successor of Mrs. Lapidge, has some sort of contingent interest in this property which should be protected by the decree, so that in the event that plaintiff corporation is dissolved at some future time, and at the time of such dissolution it still owns this property, he may receive the same. We do not deem it necessary to determine whether the doctrine that the real estate owned by such a corporation reverts or escheats to the donor upon its dissolution exists in this state, though it has been stated in one of our decisions that it does. See *People, etc., v. President and Trustees of College of California*, 38 Cal. 174. We are satisfied that, assuming for all the purposes of this decision the rule here to be in all respects as claimed by appellant, nevertheless he now has at most, so far as any of this property is concerned, only a mere possibility, not coupled with an interest. Whatever legal interest in the property he may ever have, on this account, will be created only by the dissolution of the corporation at a time when it still owns this real property. The rule is practically a rule of succession. It is the dissolution of the corporation with the real property still belonging to it that creates the right, and until that event happens, the donor is as much without any legal interest in the land as any stranger. See generally *Nicoll v. N. Y. & Erie R. R. Co.*, 12 N. Y. 121. Obviously the decree here will not bar the assertion by appellant of any such right of interest if he subsequently acquires it. It is necessary to ascertain and determine in such a proceeding as this only existing interests.

"A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind." Section 700, Civ. Code.

We cannot see that appellant at best has anything more than such "a mere possibility." It is very clearly and definitely held in one of the cases cited by appellant (*Trustees v. Venable*, 159 Ill. 215, 42 N. E. 836) that such a naked possibility of a reverter is not assignable and will not pass to a devisee. It is there said:

"He (the grantor) had no future estate in the land, but only what is called a naked possibility of reverter, which is incapable of alienation or devise."

Our own Civil Code provides that "a mere possibility, not coupled with an interest, cannot be transferred." Section 1045. So it is very much to be doubted whether appellant, simply as the residuary devisee and legatee under Mrs. Lapidge's will ever could have

any interest under the rule referred to. But as to this it is, of course, not necessary to decide here.

No other matter suggested by the briefs appears to merit discussion.

The judgment appealed from is affirmed.

We concur: SLOSS, J.; MELVIN, J.; LORIGAN, J.; SHAW, J.; HENSHAW, J.

169 Cal. 449

WILSON v. BLAKE et al., City Council of Vallejo. (Sac. 2257.)

(Supreme Court of California. Feb. 23, 1915.)

1. ELECTIONS ⇨166 — BALLOTS — DESIGNATION OF OFFICES—DIFFERENT TERMS.

Vallejo City Charter, § 15, subd. 17, provides that on the ballot the offices to be filled "shall be arranged in separate columns in the following order: * * * For commissioner (if any) vote for (giving number)." Subdivision 21 of that section provides that, in case there are two or more persons to be elected to any office, as that of commissioner, the candidates equal in number to the number to be elected receiving the highest number of votes for such office shall be declared elected. Section 6, subd. 1, makes the law of the state applicable to the elections of the city and to the canvass of the returns. Pol. Code, § 1211, subd. 2, declares that in canvassing the votes, if it is impossible to determine the voters' choice for any office to be filled, the ballot shall not be counted for such office, and section 1197, subd. 8, provides that, if any two or more officers are to be elected for the same office for different terms, the term for which each candidate for such office is nominated shall be printed on the ballot. At a special election held on petition for the recall of two commissioners whose terms expired at different times, the names of the two commissioners and of the two opposing candidates were printed on the ballot without any designation as to the term for which any of them were nominated. *Held*, that the state law should govern in such a case; since otherwise it was impossible to tell which commissioner the voters desired to have removed or for how long they desired to have the opposing candidates serve, and the ballots were void for uncertainty and could not be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 140; Dec. Dig. ⇨166.]

2. MANDAMUS ⇨74—ADEQUACY OF REMEDY—CANVASS OF VOID VOTES.

Mandamus will not issue to compel a city council to canvass votes cast at a city election, where the ballots were void for uncertainty; since the writ will not issue to compel the performance of an act which can accomplish no useful purpose.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 150-157; Dec. Dig. ⇨74.]

In Bank. Petition in the Court of Appeal by J. R. Wilson against William P. Blake and others, as the City Council of the City of Vallejo, for mandamus to compel the defendants to canvass the returns of a city election. The Court of Appeal awarded the writ, and defendants apply to the Supreme Court for a rehearing. Demurrer to the petition sustained, and application denied.

Stetson & Koford, of San Francisco, for petitioner. Hoefler & Morris, of San Francisco, for respondents.

HENSHAW, J. Petitioner applied to the Court of Appeal for mandate to compel the respondents, constituting the city council of the city of Vallejo, to canvass the returns of a certain election held in the city. The proceeding was heard in the Court of Appeal upon issue joined by general demurrer to the complaint. The Court of Appeal awarded the mandate, and, upon petition to this court, a rehearing of the controversy was ordered here to be had.

Under the charter of the city of Vallejo the city council consists of a mayor and two commissioners. The incumbents of those offices are the respondents herein. Defendant Tormey is the mayor, and defendants Blake and Warford are commissioners. Recall proceedings were commenced against Commissioners Blake and Warford, and upon April 23, 1914, a recall election was held. Commissioner Blake at the time of this election had about one year to serve. Commissioner Warford had been elected for a four-year term, and at the time of the election had served about one year, and therefore had three years more to serve. For convenience, Blake's term may be designated the short term and Warford's term the long term. Two candidates had been named by petition for the office of commissioner, but without specification or designation of the particular office (long or short term) to which they aspired. These were Wilson and Jones. Thus it did not appear that Wilson was a candidate to succeed Blake or a candidate to succeed Warford, and the same is true of the candidacy of Jones. The ballots used at this election were, so far as these candidates and their offices are concerned, in form as follows:

For Commissioner Vote for two	
For Commissioner William P. Blake	
For Commissioner William A. Jones	
For Commissioner George H. Warford	
For Commissioner Joseph R. Wilson	
For Commissioner	
For Commissioner	

The election returns showed the vote to be: For Wilson 2,071; for Warford, 2,024; for Blake, 2,012; and for Jones, 1,648. Upon the failure of the council to canvass and declare the returns of this election, Wilson filed his petition in mandate to compel action.

The council bases its failure and refusal to make this canvass, and, consequently, its

defense to this petition, upon the ground that the election itself accomplished nothing, by virtue of the illegal form of ballot employed; wherefore to canvass the returns of such an election would be the doing of a vain and useless thing.

[1] The charter of the city of Vallejo (section 6, subd. 1) makes the law of the state applicable to its municipal elections and to the canvass of the returns thereof. The state law governing the canvass of returns (Pol. Code, § 1211, subd. 2) declares that:

"In canvassing the votes: * * * 2. If a voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office."

The contention of respondents is that at this election, while the title to the office is the same—namely, that of commissioner—there were, in law and in fact, two offices to be filled; one, the office of commissioner for the short term, the incumbent of which was Blake; the other the office of commissioner for the long term, the incumbent of which was Warford. Petitioner makes answer that the matter is controlled by the provisions of the city charter; that section 5, subd. 17, of this charter provides that on the ballot—

"offices to be filled shall be arranged in separate columns in the following order: * * * For commissioner (if any) vote for (giving number)."

While subdivision 21 of the same section provides:

"In case there is but one person to be elected to an office, the candidate receiving the majority of the votes cast for all the candidates for that office shall be declared elected. In case there are two or more persons to be elected to an office, as that of commissioner or school director, then those candidates equal in number to the number to be elected who receive the highest number of votes for such office shall be declared elected. * * *"

From these provisions petitioner argues that the form of ballot adopted is that prescribed by the charter, which designedly makes no distinction in the office of commissioner growing out of the duration of the terms of the incumbents. But the language of the charter of Vallejo is not all-controlling in the matter. That charter itself makes the election laws of the state applicable to the municipal elections, and the law of the state declares (Pol. Code, § 1197, subd. 8):

"If two or more officers are to be elected for the same office for different terms, the term for which each candidate for such office is nominated shall be printed on the ballot as a part of the title of the office."

And this is not only a most reasonable, but a most necessary, provision of the law. In all of those cases where the title to the office is one, and the officers and incumbents of the office many, as boards of supervisors, city councils, commissioners, judges of the superior court, justices of the Courts of Appeal and of the Supreme Court, it would be impossible in any election, where more than one was to be voted for, and the terms were

of different periods, to determine the expressed will of the voters without such provision. And with peculiar force does this apply to recall elections. It will not be disputed that, where the incumbent of an office is subjected to this form of rebuke, he, upon the one hand, is entitled to the simple and uncomplicated verdict of his fellow citizens upon his right to continue in office, and, upon the other hand, the electors in turn are entitled to the untrammelled and unembarrassed right to declare, as to that officer, whether or not he shall be continued in office. The result of an election held as this one was gives rise to endless confusion and to astounding consequences. We may pass over the fact that the opposing candidates were not nominated against either of the incumbents; in other words, that Jones was not a candidate to defeat Blake, nor Wilson a candidate to defeat Warford, nor Wilson a candidate to defeat Blake, nor Jones a candidate to defeat Warford, with the remark that, since there were two offices to be filled, these candidates, by petition, should have looked to it that the office which they sought was specifically designated in their petitions. But, when attention is paid to the possibilities which may arise from an election so conducted, the confusion destroys the possibility of the conclusion that such an election affords a fair, or even a determinable, answer to the essential proposition upon which the voters are to act, which proposition, under the Vallejo charter, is: "Shall A. be recalled and B. be elected in his place?" This we may briefly illustrate, and in so doing it is to be noted that six forms of marked ballot are permissible under this election as held: (1) Ballots for Blake and Warford; (2) ballots for Wilson and Blake; (3) ballots for Wilson and Warford; (4) ballots for Jones and Warford; (5) ballots for Jones and Blake; and (6) ballots for Jones and Wilson. Upon the basis of 100 ballots, and thus 200 votes, assuming that Blake received 60 and Warford 61, it would appear that 6 out of 10, or a clear majority, had voted to retain the commissioners. But it is quite possible that Jones may receive 69 and Wilson 10 votes; thus accounting for a total of 100 ballots and 200 votes. The result would be that Jones would be elected. Or, again, turning our consideration to the form of ballot cast, in ballots 2 and 3 Wilson, and in ballots 4 and 5 Jones, manifestly received votes for two different and distinct offices, which votes are counted in their favor for one office. In the event that their sum in the aggregate exceeds the sum received by either of the incumbent commissioners by this method of cumulating votes, they are elected. Some of the electors may have desired to displace Warford; others to displace Blake. By this election and its method of computation, the result of their balloting is perhaps to displace a man whom they desired to retain.

And, without expatiating further upon the matter, assume that Jones and Wilson had received a majority of votes over the incumbents, for whose office—Blake's or Warford's—was Jones elected, and for whose office was Wilson elected? Sufficient has been said to show that the form of the ballot employed at this election renders the returns void for uncertainty. We hold therefore, as matter of principle, supported by our positive law, that while it was permissible to hold the elections at one time, the offices of the men sought to be recalled, because of their different terms, were separate offices; that they should have been so designated upon the ballot, as the state law prescribes; and that the names of the candidates for those offices against each of the incumbents should have been placed respectively in the proper spaces set apart on the ballot for that purpose.

Upon the proposition, which is, in effect, declared by our statute law, that differing terms make different offices, though the title be one, the authorities are uniform, and it is sufficient to refer to *Page v. Kuykendall*, 161 Ill. 319, 43 N. E. 1114, 32 L. R. A. 656; *Chamberlain v. Hartley*, 152 Pa. 544, 25 Ati. 572; *Contested Election of Gilleland*, 96 Pa. 224; *Appeal of Milligan*, 96 Pa. 222.

[2] To the suggestion that the court should order this mandate, to the end that the city council be directed to perform the public duty of canvassing the returns, even though the result shall be as above indicated—a declaration from the city council that the election returns are void for uncertainty—the answer is that the writ of mandate is issued in the discretion of the court to compel the performance not only of a public duty, but of a useful public duty. *State v. Ely*, 23 N. D. 619, 137 N. W. 834; *Belcher v. Treat*, 61 Me. 577. A court having authority to issue the writ will not do the vain and foolish thing of ordering an inferior board or tribunal to do that which accomplishes nothing. It will exercise its power to issue the writ only when some useful purpose may be accomplished thereby. *Boyne v. Ryan*, 100 Cal. 265, 34 Pac. 707; *French v. State Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756. No such result can here be accomplished, for the reasons already given.

Wherefore the demurrer to the petition is sustained, and the application for a writ is denied.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.

ANGELLOTTI, C. J. (concurring). I concur in the judgment and in the foregoing opinion. I am of the opinion, further, that there is nothing in the charter provisions of the city of Vallejo independent of the state law that, fairly construed, purports to authorize such manner of proceeding as was

had in this matter, entirely regardless of the fact that the two officers here proceeded against were commissioners for terms of different length. The provisions of the charter specially applicable to the matter of recall clearly show, in my opinion, that the recall proceeding contemplated is necessarily one against a single officer. In view of the nature of the question to be submitted to the people at a recall election, I do not see how any other system would be practicable. However this may be, the language of the charter shows that nothing else was contemplated. And, where proceedings are instituted for the recall of two officers at the same time, even though the title to the office is the same, as is the case here, they are separate and distinct proceedings, and must be separately submitted to the people. As is suggested in the opinion, such submission need not necessarily be on different days, but where, for convenience and to save expense, two or more proceedings are voted on at the same time, they must be kept separate and distinct on the ballot, so that the will of the people may be expressed as to each. In such a case, as many recall elections are being held at the same time as there are officers involved, and they are being held at the same time solely for convenience and to save expense. As each of these involves but one officer, the provision of subdivision 17 of section 5 of the charter prescribing the form of ballot cannot be construed as warranting the form of ballot that was, in fact, used at the election of April 23, 1914.

169 Cal. 484

Ex parte COOMBS. (Cr. 1825.)

(Supreme Court of California. March 2, 1915.)

1. INTOXICATING LIQUORS ☞200—OFFENSES —SUFFICIENCY OF COMPLAINT.

In a prosecution under a county ordinance forbidding any one to solicit, take, or receive any order for the sale or delivery of intoxicating liquors in a precinct where the voters had declared against retail liquor dealers' licenses, a complaint, not pleading the terms of the ordinance itself or its exceptions, but averring that defendant's acts were done at a place other than a fixed place of business for the sale of intoxicating liquors, sufficiently excluded him from the classes of dealers who might solicit trade at their licensed places of business.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 219, 220; Dec. Dig. ☞200.]

2. INTOXICATING LIQUORS ☞10 — POLICE POWER—REGULATION OR PROHIBITION.

County supervisors, in the exercise of the police powers, may impose upon the sale of liquor within the county any restrictions not in conflict with general laws, and the police power is efficient for the regulation or even for the prohibition of the liquor traffic by supervisors within their respective counties.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 7-12; Dec. Dig. ☞10.]

3. INTOXICATING LIQUORS ☞17 — REGULATION—PROHIBITION OF LAWFUL INDUSTRY.

A county ordinance forbidding one to solicit, take, or receive orders for the sale or delivery of spirituous or vinous liquors within a

voting precinct, the voters of which have declared against the granting of retail liquor dealers' licenses, was limited to the precinct, and did not attempt to prohibit the manufacture of wines within the precinct nor their sale therein for delivery in territory outside the precinct, so that it did not attempt to prohibit the conduct of a lawful industry.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 21-23; Dec. Dig. ☞ 17.]

4. INTOXICATING LIQUORS ☞ 17—REGULATION—VALIDITY OF ORDINANCE.

The *Wyllie Law* (St. 1911, p. 599) only limited the powers of county supervisors in territory that had been voted dry, and hence did not prevent a board from exercising its police power in any part of the county not subject to that law, so that its ordinance forbidding one to solicit, take, or receive any order for the sale or delivery of any intoxicating liquors in a voting precinct, where the voters had declared against retail liquor dealers' licenses, was not subject to attack on the ground that it provided a different scheme of local option.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 21-23; Dec. Dig. ☞ 17.]

5. INTOXICATING LIQUORS ☞ 17—ORDINANCE—DISCRIMINATION.

An ordinance adopted by county supervisors, directing that, at general election in each precinct, the voters should decide as to granting of different classes of licenses within the precinct, was not objectionable as discriminating against wines manufactured in the county, since neither foreign nor domestic wines could be sold in the precinct where it was in force by one taking orders at other than a fixed and licensed place of business, and the fact that he could not do business upon the same terms as those engaged in a different branch of the liquor business would not destroy the ordinance, as the power to regulate involves a wide discretion in the selection of classes of dealers in intoxicants, who shall be subject to regulation.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 21-23; Dec. Dig. ☞ 17.]

6. INTOXICATING LIQUORS ☞ 17—REGULATION—PROHIBITING DISPOSAL OF PROPERTY.

Such ordinance, the operation of which was confined to territory under the regulative authority of county supervisors, was not objectionable as an attempt to prohibit the disposal of goods lawfully possessed, as they might be sold at any place outside that area.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 21-23; Dec. Dig. ☞ 17.]

7. COMMERCE ☞ 40—INTERSTATE COMMERCE—SALE OF LIQUOR.

An ordinance forbidding one to solicit, take, or receive any order for the sale or delivery of intoxicating liquors in a voting precinct, where the voters had declared against retail liquor dealers' licenses, did not by its terms prevent the shipment of goods in interstate commerce.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 29, 30; Dec. Dig. ☞ 40.]

8. INTOXICATING LIQUORS ☞ 17—POLICE POWER—CONSTITUTIONAL PROVISIONS.

An ordinance forbidding the soliciting, taking, or receiving of orders for the sale or delivery of liquor within a precinct where the voters have declared against retail liquor dealers' licenses, which was a legitimate exercise of police power, did not violate the fourteenth amendment.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 21-23; Dec. Dig. ☞ 17.]

In *Bank*. Habeas corpus by John Coombs against William A. Hammel, sheriff of the county of Los Angeles. Writ discharged, and relator remanded to custody.

Byron C. Hanna, Joseph Musgrove, and Charles W. Lyon, all of Los Angeles (W. S. Wright, of Los Angeles, of counsel), for petitioner. A. J. Hill, J. D. Fredericks, and Percy V. Hammon, all of Los Angeles, for respondent.

MELVIN, J. Petitioner has been arrested upon a warrant issued as the result of the filing of a complaint wherein he is charged with violating a certain ordinance of the county of Los Angeles. More specifically the charge is that John Coombs did "at a place other than a fixed licensed place of business for the sale of intoxicating liquors, to wit, in Lamanda Park precinct, in Los Angeles county, solicit, take, and receive an order for the delivery of, and did then and there deliver, intoxicating liquors, to wit, three gallons of wine, to one A. L. Bradley, at his permanent residence in Lamanda Park precinct; said precinct being then and there a voting precinct in which a retail liquor dealer's license was not and could not be obtained."

The ordinance in question was adopted by the supervisors of Los Angeles county in 1910. It is known as Ordinance No. 245 (new series), and is entitled "An ordinance regulating and licensing certain kinds of business."

By the first section of this by-law it is made unlawful for any person to conduct any business specified therein without first procuring the prescribed license.

By section 18 the term "intoxicating liquors" is defined, and "vinous liquors" are included within the definition.

It is provided, among other things, in the nineteenth section, that:

"No person shall sell any intoxicating liquors in any quantity whatsoever, except at a fixed place of business, or without first obtaining a license therefor under the provisions of this ordinance. No person shall, in any voting precinct in which a retail liquor dealer's license cannot be obtained, as hereinafter provided, solicit, take or receive any order for the sale or delivery of any intoxicating liquors: Provided that nothing herein contained shall be deemed to prohibit the soliciting, taking, or receiving of such orders by a duly licensed winery keeper or hotel or restaurant liquor dealer at his licensed place of business."

Section 22 establishes the method to be adopted by those seeking licenses; and the next section establishes the procedure to be followed by the board of supervisors in hearing and passing upon such applications. That part of the section which requires particular examination by us in the decision of the questions arising in this proceeding is as follows:

"No application for either a wholesale or retail liquor dealer's license, or a winery keeper's license, or a hotel or restaurant liquor dealer's license, shall be granted unless at the last pre-

ceding general election at which the question of granting licenses of the kind applied for was submitted to the people, the majority of the votes cast upon the question of granting licenses of the kind applied for, in the voting precinct in which the business is proposed to be carried on, was in favor of granting such licenses. For the purposes of this ordinance the respective voting precincts of the county and the boundaries thereof shall be deemed to continue unchanged from any general election until the next general election thereafter."

Section 25 directs that at every general election four questions shall be presented on the ballot to the electors in each precinct of the county outside of incorporated cities and towns. By their answers to these questions the voters of each precinct express their desires with reference to the granting of "wholesale and retail liquor dealers' licenses," "winery keepers' licenses," "hotel and restaurant liquor dealers' licenses," and "licenses for public billiard rooms," within the precinct.

Section 29 defines a "retail liquor establishment." It is not necessary to quote the definition. It is sufficient to note that no part of it gives permission to solicit orders for liquor at any place, except upon the premises devoted to the retail business. The section also contains the following language:

"Every person who, either as owner, agent or otherwise, conducts or carries on or assists in conducting or carrying on a retail liquor establishment as herein defined, or who sells intoxicating liquors in any manner not included in the definitions of the terms 'hotel liquor dealer,' 'restaurant liquor dealer,' 'winery keeper' or 'wholesale liquor dealer,' as herein defined, is, for the purposes of this ordinance, declared to be carrying on the occupation of a retail liquor dealer, except as provided in section 36 hereof."

The exception stated in the above quotation is not material to this discussion.

Section 31 defines a winery to be:

"A place for the manufacture and sale of vinicultural products manufactured in this county from grapes grown in this state, when sold by the manufacturer in quantities of not less than two gallons, such minimum quantity to be all delivered at one time, and when sold on the premises where manufactured and not permitted to be drunk in, upon or about said premises; and any person, who, either as owner, agent or otherwise, conducts or carries on or assists in conducting or carrying on a winery, is, for the purposes of this ordinance, declared to be carrying on the occupation of a winery keeper."

It is alleged in the petition that John Coombs is an employé of the Sierra Madre Vintage Company, a Californian corporation conducting the business of manufacturing wine, in Lamanda Park precinct, from grapes grown in California; that said corporation has been thus engaged for more than a quarter of a century; and that the acts charged in the complaint were committed by petitioner as an employé of said corporation, the wine sold and delivered having been manufactured by his employer from grapes grown in California. It is also averred that on April 1, 1913, the board of supervisors denied the application of the Sierra Madra Vintage Company for a license, "solely and only for the reason that a majority of the

voters in the precinct, in which the said winery is situated, had, at the previous general election, voted against the issuing of winery licenses."

The ordinance is attacked by petitioner, who advances the following reasons for its asserted invalidity:

"First, that the ordinance contravenes the express public policy of the state of California; second, that it attempts to prohibit the conducting of a lawful industry; third, that the enactment of such an ordinance by the board of supervisors is not authorized; fourth, that it is in conflict with the provisions of the general law in that it provides a different scheme of local option from that authorized by the Wyllie Local Option Law; fifth, that it unlawfully discriminates against products manufactured in Los Angeles county and against grapes grown in the state of California; sixth, that it is unreasonable in that it attempts to prohibit the disposal of goods lawfully possessed; seventh, that it attempts to prevent the shipment of such goods in interstate commerce; eighth, that it violates the provisions of the fourteenth amendment to the Constitution of the United States."

[1] It is not seriously contended that the complaint fails to state an offense under the ordinance. True, there is no pleading in the terms of the ordinance itself, of the exceptions to the rule that no soliciting may be done by a dealer in liquors, but there is an averment that the acts of the petitioner were done at a place "other than a fixed place of business for the sale of intoxicating liquors." This sufficiently excludes him from classes of dealers who may solicit patronage, because even such licensed merchants or hotel or restaurant keepers may not solicit business, except at their fixed places of business.

At the outset petitioner concedes that the court is not bound to consider the ordinance by any particular state of facts presented in the petition for the writ of habeas corpus, but his counsel contend that nevertheless we should test the ordinance by the allegations of the petition, because the alleged facts are necessarily within the scope of the by-law. This question need not trouble us, because, conceding the full force of the petitioner's argument in this regard, we feel constrained to uphold the ordinance upon the authority of Californian cases.

Petitioner calls the attention of the court to the unvarying legislative policy in California of fostering and encouraging the manufacture and sale of native wines. By resolutions, by the offering of prizes for the best wines, by the establishment and generous support of a department of viticulture in the University, and by many other methods, the policy of the state to encourage this industry has been established. Petitioner argues, therefore, that the ordinance before us is opposed to public policy in that, according to his interpretation, it destroys a wine manufacturing industry in the precinct in which his employer's place of business is located. All that is said in the able briefs of counsel for petitioner, regarding the state's policy toward the growers of grapes and the pro-

ducers of wine, is true. It is true that, in reliance upon that policy, vast sums have been expended. It is true that tens of thousands of citizens derive their means of livelihood from this legitimate business of making and selling wines.

[2] But it is equally true that, in the exercise of its police power, the board of supervisors of a county may impose, upon the sale within such county of vinous and other liquors containing alcohol, any restrictions which are not in conflict with general laws. If, therefore, upon a reasonable construction of the ordinance, it appears to us to be a police measure, it will be our duty to sustain it. In this state the police power is efficient for the regulation or even for the prohibition of the liquor traffic by boards of supervisors within their respective counties. *Ex parte Campbell*, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep. 418; *Ex parte Young*, 154 Cal. 322, 97 Pac. 822, 22 L. R. A. (N. S.) 330; *Matter of Application of Ellsworth*, 165 Cal. 685, 133 Pac. 272; *Matter of Application of Anixter*, 166 Cal. 763, 138 Pac. 353. We might cite scores of other authorities to the same effect. In the opinion delivered for this court by Mr. Justice Henshaw in the matter of *Anixter's Application* he used the following language:

"It is, of course, well settled that a state and its subordinate municipal agencies may pass laws, even laws penal in their character, regulating and indeed prohibiting the sale of intoxicating liquors, or the soliciting of orders, or the making of contracts for the sale of such liquors"—citing many authorities.

[3] Examining the ordinance with reference to the contention that it attempts to prohibit the conducting of a lawful industry, we find no such result. It does not prevent the manufacture nor the sale of wine. True, the language of the section under which the petitioner was charged is rather general. It forbids a citizen, under the conditions set forth, to "solicit, take or receive any order for the sale or delivery of any intoxicating liquors" in the voting precinct. Similar but even more emphatically prohibitory language was used in the ordinance considered in the proceeding with reference to *Anixter's application*, but this court interpreted the language of the by-law in the light of the police power of the town of Winters. It was held that since the utmost power of the municipality extended, not to the control of those beyond its borders, but to the regulation of the liquor traffic within its limits, the ordinance in question only prevented soliciting and the making of contracts of sale in the town for the delivery of intoxicants therein. That authority is entirely applicable to the language of the ordinance here under review. So interpreted, it places no ban upon the manufacture of wines within the precinct nor the sale of such products therein for delivery in territory outside that part of Los Angeles county in which such traffic is prohibited.

Under the above interpretation of the ordinance, there is no force in petitioner's assertion that the enactment of such an ordinance is not within the legitimate power of the board of supervisors.

[4] The by-law is also attacked upon the ground that it provides a different scheme of local option from that authorized by the *Wyllie Law*. In the construction given to the *Wyllie Law* in the opinion of this court in *Matter of Application of Ellsworth*, supra, it was decided that the *Wyllie Law* only limited the powers of the supervisors in territory that had been voted "dry"—that in other parts of a county the police power of the board of supervisors was undiminished. Nothing in the *Wyllie Law* prevents a board of supervisors from exercising this power in any part of the county which has not been subjected to the prohibitive force of that law. In *Davis v. Board of Supervisors of Merced County*, 7 Cal. App. 572, 95 Pac. 170, the District Court of Appeal had under examination an ordinance providing that a majority of the voters living in the precinct within one mile of a proposed saloon might by protest prevent the issuance of a license to sell liquor. The ordinance was held to be a valid exercise of the police power. In *Denton v. Vann*, 8 Cal. App. 677, 97 Pac. 675, the ordinance considered was very similar to the one before us. It furnished exactly the same plan for ascertaining the wishes of the electors in each precinct. The ordinance also provided that no license would be granted in precincts in which a majority of the voters had declared against its issuance. The learned District Court of Appeal held that the ordinance did not by its terms delegate any legislative power, but established a valid condition to the granting of licenses by the governing power. A petition to have that cause heard in this court was denied. The case of *Galindo v. Walter*, 8 Cal. App. 235, 96 Pac. 505, is easily distinguishable from *Denton v. Vann*. In the latter case the ascertainment of the will of the electors was not made the basis of the issuance of licenses under an existing ordinance. The common council sought to have the electors advise them by ballot whether or not the majority favored prohibition of the sale of intoxicating liquors. The district court held that under the existing law the council had no power to submit the proposed question on the ballot.

[5] Respondent argues, correctly, we believe, that under the authority of *Ex parte Beck*, 162 Cal. 702, 124 Pac. 543, the taking effect of the ordinance is properly made to depend upon the vote of the electors of a particular locality. In that case the submission of the question to the voters in a supervisory district was achieved under the *Wyllie Law*; in this it was under the general power given to the supervisors by section 11 of article 11 of the Constitution of California,

which carries with it the power to select the subdivision in which the vote may be taken. Under the authorities cited above, we must hold that this ordinance does not conflict with the Wyllie Law, and that the submission to the voters of the questions relating to issuance of licenses in Lamanda Park precinct was proper.

We do not see that the ordinance is essentially discriminatory against wines manufactured in Los Angeles county. We are told that possibly in a precinct retail liquor licenses might be issued but winery keepers' licenses might be denied. In such a condition of affairs, it is argued, wines of foreign manufacture might be sold, while those made in the precinct could not be disposed of. But we are not confronted with that phase of the matter. Neither foreign nor domestic wines could be sold in Lamanda precinct by a solicitor taking orders at a place other than a fixed place of business. But even if the hypothetical condition presented by petitioner did exist, the mere fact that he could not do business upon the same terms as others engaged in a different branch of the liquor traffic would not necessarily destroy the ordinance. The power to regulate involves a wide discretion in the selection of the classes of dealers in intoxicants who should be subjected to regulation. For example, an ordinance is valid which gives the right to sell liquors only by keepers of hotels, and permits the serving of intoxicants only in the dining rooms of such hotels and as parts of regular meals. Indeed, the governing power which may prohibit a thing altogether may impose even arbitrary restrictions upon its existence. *Denton v. Vann*, supra; *In re Kidd*, 5 Cal. App. 159, 89 Pac. 987; *Ex parte Christensen*, 85 Cal. 213, 24 Pac. 747.

[6, 7] There is no force in the contention that the ordinance attempts to prohibit the disposal of goods lawfully possessed. Its operation is confined to the territory under the regulative authority of the supervisors of Los Angeles county. Petitioner is at liberty to dispose of his employer's products in any place without that area. Upon the same reasoning and under the interpretation which we have given it, the ordinance does not by its terms prevent the shipment of goods in the practice of interstate commerce.

[8] Being a legitimate exercise of police power, the ordinance does not violate the provisions of the fourteenth amendment to the Constitution of the United States. *Ex parte Campbell*, supra.

For the reasons given above, the writ is discharged, and the prisoner remanded to custody.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LORIGAN, J.; SLOSS, J.

169 Cal. 505

WHEATLEY v. SAN PEDRO, L. A. & S. L. R. CO. (L. A. 3299.)

(Supreme Court of California. March 4, 1915.)

1. BOUNDARIES ⇨3—DESCRIPTION.

Where deeds and partition decrees define the line between points B and C, as following the ordinary high-water mark, the statement following, that C is distant from B "in a straight line" a certain number of yards, merely fixes the location of C, more definitely, and does not limit the previous description.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. ⇨3.]

2. BOUNDARIES ⇨3—DESCRIPTION—REFERENCE TO MAP.

Under Code Civ. Proc. § 2077, subd. 6, as to construing the descriptive part of a conveyance when the construction is doubtful, providing that, when the description refers to a map, it controls them if it appears the parties acted with reference to the map, a decree in partition is not controlled, as to a boundary, by a map filed in connection with the referee's report, and referred to; the decree containing definite terms of description, sufficient to enable a surveyor to trace the course of the boundary without the aid of the map.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. ⇨3.]

3. BOUNDARIES ⇨8—DEFINITE TERMS.

The description in a deed of the boundary line between the points B and C as along the south boundary of Wilmington is a term of definite description, though the act incorporating the city of Wilmington had been repealed.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 66-76; Dec. Dig. ⇨8.]

4. BOUNDARIES ⇨3—INCONSISTENCY—NATURAL OBJECTS—COURSES BY ANGLES.

Where a deed gives a boundary line between points B and C as the south boundary of Wilmington, which had been located definitely along the line of high-water mark, the addition of a description of a course by angles may, under Code Civ. Proc. § 2077, subd. 2, be rejected as opposed to the description of a definite course well known and fixed.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. ⇨3.]

5. BOUNDARIES ⇨3—CONTROLLING DESCRIPTION—AMOUNT OF LAND.

The statement in a conveyance of the amount of land to be conveyed is not a factor in establishing boundaries, unless the more particular description expressed is indefinite and uncertain.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. ⇨3.]

6. BOUNDARIES ⇨48—ABANDONMENT.

Mere setting of stakes by a grantee of land back from the true boundary does not show an abandonment of the remainder of the land conveyed to him.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 232-242; Dec. Dig. ⇨48.]

7. BOUNDARIES ⇨48—ACQUIESCENCE.

That a boundary may be fixed by acquiescence, it must be by agreement, at least implied, and continued for the period of limitations.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 232-242; Dec. Dig. ⇨48.]

8. ADVERSE POSSESSION ⇨100—COLOR OF TITLE—CONSTRUCTIVE POSSESSION—PLACE OF ACTUAL POSSESSION—"THE PROPERTY."

The rule as regards title by adverse possession under color of title, that where a deed

gives a good title to part of the land included, and color of title only to the remainder, actual possession which will give constructive possession must be within the part to which color of title only is given, is not changed by Code Civ. Proc. § 322, providing that when the occupant enters into possession of "the property" under claim of title, founded on an instrument as being a conveyance of it, and there has been a continued occupation and possession of the property included in such instrument, or of some part of it, under such claim, for five years, the property so included is deemed to have been held adversely, the "property" being that of the opposing owner; as section 312 declares that in order to set the various periods of limitation running there must first be a cause of action, that is, an occupancy of such a character that it would be cause of action by the owner of the senior title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. ☞ 100.]

In Bank. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by W. T. Wheatley against the San Pedro, Los Angeles & Salt Lake Railroad Company. From an adverse judgment and order, defendant appeals. Affirmed.

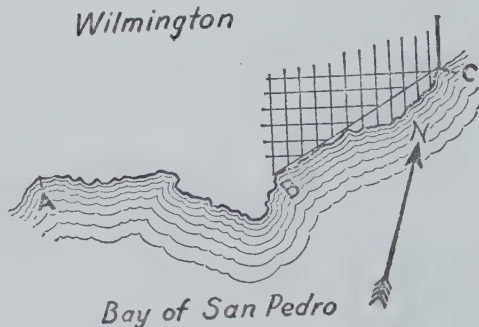
A. S. Halsted, W. F. Palmer, F. A. Waters, and Wilfred M. Peck, all of Los Angeles, for appellants. Woodruff & McClure, of Los Angeles, for respondent.

SHAW, J. This cause having been transferred to the District Court of Appeal for the Second District, that court, upon an opinion by Mr. Justice James, affirmed the judgment and order appealed from. The cause was then transferred to this court for rehearing. Upon further consideration, we adhere to the decision of the District Court and adopt its opinion, which is as follows:

Action to quiet title to certain lands. From a judgment in favor of plaintiff, and an order denying defendant's motion for a new trial, appeals were taken.

The lands as to the title to which controversy is made are lands lying along the northerly shore of the Bay of San Pedro in Los Angeles county. These lands, together with those composing the entire town site of the city of Wilmington and lands east and south thereof, were originally owned, under the name of Rancho San Pedro, by one Christopher Dominguez, whose title rested on a grant from the Spanish government. The heirs of Dominguez, in the year 1855, conveyed to B. D. Wilson, John G. Downey, and four others the tract of land upon which the town of Wilmington was afterwards platted. The conveyance was to the grantees as tenants in common. In general, the southerly boundary of the tract so conveyed was fixed at the line of high-water mark on the bay. The description given in the deed traced a course from the intersection of the westerly boundary of the tract with the line of the bay, easterly until a point on the shore line designated as "B" was reached. The point where the easterly boundary intersected the shore line of the bay was designated as "C." The high-water mark between points B and C made a meandering line and mainly followed a course southerly of a straight line drawn between points B and C. The diagram

accompanying this opinion is referred to as illustrating roughly the conditions just described:



It then appears that a straight line drawn between B and C would leave between such line and high-water mark an irregular shaped plat of ground. A portion of this ground is the land about the title to which this litigation revolves. The deed of conveyance by the Dominguez heirs to the grantees hereinbefore mentioned described the southerly line of the tract, after the point B was reached, as follows: "From the said point B unto a stake marked 'C,' following the ordinary high-water mark, and distant in a straight line sixteen hundred and nineteen yards and three inches, with the course by compass east 47° north," etc. In the year 1855 a decree of partition entered in the district court of the county of Los Angeles partitioned the land of the Rancho San Pedro among the Dominguez heirs and their grantees, and the description quoted from, which refers to the southerly boundary of the tract deeded to Wilson et al., was incorporated into the decree. In 1862, in the same district court and in case No. 877, a partition by decree was made of the tract purchased by Wilson and others. In this suit of partition the referees appointed one Frank Lecouvreur, a surveyor, to assist them, and he prepared a map of the tract showing the boundaries thereof. The tract as delineated upon this map was also subdivided into blocks with streets between them, which blocks composed the town site of the city of Wilmington thereafter incorporated. The subdivision was at that time designated by the name of "New San Pedro." The interlocutory decree entered in action No. 877 described the boundary line between the points B and C in substantially the same terms as were used in the deed from the Dominguez heirs to Wilson et al., and in the decree in the first partition suit. In the final decree in this second suit (No. 877) were these clauses: "Having reference, in the descriptions in this decree, for fuller explanation, to the map made by Frank Lecouvreur, the surveyor appointed by said referees to assist them in said partition, which map was submitted by the referees with their said report and filed herein with said report. And it is further ordered * * * that the entire tract of land included within the exterior boundaries of said map be and shall be partitioned between the parties in this suit, the said tract being * * * described as follows: Commencing at the point know as 'Los Barriles,' marked 'Station A' on said map; thence following the line of ordinary high-water mark, easterly as far as the point marked 'C' on said map, or where the eastern exterior boundary of said tract of land will intersect said ordinary high-water mark, the courses and distances from said point A to station C, according to said map, being as follows, * * * links to station B; thence north 43° east seventy-three (73) chains, sixty (60) links to station C, * * * the same being the

resurvey of the lands first described in the complaint in this case, and in said former decree of date September 6, 1862, i. e., the interlocutory decree, excepting from said lands the strip of one mile in length by one hundred yards in width within said estuary whereon the said lands are situated, commencing from station B." On the map filed with the referees' report in case No. 877 the side lines of the blocks were not shown extended through to high-water mark, but all such lines intersected a straight line drawn from B to C. The decree of partition adopted the subdivision lines shown on the map, but, in allotting the blocks fronting the bay between points B and C, extended the side lines of such blocks through the straight line drawn from B to C by recitation in each case as follows: "Extending its east and west line southerly across * * * to ordinary high-water mark." Following this decree, a map was drawn and filed for record in the county recorder's office, which map was a duplicate of the map filed with the referees' report, except that the blocks within the subdivision were not numbered, but were lettered according to the township, as allotted under the decree, and except also that the side lines of the blocks were shown thereon extended through the straight line drawn from B to C and extended to what appears to be the mark made by the waters of the bay. The various instruments of conveyance hereinbefore mentioned and the decree of partition contained (referring to the entire tract allotted to Wilson and others), and after the terms of description referred to, this clause: "So as to include neither more nor less, but exactly 2,400 acres of land within the above-described limits."

Defendant's claim of title to the strip of land in controversy is based, first, upon a deed from the Dominguez heirs. These heirs, in 1892, deeded to the Terminal Land Company, the grantor of defendant, a large body of land lying easterly of the tract previously granted to the predecessors in title of the plaintiff, and immediately adjoining it. In the deed to the Terminal Land Company the dividing line between points C and B was described as follows: "* * * To station C of Wilmington; thence along the south boundary of Wilmington, south $56\frac{1}{2}$ degrees west, $73^{60}/_{100}$ chains to station B of Wilmington." By the testimony of a surveyor it was shown that the course of the boundary as described in this deed by angles and distances from station C to B was along a straight line. The Terminal Land Company in 1892 prepared a map of its lands lying easterly of the town of Wilmington. Lot 3 as designated on this map had for a portion of its northerly boundary the straight line C B. This map was recorded in the office of the county recorder and thereafter was used by the assessors of the county of Los Angeles, the city of Wilmington, and later the city of Los Angeles, in making up the tax rolls. It was shown that defendant had paid all of the taxes assessed against the land in controversy for more than five years prior to the commencement of this action. The negative fact was also shown that the owners of the land lying north of the straight line B C had not evidenced their claim of title to the lands in dispute by improving or entering upon actual possession of the same until a short time before the commencement of this action. It was also shown that neither the defendant nor its immediate predecessor in title had improved the land in dispute, nor entered into actual possession of the same by the making of any use thereof, until just prior to the time plaintiff commenced his action. Various improvements had been made more than five years prior to the commencement of the suit on the land easterly and southerly of the disputed ground, and upon the tract designated generally as "Lot 3" on the map made by the Terminal Land Company, being the map before mentioned as having been recorded and

used by the city and county assessors. In 1872 the city of Wilmington was incorporated by an act of the Legislature (Stats. 1871-72, p. 108). The description of the municipal boundaries used in that act were those found in the deeds of the Dominguez heirs to Wilson et al., and the recorded Lecouvreur map (showing the disputed boundary to be along the water's edge) was referred to in the act and expressly adopted as the official map of Wilmington. The act of incorporation was repealed in 1887, and the town was reincorporated as a city of the sixth class in 1905. The main facts upon which the judgment was based have now been fairly stated.

It is contended by appellant that the facts are such as to compel a judgment in its favor because: First. The description used in the early conveyances should be construed as indicating a straight line between the points B and C; that the map filed in partition suit No. 877 delineated that line as running in a direct course between the points named, and this map should control other language of the decree inconsistent therewith; that, should the southerly line of the tract be fixed at the high-water mark, then more than the intended amount of land would have been included in the grant, which parcel was to be composed of "neither more nor less, but exactly 2,400 acres." Second. That, conceding the location of the boundary between B and C to be a matter of uncertainty under the various instruments of conveyance and decrees of partition, it had become fixed and certain by long acquiescence and agreement as being located along a straight line. Third. That appellant has obtained a prescriptive title to all of the ground in dispute.

[1, 2] The terms of description used in the conveyances, and also the partition decrees, were reasonably clear and certain; they all defined the line between points B and C as following the ordinary high-water mark. The statement that the point C was distant from B "in a straight line 1,619 yards and 3 inches" fixed the location of C more definitely, but did not purport to be used in limitation of the other specific terms of description by which the southerly boundary had already been fixed as being along the line of ordinary high water. Section 2077, Code of Civil Procedure, is cited in support of the contention that the map filed in the partition suit determined B C to be a straight line. It will be remembered that the particular description in the decree carried the side lines of the blocks of land through to high-water mark. The plat recorded in the office of the county recorder, made after the partition was made, also showed the side block lines so extended. This last map was one apparently filed for the benefit of the partitioning parties, and it showed that they construed the decree as providing for the partitioning of the property down to the water's edge. Section 2077, Code of Civil Procedure, provides rules for construing the descriptive part of a conveyance of real property where the description is doubtful. Subdivision 6 of that statute reads as follows: "When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars." Admitting for the moment that the descriptive terms contained in the deed from the Dominguez heirs to the predecessors in interest of the plaintiff were indefinite, it must appear clearly that the original parties all relied upon the high-water mark as constituting the southerly boundary of the Wilmington tract. The decree of partition in case No. 877 was not controlled by the map filed in connection with the referees' report. That decree contained definite terms of description—sufficient to enable a surveyor to trace the course of the southerly boundary without the

aid of the map. The recorded map followed the decree in delineating the block lines as extending to the water's edge.

[3-5] From what has been stated it may be understood that the view the court takes is that the particular descriptions used in the deeds of the Dominguez heirs to the predecessors in title of plaintiff and in the partition decrees referred to clearly and sufficiently describe the boundary line between the points B and C as being located at the line of high water. The deed of the Dominguez heirs to the Terminal Land Company did contain inconsistent terms of description. It has been noted that this deed in particular described the line between B and C along a straight course. At the same time it described that course first as being "along the south boundary of Wilmington." The south boundary line of the municipality of Wilmington had been fixed by the act of 1872, whereby the recorded Lecouvreur map had been adopted as the official map of the city and the particular description of the boundary of the municipality between points B and C had been described in the terms of the original conveyance to Wilson et al. In this deed the points B and C were referred to as established monuments and were identified further as being referable to the Lecouvreur survey. The phrase used in the deed, that the line between points B and C was along the south boundary of Wilmington, constituted a term of definite description, notwithstanding that the act of 1872 incorporating the city of Wilmington had been repealed by the act of 1887. Wilmington was not reincorporated until 1905. So far as the testimony shows, the south boundary line of Wilmington was the line established by the Legislature in the act of 1872, and it is reasonably apparent that the Dominguez heirs intended to adopt that line as the boundary between points B and C. This line, as has been hereinbefore declared, had been located definitely along the mark of high water. The addition of the description of a course by angles may well be rejected as being opposed to the description of a definite course well known and fixed. Section 2077, Code Civ. Proc., subd. 2; *Mills v. Lux*, 45 Cal. 273. However, for the purposes of a full consideration of the claim made by appellant that it holds a good prescriptive title, it may be conceded that the Dominguez heirs by their instrument of conveyance pretended to clothe their grantee with title to that property. As the argument of appellant is here understood, it is admitted that, where in an instrument of conveyance or other description of real property the quantity of land to be conveyed is stated, that term is not to be viewed as a factor in establishing boundaries, unless the more particular description expressed is indefinite and uncertain. The following decisions are in point to that effect: *Baldwin v. Temple*, 101 Cal. 396, 35 Pac. 1008; *Dutra v. Pereira*, 135 Cal. 320, 67 Pac. 281. It may be suggested, also, that the evidence does not establish that by the location of the southerly boundary line along such high-water mark the tract conveyed to Wilson et al. would have included more than 2,400 acres.

[6, 7] As to the line in dispute having become fixed by agreement or acquiescence at the location claimed by appellant, the facts do not bear out that contention. The ground was not improved for a long period of years by either plaintiff or his predecessors, or by appellant or its predecessors. The line could not have become fixed at a place different from that at which the record title located it, where there was no active possession on the part of claimants adverse to the record, nor any dispute or question expressed as to the true location of the line. Some testimony was given tending to show that surveyors had, in years subsequent to that during which the Terminal Land Company obtained its deed, found certain stakes, called lot and block stakes, along the straight line B

C. As to when these stakes were set and by whom, the evidence did not show. Assuming that the stakes were placed there by plaintiff's predecessors in title, their location at those points would not show an abandonment of the remainder of the land conveyed to them under their deeds. There must be an agreement in order that a division line shall become fixed; this agreement must be express or implied from the acts of the parties and acquiesced in for the period fixed by the statute of limitations. *Helm v. Wilson*, 76 Cal. 476, 18 Pac. 604. There was no evidence that appellant took possession of the disputed strip of land or openly claimed that it was entitled to it until a short time prior to the bringing of this suit. There was no evidence of any agreement as to the straight line B C being adopted as the true boundary, and no acquiescence in that line was shown; but, on the contrary, when appellant did enter upon the strip of ground and begin to make improvements thereon, it was met by this suit, by which it was called upon to establish its legal right to be there.

[8] Appellant's claim to title by adverse possession rests upon the following facts for support: The deed from the common grantor of both plaintiff's and appellant's predecessors describing the line B C both as a straight line (by angle description) and as being the southerly line of Wilmington; the deed of appellant's immediate grantor following the Terminal Land Company's map which had been recorded and which showed B C to be a straight line. It was proven and not denied that appellant had paid all taxes on the land in dispute for more than five years prior to the commencement of this action; also, that upon a considerable portion of the tract purported to be conveyed, not including the ground in dispute, improvements had been made by appellant and its predecessor. The deeds were sufficient to give color of title. *Wilson v. Atkinson*, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299; *Owsley v. Matson*, 156 Cal. 401, 104 Pac. 983. It has been held that, where a tract of land is claimed adversely, the possession that will be held sufficient is not necessarily an actual possession and occupancy of the whole, but that, if some part of the tract has been subjected to the continuous possession of the claimant, this possession will extend to the whole (*Owsley v. Matson*, supra), for the possession of one who enters under color of title and who sets up a prescriptive claim may be in part constructive. Where the entry is without color of title, the possession and occupancy must be actual as to the whole body of the land claimed. The underlying theory of this rule, which is of general application, is that there must be notice given to the legal owner as to the adverse claim; that where color of title is held by the claimant the extent of his claim is evidenced by the paper or judgment conferring such colorable title; and that when possession is taken of part of the land it will be presumed to extend to the limits of that described in the instrument or judgment conferring the imperfect title. "Where possession has been taken under color of title, the law, operating on the 'color,' puts the claimant in constructive possession of that part of the land called for by the 'color,' although it is not in his actual possession." *Ruling Case Law*, vol. 1, § 44. On the other hand, when color of title is not so possessed by the claimant, the real owner has no means of notice as to the extent of the adverse holder's claim, other than his acts of possession indicate; and it is said that constructively the possession of land is *prima facie* in the owner of it. Our Code sections express this rule as it is generally applied. Sections 322, 324, Code of Civil Procedure. Nevertheless, in order that this rule of constructive possession shall apply in favor of the adverse claimant, it must appear that that portion of the land upon which he plants his hostile possession is a part of that

claimed adversely. He cannot, under a deed which conveys a good title to a portion of a tract and a colorable one only to another portion thereof, take possession of the portion to which he has received good title and by so doing maintain the claim that constructively he is in possession of the whole of the tract. His right to the possession of property, the complete title to which he has acquired, would be no sort of notice to the true owner of the land not occupied that he claimed to be in possession of that also. The law as to this is well established. *Schmitt v. Traphagen*, 73 N. J. Eq. 399, 69 Atl. 189, 133 Am. St. Rep. 739; *Turner v. Stephenson*, 72 Mich. 409, 40 N. W. 735, 2 L. R. A. 277. The possession proved in favor of appellant in this case was not a possession of land subject to an adverse claim. A good title was acquired by the predecessor of appellant to a large part of the tract of land which it received from the Dominguez heirs, and it was upon such portion of the tract only that possession was established and improvements made. There was no entry upon or actual possession maintained of any part of the land in dispute until a date less than five years prior to the commencement of this action. Under the rule stated, the proof of possession was insufficient to sustain the claim of title acquired by prescription.

The other errors assigned relate mainly to rulings of the trial judge as to the admission and rejection of evidence. These rulings, conceding error, were not such as to prejudice the rights of appellant, in view of the conclusions expressed on the main and controlling questions of the case.

The rehearing was ordered to again consider the provisions of section 322 of the Code of Civil Procedure. It is claimed by the appellant that the foregoing opinion is inconsistent with the rule laid down in that section.

The section defines constructive adverse possession of land where the possession is taken under color of title. It provides that where "there has been a continued occupation and possession of the property included in such instrument, decree or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely," except where it is divided into lots and the actual possession is of only one lot. Under this provision, appellant claims that where the boundaries of the junior title interfere with those of the senior title, so that part only of the area of each is common to both and is unoccupied, the junior holder who occupies a part of his land not within the interference thereby becomes an adverse occupant of the overlap, although the right of the owner of the senior title to the whole of his tract is nowhere invaded or disturbed.

We are satisfied that this construction of the section cannot be sustained. The section is a part of the chapter relative to the statute of limitations, and it is intended to prescribe a rule to determine the time within which an action to recover real property, or an action arising out of the title thereto must be begun in order to avoid the bar of sections 318 and 319 relating thereto. All of these sections must be read in connection with section 312, declaring that in order to

set the various periods of limitation running there must first be a cause of action; that the period begins to run only "after the cause of action shall have accrued." This is a necessary condition to the application of section 322; the occupancy must be of such a character that it would constitute a cause of action by the owner of the senior title. If the boundaries in the conflicting deeds are coterminous, the occupancy of any part of the tract by the owner of the junior title is an invasion of the right of the previous grantee and creates a cause of action in his favor. In such a case the constructive adverse possession extends to the entire tract. But if the boundaries given in the respective deeds of the two claimants are not coterminous, but only interfere, the senior owner has no cause of action, and, consequently, there is no constructive possession against him, unless some part of the land embraced in his deed is occupied by the junior holder. This proposition was well established at the time the Code provision was adopted, and will be found declared in the following cases: *White v. Burnley*, 61 U. S. (20 How.) 251, 15 L. Ed. 886; *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 140; *Turner v. Moore*, 81 Tex. 206, 16 S. W. 929; *Parker v. Bains*, 59 Tex. 18; s. c., 65 Tex. 605; *Trimble v. Smith*, 7 Ky. (4 Bibb) 257; *Pogue v. McKee*, 10 Ky. (3 A. K. Marsh.) 128; *Fox v. Hinton*, 7 Ky. (4 Bibb) 561; *Talbot v. McGavock*, 9 Tenn. (1 Yerg.) 275; 3 Wash. Real Prop. (6th Ed.) § 1984. In *Sedgwick & Wait on Trial of Title*, § 770, the authors say:

"An actual entry and disseisin of the true owner by the adverse claimant under a paper title is therefore necessary for the latter to acquire any constructive possession under it."

In *Bailey v. Carleton*, supra, the court says that the principles upon which the rule is founded are "that the entry and possession of the party is notice to the owner of a claim asserted to his land," and that, if he makes no objection within the period of limitation, "he may well be presumed to have made some grant," and, further:

"We are of opinion that the rule cannot apply to a case where a party, having a deed which embraces land to which his grantor had good title, and other land to which he had no right, enters into and possesses that portion of the land which his grantor owned, but makes no entry into that part which he could not lawfully convey. There is no notice in such case to the owner of the land thus embraced in the deed and no possession which can be deemed adverse to him," and that, in order to give the entry the character of a disseisin of the true owner, "there must be actual possession of some portion of the land of such owner, and that of a nature to give notice of an adverse claim."

In that case there were adjoining lots with separate descriptions. But, as the quotation shows, the reasoning does not proceed upon that fact as a basis. Speaking of a case of interfering boundaries, the Supreme Court of Texas said:

"A condition precedent to the operation of the statute of limitations is possession, 'actual,

visible, notorious, distinct, and hostile.' In this case, as against the true owner, no such possession was taken."

The possession of the adverse occupant did not include any part of the overlap. *Turner v. Moore*, supra. The other cases cited involved interfering boundaries and in this respect were practically identical with the case at bar.

The appellant endeavors to avoid the force of these decisions by the claim that in those states adverse possession gains title only to the part actually occupied. But this is not the case. The rule regarding occupancy under color of title is substantially the same as here. The condition precedent here involved was recognized in this state in *Kimball v. Stormer*, 65 Cal. 120, 3 Pac. 411, where the court said:

"It is apparent that, for a person to acquire a constructive adverse possession of land, he must actually oust the true owner of some part of his land."

Any other rule would be in some cases productive of great injustice. One could be deprived of title to his land without ever having actual notice that his title was disputed or claimed, and with no visible invasion of his premises. The present case is a good illustration of the consequences that would ensue. The strip in dispute bounded upon tidewater. The actual occupancy mainly relied on by appellants consisted of a railroad and appurtenances situated a mile distant and across an estuary of the bay. It did not give the least indication of a claim to the land along the meander line of the estuary and on the opposite side thereof.

We conclude therefore that the opening clause of section 322 reading as follows, "When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title," must be understood to refer to the "property" of the opposing owner, as distinguished from that described in the instrument constituting the color of title; that the "property," upon which he must enter to start his adverse claim against the true owner, must be some part of the property of that owner. It is the true owner whose title is to be destroyed, and it is some part of his rightful ownership which must be invaded. Once that is done, the adverse claim extends to all of the true owner's land embraced within the junior conveyance; but, until that is done, the section has no application.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

169 Cal. 520

DE WATSON v. SAN PEDRO, L. A. & S. L. R. CO. (L. A. 3300.)

(Supreme Court of California. March 4, 1915.)

BOUNDARIES — 3 — IRREGULAR NATURAL BOUNDARY—STRAIGHT COURSES.

Where a deed gives the south boundary of a city, which is the high tide line of a bay, an irregular boundary, as the boundary between the points B and C of the land conveyed, such boundary is not changed by the additional description by straight courses.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. 3.]

In Bank. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Marie Dolores D. De Watson, a widow, against the San Pedro, Los Angeles & Salt Lake Railroad Company. From an adverse judgment and order, defendant appeals. Affirmed.

A. S. Halsted, W. F. Palmer, F. A. Waters, and Wilfred M. Peck, all of Los Angeles, for appellant. Woodruff & McClure, of Los Angeles, for respondent.

PER CURIAM. With one exception, the questions in this case are the same as those considered and decided in *Wheatley v. San Pedro, Los Angeles & Salt Lake Railroad Company* (L. A. No. 3299), 147 Pac. 135, this day decided. Upon the authority of that case those questions are determined against the appellant.

In this case the plaintiff was one of the grantors in a deed under which the appellant derives title. From this fact the appellant makes the additional point that she is estopped by her deed to assert a claim to the land in controversy. This proposition is based upon the theory that the deed executed by her conveyed title to the grantee to the strip of land between the straight line from B to C referred to in the opinion in the *Wheatley Case*, and the tide line to the south of it. This claim is without foundation. The boundary of the land described in her deed to the Terminal Land Company was not, as appellant claims, the straight line extending from B to C, but was the south boundary of Wilmington itself; that is to say, the actual high tide line of the bay. That deed presents the familiar case of an irregular boundary located by means of a meander line giving straight courses from point to point along the irregular line to be located thereby. In such cases the boundary extends to the irregular natural object which is meandered by the straight courses. See *Wood v. Appal*, 63 Pa. 221; 1 Jones on Real Prop. § 491.

The judgment and order denying a new trial are affirmed.

169 Cal. 804

FLINT v. SAN PEDRO, L. A. & S. L. R. CO. (L. A. 3298.)

(Supreme Court of California. March 4, 1915.)

In Bank. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by George C. Flint against the San Pedro, Los Angeles & Salt Lake Railroad Company. From an adverse judgment and order, defendant appeals. Affirmed.

W. F. Palmer, F. A. Waters, and Wilfred M. Peck, all of Los Angeles, for appellant. Woodruff & McClure, of Los Angeles, for respondent.

PER CURIAM. The questions in this case, based upon similar facts, are considered and decided in the case of *Wheatley v. San Pedro, Los Angeles & Salt Lake Railroad Company* (L. A. No. 3299) 147 Pac. 135, this day decided. Upon the authority of that decision, the judgment and order denying a new trial are affirmed.

169 Cal. 521

PATTON et al. v. CITY OF WILMINGTON et al. (L. A. 3485.)

(Supreme Court of California. March 4, 1915.)

1. PUBLIC LANDS — 144 — SALE — TIDELANDS.

A sale by the state of uplands and adjoining tidelands being void as to the tidelands, because they were within two miles of an incorporated town, and so reserved from sale, subsequent repeal of the incorporation of the town would not vest title to the tidelands in such purchasers.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 391-399; Dec. Dig. — 144.]

2. NAVIGABLE WATERS — 44 — RIPARIAN OWNERS — ACCRETIONS.

Accretions, caused by an embankment built by a railroad across tidelands under license from the state, do not inure as such to the owner of the upland, so as to divest the state of title to tidelands so covered.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 266-278, 281, 282; Dec. Dig. — 44.]

3. NAVIGABLE WATERS — 44 — RIPARIAN OWNERS — FILLED IN TIDELANDS.

That the city, to which the state grants tidelands in trust for the purposes of public navigation and commerce, to fit it for such purposes, fills in along the shore, does not have the effect of passing to the owner of the upland the title to the tidelands so filled.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 266-278, 281, 282; Dec. Dig. — 44.]

4. NAVIGABLE WATERS — 39 — RIPARIAN OWNERS — TIDELANDS.

All rights of riparian owners over adjacent tidelands are subject to the public easements for the purposes of navigation, and must yield thereto when asserted by the state or its agencies.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. — 39.]

5. ADVERSE POSSESSION — 7 — TIDELANDS.

No title to tidelands can be acquired by adverse possession against the state.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 24-42; Dec. Dig. — 7.]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Ruth Patton and others against the City of Wilmington and another. From

an adverse judgment, plaintiffs appeal. Affirmed.

Smith, Miller & Phelps, of Los Angeles, for appellants. John W. Shenk, City Atty., Anderson & Anderson, and Leslie R. Hewitt, all of Los Angeles, for respondents.

SHAW, J. The plaintiffs have appealed from the judgment. The city of Los Angeles was not named as a defendant in the complaint. It was, however, substituted as defendant instead of the city of Wilmington. Thereupon the action was dismissed as to all the other defendants. The action proceeded as an action between the plaintiffs and the city of Los Angeles as the sole defendant, the city filed an answer, and upon these pleadings the trial took place. The complaint states a cause of action to quiet title to a tract of land, a part of which lies within the bay of San Pedro, containing about seven acres, and incidentally to enjoin the defendants from removing the soil therefrom and from depositing soil thereon, and for damages. The pleading of the city of Los Angeles denies the plaintiffs' title and the alleged trespasses and damages. It further alleges that the part of the land described in the complaint which lies south of the southern boundary line of the San Pedro or Dominguez ranch is tideland and is covered by the ordinary tides of the bay of San Pedro. Thereupon it asks judgment that the plaintiffs have no right or title in or to said tideland. The findings state that the plaintiffs are the owners of the part of the tract lying north of the San Pedro ranch boundary and that the city of Los Angeles is the owner of the part lying south of said line, that is, of the tidelands, and is entitled to the possession thereof, and further that said land has been reserved, for purposes of navigation, by the United States government. Judgment was given that the plaintiffs are the owners of the said upland parcel and that the city of Los Angeles is the owner of the parcel of tideland, in trust for the uses set forth in the act of the Legislature granting said lands to the said city.

In explanation of what would otherwise seem to be a finding outside of the issues, it is to be observed that, after the filing of the answer and before the trial, the Legislature passed the act of May 1, 1911, granting to the city of Los Angeles all the right, title, and interest of the state in all the tide and submerged lands within the city boundaries, as then constituted, which included the tideland in controversy here, in trust for certain enumerated uses and purposes which may be described in general terms as the uses and purposes of public navigation and commerce. Stats. 1911, 1256. At the time of the trial, therefore, the city of Los Angeles had succeeded to the title of the state. The case is to be considered as a controversy between the

plaintiffs and the city of Los Angeles as the successor of the state. As this was shown as matter of law, of which the court will take judicial notice, and as there seems to have been no objection made in the court below to the substitution of the city of Los Angeles for the city of Wilmington, or to the filing of the answer by the former, or to the sufficiency thereof, or to the making of the finding of title in the former, provided it is supported by the law and the evidence, the irregularity of the proceedings may be disregarded. The trial manifestly proceeded upon the theory that the title of the defendant, under the aforesaid statute, and the title previously held by the state as well, was in issue.

The first point urged is that the land south of the boundary of the San Pedro or Dominguez grant is not tideland. If it is tideland, then, under the decisions in *People v. California Fish Co.*, 166 Cal. 576, 138 Pac. 79, and the companion cases decided at the same time, it was withheld from sale at the time the predecessors in interest of the plaintiffs claim to have purchased it from the state, and the patents and purchases made by them from the state officers are void. In so far as it proves to be tideland, a secondary question is presented, namely, the claim of the plaintiffs that they have acquired title thereto from the state by prescription. The appellants also claim littoral rights as owners of the upland riparian to the navigable water.

[1, 2] It is first contended that a part of the land south of the boundary has ceased to be tideland because of an accretion to the mainland caused by the erection of an embankment leading from the upland by the Southern Pacific Railroad Company along the line of its road leading from the mainland across a part of the bay. Regarding this and other claims of accretions by and additions to the upland, or because of erections and embankments of others, it is sufficient to say that the point assumes that it was once tideland, and that, this being so, it was reserved from sale, and was not alienable by any state officer under any law, during the time when the alleged accretions occurred, and therefore no artificial embankment, made by third persons, or made or suffered by state officers or agents, nor any accretion to the adjacent upland caused thereby, could operate to divest the state of its title to the tideland so reserved. There was an interval of nearly a year, being the period between March 12, 1887, the date of the repeal of the act incorporating Wilmington, and March 1, 1888, the date of the incorporation of the city of San Pedro, during which there was no incorporated city or town within two miles of this land and it was free from the reservation aforesaid. We do not think this fact could have effect to attach to the upland, as part thereof, the previously formed accretions and embankments, or to divest the state of its title to the tideland with which it had not previously parted. The railroad embank-

ments were made pursuant to a license from the state under the Civil Code. We can see no plausible reason for the contention that the making of such embankments, or accretions caused thereby, would operate in favor of third persons to divest the state of its title to tidelands covered by the embankment and accretions extending out over it from the adjacent upland, and transfer the title to the owner of the upland. The case of *Ledyard v. Ten Eyck*, 36 Barb. (N. Y.) 102, cited by appellants in support of the proposition that such embankments or accretions belong to the owner of the adjacent upland, is really authority to the contrary. That was a controversy between the owner of the upland and the owner of other land in the vicinity. What the court decided was that the possession of the accretions by the owner of the abutting upland could be disputed by no one except the state. In view of the statute under which this railroad embankment was made and the purposes for which it is used, the state cannot have intended to put itself in the position of one who affixes his property to the land of another without an agreement for its removal, and thus to transfer the affixed property to the owner of the land, as provided in section 1013 of the Civil Code. That section can have no application to an accretion thus caused.

[3] The appellants also claim title to a part of the tideland that has been filled in by the city of Los Angeles since its acquisition of the title, in the improvement of the land to fit it for navigation and commerce. The city, under its grant, has no power to deal with the land otherwise. This change in the character of the land could have no effect to transfer it to the owners of the abutting upland. Our conclusion, upon all these points, is that the land south of the ranch boundary still retains its character as tideland.

[4] With regard to the claim of littoral rights, we need only refer to the discussion thereof in *People v. Southern Pacific Co.*, 166 Cal. 629, 138 Pac. 103, and in the more recent case of *Henry Dalton & Sons Co. v. Oakland*, 143 Pac. 721, wherein it is held that all rights of riparian owners over the adjacent tidelands are subject to the public easements for the purposes of navigation, and must yield thereto when the latter are asserted by the state or its agencies.

[5] The remaining proposition urged for reversal is that of the claim of the appellants to title by adverse possession. There is evidence that in 1874 the plaintiffs' predecessor in interest took possession of the part of the land north of the ranch boundary, under a deed from Banning & Alexander, purporting to describe and convey the entire tract in controversy, including the tideland, and that said predecessor and the plaintiffs have ever since that date held possession of such upland, claiming title to the entire tract. The claim is that, under this deed and

possession of the upland, the plaintiffs have for that period had constructive adverse possession of the tideland. If this is correct, and such adverse possession could lawfully divest the title of the state to the tideland, the plaintiff would thereby have acquired such title, and the judgment awarding said tideland to the city would be erroneous.

It is conceded that no character or period of adverse possession could terminate or affect the public easements for purposes of navigation and fishery. It has long been the doctrine in this state that no length of time of maintenance, or number of repetitions, of wrongful encroachments, can legalize a public nuisance; that adverse possession of land devoted to public use does not divest the right of the state, or other public body corporate in which the title is vested, to maintain such public use, nor in any manner affect the public right or the public use. *People v. Kerber*, 152 Cal. 731, 93 Pac. 878, and cases there cited, to which may be added, *Ex parte Taylor*, 87 Cal. 95, 25 Pac. 258; *Bowen v. Wendt*, 103 Cal. 238, 37 Pac. 149; *Hoadley v. San Francisco*, 70 Cal. 324, 12 Pac. 125; *San Francisco v. Itsell*, 80 Cal. 59, 22 Pac. 74; *San Francisco v. Straut*, 84 Cal. 125, 24 Pac. 814; *People v. Holladay*, 93 Cal. 245, 29 Pac. 54, 27 Am. St. Rep. 186; *Hargro v. Hodgdon*, 89 Cal. 631, 26 Pac. 1106; *Board v. Martin*, 92 Cal. 209, 28 Pac. 799. So far as the public easements and the right of the state to improve and control the land for such purposes are concerned, therefore, the claim based on adverse possession gives the plaintiffs no rights whatever.

The theory is advanced that, although the public easements are not impaired or affected, the adverse possession is effectual to vest in the possessor the servient estate, the fee subject to the public easements. The general doctrine is that the title acquired by complete adverse possession is a title in fee simple. *Wright v. Carillo*, 22 Cal. 595; *Arrington v. Liscom*, 34 Cal. 370; *Cannon v. Stockmon*, 36 Cal. 541, 95 Am. Dec. 205. The suggestion is that, if this be so, the adverse possession will be given effect as far as it can go, and will divest that part of the estate which the state had power to alienate without a violation of its duty to protect and improve the land in furtherance of the public use, the same effect that this court, in *People v. California Fish Co.*, supra, held will be given to sales of unreserved tidelands under the law for the disposition of swamp and tidelands; that is, to give the possessor the naked title to the soil without right to interfere with the public easements.

There can be no doubt that this proposition has not heretofore had the approval of this court. The contrary has been often, in effect, adjudged. An examination of the cases above cited and referred to shows that in many of them the decision and judgment was, in effect, a denial of the doctrine.

In *People v. Kerber*, supra, the plaintiff

sued to recover possession of tidelands in San Diego Bay. The defendants denied the plaintiff's ownership and claimed title by prescription. The judgment in favor of the state, covering the entire fee, was affirmed. The defendants had held possession for some 15 years, claiming title-in fee. If this possession had availed to give them title by prescription, to the fee, subject to the public easement, the judgment should at least have been modified so as to preserve to them that title. It was a valuable right, for a seawall had been established by the state, which, if built as planned, would have excluded this land from navigation, the public easements over it would have ceased, and the defendants would have thenceforth held the land in fee simple, free from the public right.

In *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405, a judgment declaring that defendants could not, by prescription, become owners of land dedicated as a public square, was affirmed. Under the doctrine claimed, the adverse possession would have given them the fee subject to the public use. If that doctrine had been sanctioned, the judgment should have been reversed or modified.

In *Mills v. Los Angeles*, 90 Cal. 522, 27 Pac. 354, an absolute judgment for defendant, notwithstanding the fact that plaintiff had held the land adversely many years, was unconditionally affirmed, thus virtually denying that plaintiff had acquired any title or interest by the adverse possession, though it had continued for more than 10 years.

In *Archer v. Salinas*, 93 Cal. 47, 28 Pac. 839, 16 L. R. A. 145, the action was to quiet title to land dedicated as a public park. Plaintiff had held adverse possession for more than 10 years, but judgment was given for defendant. This judgment was affirmed, with no provision for any subordinate estate in Archer, in effect declaring that he gained no right by the adverse possession.

Home v. San Francisco, 119 Cal. 534, 51 Pac. 950, was in all respects identical with *Archer v. Salinas* on this point, except that the lot had been set apart for a different public use. The cases of *Holladay v. San Francisco*, 124 Cal. 352, 57 Pac. 146, and *San Francisco v. Sharp*, 125 Cal. 534, 58 Pac. 173, the first involving land dedicated as a park, and the second land dedicated as a hospital lot, are each to the same effect. The adverse claimants were awarded no title whatever, whereas, under this doctrine, they should have been awarded the fee, subject to the public use. These decisions are all, in effect, a denial of the proposition.

In *Yolo Co. v. Barney*, 79 Cal. 378, 21 Pac. 833, 12 Am. St. Rep. 152, the land in controversy had been dedicated to public use for a county hospital. The defendant had been in possession of part of it, under adverse claim of title, for 15 years. About a year before the suit was begun, the county hospital had been removed from the tract, and the actual public use seems to have been then dis-

continued and abandoned in fact, though the court found that there had been no abandonment of the right to the public use. The action was to quiet title, and the judgment in favor of the plaintiff, covering the entire fee, was affirmed without qualification.

If we look to the language of the decisions, we find many expressions wholly inconsistent with the theory here advanced. The italics in the subsequent quotations are ours. In *Visalia v. Jacob*, 65 Cal. 434, 4 Pac. 433, 52 Am. Rep. 303, the court said:

"The right of possession is held by the corporation for the benefit of the public, and this right cannot be conveyed to any private person. The *lands* so held are effectually withdrawn from commerce while the street continues. * * * As the municipality cannot convey the *title*, or release itself of the trust, private persons are virtually precluded from acquiring it."

In *Yolo Co. v. Barney*, supra, the court said:

"As we understand the decisions of California, they place the nonrunning of the statute of limitations upon the ground that the public is in the use of the *land*, and that while in such use a trespasser may neither erect a nuisance thereon, nor acquire a right to hold the *land* based upon a supposed grant to the *land* from the owner."

In *Mills v. Los Angeles*, supra, the opinion concludes with this statement:

"Of course, *no adverse rights* could be acquired *in the property* after it had become a public street."

In *Orena v. Santa Barbara*, 91 Cal. 631, 28 Pac. 270, is this language:

"If the premises are a part of the public street, there could be *no adverse possession*. Individuals may intrude upon or obstruct a public thoroughfare, but the public cannot be dispossessed of *such lands*, and such intruder acquires *no rights*."

In *San Francisco v. Bradbury*, 92 Cal. 418, 28 Pac. 805, speaking of land reserved for public use, this is said:

"An individual could not by mere adverse possession acquire *any title* to such *land*, or invoke the aid of the statute of limitations as a defense to its recovery."

In *Board v. Martin*, supra, 92 Cal. at page 217, 28 Pac. 802, on the same point it is said:

"The *lands* so reserved could not thereafter have been divested by any adverse possession."

In *Archer v. Salinas*, supra, 93 Cal. 51, 28 Pac. at page 841, 16 L. R. A. 145:

"The *property* dedicated has become *public property*, impressed with the use for which it was dedicated, and neither can the public divert it from that use, nor can it be lost by adverse possession."

In *Ames v. San Diego*, 101 Cal. 394, 35 Pac. 1006, it is said that land held by a city in trust for a public use "cannot be alienated by the city, and the title of the public thereto cannot be lost by a possession adverse to the city."

In *Southern Pacific Co. v. Hyatt*, 132 Cal. 244, 64 Pac. 274, 54 L. R. A. 522, the court says:

"Individuals may intrude upon or obstruct the public thoroughfare, but cannot acquire title by prescription."

And finally, in *People v. Kerber*, supra, the subject is treated at length in a case where,

as above stated, the subordinate estate was involved and was of immediately prospective value. Speaking in terms of "tidelands," and not merely of the public easements therein, the court says (152 Cal. 733, 93 Pac. 879):

"And when such tidelands are situated in a navigable bay and constitute a part of the waterfront thereof, as is the case here, they constitute property devoted to the public use, of which private persons cannot obtain title by prescription, founded upon adverse occupancy for the period prescribed by the statute of limitations. * * * Property thus held by the state in trust for public use cannot be gained by adverse possession, and the statute of limitations does not apply to an action by the state or its agents to recover such property from one using it for private purposes not consistent with the public use."

And referring to the abandonment of the public use, after saying that upon such abandonment the state will hold the land as a proprietor and not as a public agent in charge of a public use, the opinion proceeds:

"If an adverse possession can be maintained, or if the statute of limitations can run against the state, in regard to such proprietary property, it will begin from the date when the public use ceased and not before."

Further referring to the provisions of the Constitution withholding from grant or sale "all tidelands" within two miles of any incorporated city or town" fronting on navigable waters, the opinion proceeds to say that:

Such property "cannot without an amendment of the Constitution be disposed of by the state in any manner, except in furtherance of the purpose of navigation to which it is dedicated. * * * If the state is without power to dispose of this land for private use at all, its officers and agents must be without power to make a virtual disposition of it by their neglect in permitting private persons to occupy it for a period of 10 years, under claim of ownership, and thus giving such persons an opportunity to invoke for their benefit a legislative declaration that such occupancy will bar the state of its title. * * * In this view of the case, it is immaterial whether title by prescription under the code is, or is not, founded upon the presumption that the possession was originally taken under a grant which has been lost in the lapse of time, as was the case at common law, even if it were conceded that the rule that there can be no adverse possession of property devoted to public use did not apply to this land."

In considering the effect of these statements, it must be remembered that, in order to sustain the judgment of the lower court in that case, it was necessary to establish the proposition that the defendants had not, by their admitted adverse possession, acquired any title, interest, or estate whatever in the land. They asserted title, and, if they had shown any interest, it would have been necessary to modify or reverse the judgment. The decision must be deemed to hold that they did not acquire a subordinate estate subject to the public easement, nor any estate of any character.

From this review of the decisions, it is certain that it has hitherto been the opinion of this court, many times reiterated, that possession under adverse claim of title, of land devoted to public use at the time, is

wholly ineffectual, not only upon the public use or easement, but also upon the title to the soil, or land, including the public easement and every subordinate estate, as well.

Against the force of these decisions the argument seems to be that as in the recent decision in *People v. California Fish Co.*, supra, we declared that a sale of tideland, in pursuance of the swamp and tideland provisions of the Political Code, while not a disposition of the public easement or a discontinuance of the use for navigation was nevertheless a valid transfer of the subordinate estate, and since it is well settled that a prescriptive title is a title in fee simple as against all upon whom prescription is effective, we must now hold that prescription runs against the state with respect to the subordinate estate and is sufficient to divest it of title to that interest. We do not think the conclusion is necessary or reasonable. Mainly because of the entire absence of anything in the swamp land laws purporting to deal with the subject of navigation, or to protect, preserve or provide for it, or to show a design to execute the public trust upon which the state holds tideland in the interest of navigation, we held in that case that such a sale did not affect the public easement. But, because the law clearly indicated the intent and purpose to dispose of some estate in the land, we gave it effect upon the subordinate estate only, the title to the soil subject to the public easement. The cases are not analogous or parallel. There is nothing in our law from which it can be reasonably inferred that the state intends that adverse possession shall operate against the subordinate estate in cases in which it is inoperative upon the public use. Such possession is a plain trespass upon the public easement, an easement to the enjoyment of which actual possession is necessary. The proposition requires us to say that a possession which is entirely ineffective against the public right which involves possession is at the same time silently working upon the servient estate which it does not in any practical manner disturb so long as the public easement exists. This is in direct contravention of the well-established principle that nothing can be taken by implication against the state, that it will not be presumed to have intended to divest itself of its property, unless such intent is expressed in terms or necessarily implied from the words used. *Oakland v. Oakland W. F. Co.*, 118 Cal. 171, 50 Pac. 277; *Clark v. Los Angeles*, 160 Cal. 39, 116 Pac. 722; *Helena W. Co. v. Helena*, 195 U. S. 392, 25 Sup. Ct. 40, 49 L. Ed. 245; *Knoxville v. Knoxville*, 200 U. S. 33, 26 Sup. Ct. 224, 50 L. Ed. 353. This principle is more frequently applied to public statutes or express grants, but we see no reason why it does not also apply to acts in pais whereby public property may be taken. The conduct of public officers in charge of these lands in failing to dispossess trespassers, clearly,

is no evidence of an intent of the state to dispose of any interest therein. We regard this argument as wholly insufficient to justify a disregard of the numerous precedents and declarations to the contrary in our decisions.

Moreover, it is not in accord with the reasons upon which the rule that adverse possession does not affect land devoted to public use rests. Upon this point it has been said:

"The distinction between public rights and private ones is quite natural. Every man must look to his rights; but in the case of public rights, where no individual has a prior right or interest, distinct from his fellows, where he can bring no action for a public nuisance, acquiescence—silence—goes for nothing. No man wishes in such a case to single out himself, and to be the actor against his neighbor; what is every one's concern is no one's concern, and therefore it is that length of time is no answer to a public prosecution for a public injury." *Commonwealth v. McDonald*, 16 Serg. & R. (Pa.) 394.

True, this was said in a case where the defendant was prosecuted for obstructing a public highway; public right alone was involved; but no distinction between the public easement and the subordinate estate was mentioned. And in civil cases similar reasons are given.

In *Almy v. Church*, 18 R. I. 187, 26 Atl. 58, the court said that the grounds of the doctrine "are variously stated, as: That an obstruction is a nuisance and no nuisance can ripen into a right; that individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have an interest sufficient to make them vigilant; while in public rights of property, each individual feels but a slight interest and will tolerate a manifest encroachment rather than seek a dispute to set it right; that public policy requires the preservation of public rights; and that a municipality cannot by permissive neglect invest an intruder with title to a public highway." The main idea seems to be that a hostile occupancy of land devoted to a public use cannot be allowed to initiate an effective adverse possession, the reason being that land so used is not ordinarily as well guarded against intruders as proprietary land or land in private ownership. The reason applies to the underlying estate as forcibly as to the public easement.

And, lastly, it cannot be said that the rule so long followed has been productive of such injury or injustice that public policy requires its abrogation. Almost invariably an adverse possession of land is manifested by acts occurring only on the surface and consists solely of the control of the surface. The subordinate estate, the estate which can be enjoyed without control of the surface, is not disturbed or injured in any manner by the ordinary or usual adverse possession. Where, under the law, the hostile possession cannot operate upon the easement for the enjoyment of which the surface is necessary,

and where no notice of any claim to the servient estate is brought home to the owner thereof, it would not occur to the ordinary mind that such possession would affect or divest such servient estate. To declare that it does would cause injustice oftener than it would prevent it.

All these considerations are emphasized by the character of the possession upon which this hostile claim is asserted. There has been no actual occupancy of this tideland by the plaintiffs or their predecessors in interest. Their claim is based on the fact that the lines of the deed under which they claim extended out into the bay and included this tideland. If such constructive possession were allowed to accrue into a title, all that would be necessary to divest the state of the fee in the soil under the tidewater would be to go into possession of upland under a deed which included any desired area of the soil under the ocean, claiming title to the entire tract, and hold the possession for the required time. The plaintiffs claim that there was evidence of actual possession; but we find that it consisted of mere occasional passage across the tideland to deep water, and we cannot say that the implied finding on this point was contrary to the evidence. We find no error in the record. The judgment is affirmed.

I concur: SLOSS, J.

ANGELLOTTI, C. J. I concur in the judgment, and in the opinion, except in so far as it deals with the question of the effect of the statute of limitations. I am not prepared to hold that the statute will not run against the state as to tideland with respect to the subordinate estate which it holds in a proprietary capacity, and which it may convey subject to the paramount trust under which the state holds all tideland. This precise question, discussed at great length in the opinion, has never been expressly decided, and I do not think the conclusion reached by Mr. Justice SHAW is at all compelled by any previous expression of this court. Of course, it was involved in one or two of the cases cited, though probably never argued, and certainly never discussed in any opinion.

A discussion of this question is entirely unnecessary in this case. It appears here, as stated in the opinion, that the implied finding that the plaintiffs and their predecessors have not had actual possession of any of the tideland is sufficiently sustained by the evidence. Their real claim is that, by virtue of a deed purporting to describe and convey to their predecessor such tideland and adjoining upland, the grantors being the owners of the upland, the subsequent possession by their predecessor and themselves of the upland carried constructive possession of the tideland. That such a claim is without good foundation is expressly held in *Wheatley v. San Pedro, etc., R. R. Co.*, 147

Pac. 135, L. A. No. 3299, decided March 4, 1915, where the question is exhaustively discussed, and it is not necessary to say more on the subject here. This sufficiently disposes of the contentions of plaintiff herein based on a claim by prescription or under the statute of limitations.

HENSHAW, J. I concur in the judgment, but for reasons quite distinct from those announced in the prevailing opinion. The effort of appellants in this case was directed to establishing that they had acquired some sort of a prescriptive title to the lands in question—a fee growing out of the just privatum which is subject to the public control of the state under the *jus publicum*. It is learnedly argued, with an elaborate review of the authorities, that “this proposition has not heretofore had the approval of this court,” and pains are taken to show that certain judgments of this court have been given which could not have been given if the right to acquire such a title existed. All this argument is superfluous in view of the fact that no court nor jurisconsult ever conceived of the possibility of the existence of such a split fee until it was declared, or rather, I should say, was created by this court in *People v. California Fish Co.*, 138 Pac. 79, and *People v. Southern Pacific R. R. Co.*, 138 Pac. 94, 166 Cal. 576 et seq. In those cases the people of California were for the first time advised that this state, in offering for sale the fee of certain of its tidelands, without the slightest reservation of any rights in the act authorizing the sale, and in making grants and patents of these lands, without the suggestion of a reservation or limitation upon the title, and in taking its citizens’ money, under these circumstances was practicing the art of a Jeremy Diddler by hoodwinking its citizens into the belief that they were acquiring a fee simple to lands, whereas in fact they were but acquiring a nondescript *jus privatum* which entitled them to use the lands until the state should re-take them. The reason why no one of our early cases gives consideration to the proposition of this divided fee—the reason why no lawyer ever advanced it for the consideration of this court—is that it first came into existence in the law as the creation of this court in 1913. Indeed, it is said in the cases above referred to that in our earlier decisions “the double right of the state, private and public, does not seem to have been suggested or considered.” What more natural, since the creation by construction put on our tideland statute of this novel character of estate, than that litigants should come to this court for further definition of it and further light as to the method of its acquisition? Therefore it seems to me a wholly unsatisfying answer to such litigants to say that because a title by prescription embraces the whole fee, and that because our earlier decisions do not recognize that one may ac-

quire a partial fee subject to a governmental right, their appeals are groundless. If there be such a divided fee as that which this court has said exists, why should not the right to acquire it be open to every one as is their right to acquire any other property by the same means? This is but the first of many questions that are certain to arise under this newly created fictional fee. The true and simple answer, under long and well-established principles of law, is that there is no such divided fee. That title to public land may not be acquired by prescription or adverse possession does not call for any refined and meticulous reasoning, made necessary only by our new creation, but may still rest safely upon the old familiar principles that one who by occupancy, however open, tries to gain an exclusive right in such lands, is maintaining a continuous public nuisance in the first place, and, in the second place, regardless of the length of time of such occupancy, he will not be protected against the state for his invasion of its rights, for the reason that under such circumstances the state is never charged with notice that its rights are invaded. Wherefore, and still applying these old and familiar principles, if the asserted occupancy of the appellants was constructive merely, manifestly no prescriptive title could be acquired. If the occupancy was actual and visible, then, if not under license or grant of the state, it was a mere purpresture, subject to abatement at any time at the will of the state. For these reasons I concur in the judgment.

We concur: MELVIN, J.; LORIGAN, J.

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HORSBURGH et al. v. MURASKY, Superior Court Judge. (S. F. 7038.)

(Supreme Court of California. March 3, 1915. Rehearing Denied April 1, 1915.)

1. HUSBAND AND WIFE ⚡214—JOINDER OF HUSBAND—TORTS.

Unless modified by statute, the common-law doctrine prevails that a husband must be joined as party defendant in a suit growing out of the wife's tort.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 791-794; Dec. Dig. ⚡214.]

2. HUSBAND AND WIFE ⚡212—JOINDER OF HUSBAND—STATUTES.

Code Civ. Proc. § 370, authorizing a wife to sue alone when the action concerns her separate property, does not authorize a suit against the wife without joinder of her husband for injuries resulting from a defective sidewalk in front of her property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 784-786; Dec. Dig. ⚡212.]

3. MANDAMUS ⚡43—REMEDY AT LAW—DISMISSAL OF SUIT—NONJOINDER OF HUSBAND.

Where suit is brought against husband and wife for injuries from a defective sidewalk in front of the wife's property, and the action is dismissed as to the husband, mandamus is the

proper remedy to compel the dismissal of the action as to her; the wife not being suable alone, and no adequate remedy at law existing.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 88, 89; Dec. Dig. ⚡43.]

In Bank. Petition for mandamus by Frances B. Horsburgh and James Horsburgh, Jr., against Frank J. Murasky, Judge. Alternative writ made final.

Charles S. Wheeler, John F. Bowie, and Nathan Moran, all of San Francisco, for petitioners. Lewis F. Byington, of San Francisco, for respondent.

MELVIN, J. Petitioners applied for a writ of mandate requiring the respondent as judge of the superior court to dismiss a certain action as to Frances B. Horsburgh. An alternative writ issued, and the matter comes on regularly for decision and a determination whether or not the writ shall be made permanent.

The action in which petitioners were defendants was commenced on July 9, 1910, by Joseph B. Keenan and Carlotta Keenan, his wife, against a number of persons, including the Horsburghs. The complaint averred that they were husband and wife. The basis of the action was an alleged claim for damages for personal injuries sustained by Carlotta Keenan on July 12, 1909, by reason of the defective condition of a sidewalk in front of property belonging to Frances Horsburgh in the city and county of San Francisco. On July 1, 1913, summons and complaint were served on Mrs. Horsburgh, but her husband was not served until more than three years after the date of the issuance of the summons, and upon motion the action was dismissed as to him. On August 1, 1913, Mrs. Horsburgh moved for dismissal of the action on the ground that, as it had been dismissed so far as her husband was concerned, it might not be prosecuted against her because, under the provisions of section 370 of the Code of Civil Procedure, he was a necessary party. In denying the motion the learned judge of the superior court said, among other things:

"The statement made in McDonald v. Porsh, 136 Cal. 301 [68 Pac. 817], that, under the express provisions of the statute, the husband is a necessary party defendant in all cases where the wife is sued, a reading of the statute will show is incorrect. Section 370, Code of Civil Procedure, by its terms creates exceptions to the general rule, and this action falls within the exception stated in subdivision 1 of the section. This section but states the doctrine as laid down in Pomeroy: 'It is the settled rule in all the states which have adopted the reform procedure that in actions to recover damages for all torts, whether with or without violence, negligence, frauds, deceits, and other such wrongs done by the wife personally, and not done merely by or by the use of her separate property, the common-law principle is unaltered, and the husband and wife must be joined as codefendants.' Pomeroy on Remedies and Remedial Rights, § 320."

[1, 2] It is the settled law of this state that, unless modified by statute, the common-law doctrine that a husband must be joined as a party defendant in a suit growing out of a wife's tort still prevails. *Henley v. Wilson*, 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941, 92 Am. St. Rep. 160. If the action may be maintained against the wife alone, there must be therefore some statutory authority for such course. We do not find it in section 370 of the Code of Civil Procedure. That section, at the time the action against petitioner was instituted, provided that:

"When a married woman is a party, her husband must be joined with her, except: (1) When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone. (2) When the action is between herself and her husband, she may sue or be sued alone. (3) When she is living separate and apart from her husband by reason of his desertion of her, or by agreement, in writing, entered into between them, she may sue or be sued alone."

The recent amendment of this section (Stats. 1913, p. 217) did not alter the first subdivision in any respect which is at all material to this discussion.

Mrs. Horsburgh is admittedly living with her husband and they are not adverse parties in the suit in which the Keenans are plaintiffs. Therefore, if any authority exist for maintaining an action against her, it must be found in the first subdivision of the quoted section, and it will be noticed that said subdivision, while it permits a married woman to sue alone in an action concerning her separate property, does not provide that she may be sued alone. The learned trial court was in error therefore in construing that subdivision as giving authority for maintaining a suit against a married woman without joining her husband as a party. The rule is correctly stated in *McDonald v. Porsh*, supra, and in *Taylor v. Darling*, 19 Cal. App. 232, 125 Pac. 249, in which that case was followed. The quotation from *Pomeroy's Remedies* and *Remedial Rights* does state the general rule correctly, but the learned author also uses this language:

"If, however, the tort is not committed by the wife personally, but is done by means of her separate property, or in the use thereof, or under color or claim of ownership of her separate property, the action should be brought against her individually, without joining the husband as codefendant, in all those states whose statutes permit a married woman to be sued alone in respect of all matters which concern her separate estate."

See *Pomeroy's Code Remedies*, p. 314, § 222.

In many of the states the wife may sue or be sued in actions relating to her separate property without the necessity of her husband being joined as a party to the action. This is the rule in New York, for example (*Rowe v. Smith*, 45 N. Y. 233); but Prof. *Pomeroy* points out the fact that in California, Idaho, and Washington the law pro-

vides that she may sue alone in actions concerning her separate property. *Pomeroy's Code Remedies* (4th Ed.) § 152, note. In the brief filed on behalf of respondent the following language from *Henley v. Wilson* is quoted as sustaining the ruling of the lower court:

"Furthermore, by the express provision of the statute, the wife cannot be sued without her husband for a tort which does not concern her separate estate. She can sue or be sued alone only when: (1) The action concerns her separate property or her claim to the homestead; (2) when the action is between herself and husband; (3) when she is living in separation by his desertion, or under an agreement in writing. Code Civ. Proc. § 370."

The sole question in that case was whether or not the husband was liable in damages for the tort of his wife in committing an assault upon the person of another. It was held that he was liable. There was no question with reference to the kind of tort which we are here considering, and the quoted language was a dictum. Doubtless the quoted interpretation of subdivision 1 of section 370, Code of Civil Procedure, was due to an inadvertence.

We are of the opinion therefore that under our Code provisions the husband is a necessary party in an action for tort arising from the condition of the wife's separate property.

[3] *Mandamus* is the proper remedy. As we said in *Puterbaugh v. Wadham*, 162 Cal. 613, 123 Pac. 805:

"It is undoubtedly true that the writ of mandamus is not a writ of error, and that, generally speaking, it is not available for the purpose of altering or varying in any particular the finding of a judicial or quasi judicial body or officer acting within its or his appropriate jurisdiction; but where the facts are not disputed, and the only matter to be determined is the duty of the body or officer under the law, the court will define such duty and enforce not only its performance but the carrying out of the obligations of the respondent body or officer in a particular manner."

There is no plain, speedy, and adequate remedy available to petitioners for the court's failure to grant their motion to dismiss the action for damages so far as it related to Mrs. Horsburgh. Appeal is no such remedy, for there is no assurance that the cause will be promptly brought to trial, and Mrs. Horsburgh may be subjected for years to the inconvenience of having a suit for damages pending against her. Neither should she be put to the expense of defending in the action to which she remains a party through the trial court's error in denying her motion. Mandate will issue to compel the superior court to reinstate an appeal erroneously dismissed (*Golden Gate Tile Co. v. Superior Court*, 159 Cal. 474, 114 Pac. 978), or to grant a motion to dismiss an indictment upon which the court should have acted in accordance with petitioner's prayer (*In re Ford*, 160 Cal. 348, 116 Pac. 757, 35 L. R. A. [N. S.] 882, Ann. Cas. 1912D, 1267). If follows, from the foregoing discussion,

that petitioners in this proceeding are entitled to the relief for which they ask.

Let the alternative writ be made final, and the judge of the superior court be required to dismiss the action as to Frances B. Horsburgh according to the direction contained in said writ.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

(169 Cal. 494)

McLAUGHLIN et al. v. UNITED RAILROADS OF SAN FRANCISCO.
(S. F. 6195.)

(Supreme Court of California. March 2, 1915.
Rehearing Denied April 1, 1915.)

1. DEATH ⚡11 — ACTION FOR DEATH BY WRONGFUL ACT—STATUTORY RIGHT.

A right to recover for the death of another is statutory.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 10, 15; Dec. Dig. ⚡11.]

2. DEATH ⚡86—DAMAGES FOR DEATH—COMPENSATORY DAMAGES.

Under Code Civ. Proc. § 377, authorizing the jury to give such damages for death as under the circumstances may be just compensation, damages for grief and wounded feelings cannot be awarded, nor can the suffering by decedent in consequence of receiving the fatal injuries be considered, but the law seeks only to compensate in terms of money for the loss, and, where children sue for the death of a parent, they may recover their reasonable expectations of financial benefit from the continued existence of the parent, including in this estimate the loss of the nurture, instruction, training, and care of which the children have been deprived.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 112-114, 117, 119; Dec. Dig. ⚡86.]

3. DEATH ⚡91—ACTION FOR DEATH—EVIDENCE—ADMISSIBILITY.

In an action by children for the negligent death of a parent, evidence of the property received by them in the distribution of the estate of the deceased parent was not admissible.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 99-101; Dec. Dig. ⚡91.]

4. TRIAL ⚡260—INSTRUCTIONS—REQUESTS—MATTERS ALREADY COVERED—ACTION FOR NEGLIGENT DEATH.

Where, in an action for negligent death, the court fairly instructed the jury on the measure of compensation, refusal to charge that the pecuniary value of the life of decedent to plaintiffs was the value in money of the life of decedent to plaintiffs at the time of her death was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ⚡260.]

5. TRIAL ⚡219—INSTRUCTIONS—ACTION FOR DEATH—MEASURE OF DAMAGES.

An instruction in an action by children for the negligent death of a parent that the pecuniary value of the life of decedent to the children was the value in money of the life of decedent to them was properly refused because misleading for failing to define the term "value in money."

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 489; Dec. Dig. ⚡219.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Maud McLaughlin and others against the United Railroads of San Francisco. From a judgment for plaintiffs, defendant appeals. Affirmed.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco, for appellant. Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondents.

HENSHAW, J. Plaintiffs are the children and heirs at law of Margaret McLaughlin, a widow, whose death was occasioned by the admitted negligent act of defendant. Two of the children, Maud and Ralph, had attained their majority. Juanita, at the time of her mother's death, was a minor, aged 17 years. The jury returned a verdict in favor of the plaintiffs for the sum of \$7,500. From the judgment which followed and from the order of the court denying defendant's motion for a new trial this appeal is prosecuted. Upon the appeal the principal question urged and argued is the error of the court in refusing to admit certain evidence offered by defendant. The case was first heard and decided in department, and a reconsideration of it was ordered before the court ~~in~~ bank because the question of the admissibility of the evidence here presented is new in this state, and in other states there is a contrariety of judicial opinion upon it.

Mrs. McLaughlin was a woman of refinement and of executive ability. Upon the death of her husband, a physician, she successfully conducted a drug store, which business brought in a net income of \$250 a month. In addition to this she had a fixed income by way of rentals from real property of about \$85 a month. The offered and rejected evidence was the inventory and appraisal and decree of final distribution in her estate. In short, it was evidence showing that the children—plaintiffs herein—had by the death of the mother come into the ownership of all of her property. The contention of the defendant upon the offer was that this evidence, showing what property the children had received because of the death of the mother, was not only proper, but necessary, for the consideration of the jury in the latter's effort to arrive at and declare in terms of money the loss with which the children had met because of her wrongful death, and that this is peculiarly and especially true as to the sum of \$85 a month from rentals, which monthly sum represented a return in no wise dependent upon the skill, ability, or exertions of the deceased; that the exclusion of this evidence would necessarily result in a verdict by the jury greater than is warranted by the law.

[1, 2] At common law no right of action existed in favor of any one for the wrongful

death of another. Human life was considered to be of such a character that its wrongful destruction could not be measured in terms of money. Where, therefore, such an action exists, it is the creature of statute. It is so in England by virtue of Lord Campbell's Act (Stats. 9 and 10, Victoria, c. 93). It is so in many of the states of the United States. These statutes differ in important respects. Thus in England and in some of the states, while the action may be brought by all of the heirs, there is the wise provision that the award shall be segregated amongst the heirs, for manifestly the loss by the death of a mother to a dependent minor daughter is much greater than the loss by the death of the same parent to an adult self-supporting married son. Some states in turn, because of the difficulty which they thought the jury would experience in making the award, have limited the maximum amount to various named sums. In this state (Code Civ. Proc. § 377) the jury is advised that it may give "such damages as under all the circumstances of the case may be just." Upon two propositions, however, all the statutes and all the decisions are agreed, that compensation for the grief and wounded feelings is not a legitimate element of the damages to be assessed, nor is the suffering of the injured person, though a matter for which he, had he lived, might recover, an element of the compensation of the plaintiffs. Indeed, it may be said that upon the fundamental principle governing the award in such cases all of the authorities are in harmony. The elements of damage differ, as for example, the elements of damage to a husband for the loss of his wife are not identical with the elements of damage to the minor children for the loss of their mother. But fundamentally the law seeks to compensate in terms of money for the loss (in the case here of children) of their reasonable expectations of financial benefit from the continued existence of the parent, including in this money estimate the loss of the nurture, instruction, training, and care, of which the children have been deprived. These latter elements are not here in question, and what is said has no reference to them. Our concern is solely with the question of the direct material, property loss, and of the legitimate evidence bearing upon that consideration.

[3] The English courts adopted the broad view that whatever of property the plaintiffs could be shown to have received through the death was competent evidence for the consideration of the jury in their effort to determine the amount of damage occasioned by the death. Thus the English courts held that, if a father had nothing and earned nothing and contributed nothing to the support of his family, the heirs' recovery under the statute would be nominal; that if the father's income was from fixed property, wholly independent of his own exertions, and this property went to plaintiffs, this

could be shown to lessen the amount of the damages which might otherwise be awarded. Lord Campbell instructed his jury that the amount of an accident policy which the plaintiffs had received should be deducted from any award made to them. He thought that deduction should also be made on account of a regular life insurance policy, and suggested the nature of the allowance. But he ended his advice to the jury in this regard, by "leaving the matter, however, entirely in your hands." *Pym v. Great Northern Ry. Co.*, 4 Best & Smith, 403; *Bradburn v. Great Western Ry. Co.*, 10 Exch. 1; *Jennings v. Grand Trunk Ry. Co.*, 13 App. Cas. 800. Diametrically opposed to this line of authority are the decisions of many of the courts of the United States, holding, for the reasons hereinafter considered, that it is not permissible to present such evidence to the consideration of the jury; while occupying a middle ground are cases typified by one which is perhaps the most quoted—*San Antonio Ry. Co. v. Long*, 87 Tex. 156, 27 S. W. 116, 24 L. R. A. 637, 47 Am. St. Rep. 87. Certain expressions in the *Long* Case would seem to carry the doctrine of the Texas court to the full extent of the English decisions, as "under such a law we cannot see how it can be maintained that one has been damaged by the death, when he has received from the estate of the deceased property exceeding in value all the prospective benefits which would have accrued to him had the death not ensued." But the force of this general language is much modified by later decisions. *Gulf, etc., Co. v. Younger*, 90 Tex. 387, 38 S. W. 1121; *Tyler, etc., v. Raspberry*, 13 Tex. Civ. App. 186, 34 S. W. 794; *Lipscomb v. Houston, etc., Ry. Co.*, 95 Tex. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804; *Houston, etc., Co. v. Le Mair*, 55 Tex. Civ. App. 237, 119 S. W. 1162. In short, the Texas courts have shown no disposition to put into judicial effect the language of the *Long* Case, above quoted. And yet it must be apparent that there is no logical middle ground such as that sought to be established in the *Long* Case. The English doctrine is at least logical, in allowing all of the evidence of this character to go before the jury. It is certainly extremely illogical to admit certain evidence and refuse consideration to other evidence of like character tending equally to establish the controverted issue, namely, the amount of damage sustained. The other doctrine, which may be designated the American doctrine, since it finds acceptance in most of the courts of the United States, announces, as has been said, the diametrically opposite view, that none of this evidence is admissible, and none of it is entitled to the jury's consideration. The best-reasoned of these cases is *Stahler v. Philadelphia Ry. Co.*, 199 Pa. 383, 49 Atl. 273, 85 Am. St. Rep. 791. While the discussion is all of interest and value, we must content ourselves with a brief quotation,

which succinctly presents the view in opposition to that of the English courts:

"The true question is: What had these plaintiffs the right to expect to receive from the parent during his life? And for the loss of this they are to be compensated. What they got after his death does not enter into the case. The loss spoken of is the taking away of that which they were receiving, and would have received had he lived. It is the destruction of their expectations in this regard that the law deals with, and for which it furnishes compensation. To say, 'True it is we have taken from you his benefactions, but you get by law, not from us, but from his estate which we thus make available for you, something better,' is to substitute the heirs' legal right under the law for the company's liability."

This rule of evidence has its foundation in the refusal of the court to allow the defendant to benefit by his own wrong, to lessen his responsibility in damages for the injury which he has inflicted, by a showing that, quite fortuitously, through no contribution of defendant's own, the plaintiffs have received a certain pecuniary benefit.

As we have said, there is no tenable middle ground and no sound fluctuating rule of evidence. Under the English view all such evidence is admissible and logically admissible. Under the American view such evidence is in its nature base, is founded upon the tort of the party who seeks to avail himself of it, and should not be admitted; so the law will admeasure the consequences of the defendant's act by the situation existing at the time of the act, and not by after-accruing consequences. That this, as has been said, is the American view, citation may be made to numerous cases, viz.: *Kellogg v. N. Y. C. & Hudson R. R. Co.*, 79 N. Y. 72; *Althorf v. Wolfe*, 22 N. Y. 355; *Geary v. Metropolitan St. Ry. Co.*, 73 App. Div. 441, 77 N. Y. Supp. 54; *Ill. Cent. Ry. Co. v. Barron*, 72 U. S. (5 Wall.) 90, 18 L. Ed. 591; *Ladd v. Foster* (D. C.) 31 Fed. 833; *Clune v. Restine*, 94 Fed. 749, 36 C. C. A. 450; *Chicago, etc., Co. v. Hambel*, 2 Neb. (Unof.) 607, 89 N. W. 643; *Houston v. Gran*, 38 Neb. 687, 57 N. W. 403; *Western Ry. v. Meigs*, 74 Ga. 867; *Harding v. Townsend*, 43 Vt. 536, 5 Am. Rep. 304; *Carroll v. Railway Co.*, 88 Mo. 239, 57 Am. Rep. 382; *Sloss-Sheffield Co. v. Holloway*, 144 Ala. 280, 40 South. 211; *C. R. I. & P. Co. v. Holmes*, 68 Neb. 826, 94 N. W. 1007; *Tiffany on Death by Wrongful Act*, § 176; 13 Cyc. p. 364; 8 Am. & Eng. Ency. of Law, 935; 4 Sutherland, Dam. 1265. In conclusion upon this matter, we hold that the rule of evidence thus announced by the American authorities is more in consonance with justice than that which obtains in England, and that therefore the proffered evidence was properly rejected.

[4, 5] Appellant complains of the court's refusal to give an instruction in the following language:

"The pecuniary value of the life of the deceased to the plaintiffs is the value in money of the life of said decedent to the plaintiffs at the time of her death."

It is said that this instruction was approved as a correct exposition of the law in *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 236, 73 Pac. 163. In the *Hillebrand* Case the action was on behalf of the father and mother, sole heirs, to recover for the death of their daughter. The court had instructed the jury that its award must be limited to the pecuniary damages, and then had said that:

"The pecuniary loss in such case means the value in money, if any, of the life of the deceased to her father and mother."

Appellant, objecting to this instruction, contended merely that the phrase "to her father and mother" would justify an allowance greater than the actual pecuniary loss sustained. This court declared merely that such a ground of objection was trivial and untenable. But to hold that an instruction is not erroneous for the reason above indicated is an entirely different matter from saying that a case should be reversed for a refusal to give the instruction. And, indeed, such an instruction, standing alone, might very properly be refused, as tending to confuse, rather than to enlighten. It states a truth as obvious as that two and two make four, and therefore there is no necessity for giving it. The giving of it alone and unexplained therefore would tend to arouse inquiry in the jurors' minds as to some deeper significance, some profounder truth, which it might be thought to contain. In a very broad sense, the plaintiffs do recover for the "value in money" to them of the life which is taken away. But unless fully advised, the jury might not understand that that value in money includes elements upon which in truth no real value in money can be placed, elements the value of which the law, for utter lack of a better method of compensation, says shall be estimated in terms of money. Who can accurately estimate, for example, in terms of money, the value to a growing daughter of the care of a wise and loving mother? With that companionship the daughter may grow into a worthy successor of the mother; without it she may fall upon evil ways, and her loss be incalculable in any terms of money. These are legitimate elements of consideration by the jury, but they are elements which are not obvious in the mere declaration, standing alone, of "the value in money of the life of the deceased." Wherefore we hold that, since the jury was fully and fairly instructed upon all of these matters, the refusal to give this particular instruction was not error, and, if the jury had not been fully instructed upon these matters the court would have been justified in refusing to give this instruction, which, though verbally accurate, might have occasioned misleading confusion in the jurors' minds.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

26 Cal. App. 458

GOLDSMITH v. GOLDSMITH. (Civ. 1544.)(District Court of Appeal, Second District,
California. Feb. 2, 1915.)**DIVORCE** ⚡129—**ACTIONS—EVIDENCE.**

Under Code Civ. Proc. § 2079, and Civ. Code, § 130, declaring that a divorce cannot be granted upon the uncorroborated statement, admission, or testimony of the parties to an action, a divorce cannot be granted on the ground of misconduct of the wife, where the only proof of it was contained in letters claimed to have been written by her to her alleged paramour.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 411-441, 454; Dec. Dig. ⚡129.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Meyer Goldsmith against Lena Goldsmith, who cross-complained. From a judgment for plaintiff and an order denying new trial, defendant appeals. Reversed.

W. A. Martin, of Los Angeles, for appellant. Frank S. Adams and Adams & Mahan, all of Los Angeles, for respondent.

JAMES, J. Respondent brought this action to secure from appellant a decree of divorce on the ground of adultery. A cross-complaint was filed in which appellant set up causes of action for extreme cruelty, desertion and failure to provide. The trial judge granted to plaintiff the decree, and defendant appealed from an order made denying her motion for a new trial.

It is urged that the evidence is insufficient to justify the decision of the court, and with this contention we must agree. In the complaint four specific acts of adultery were charged as having been committed by appellant with one Ben Gordon (or Van Gordon) in the year 1910. The court made a general finding that in the year mentioned appellant had been guilty of the acts charged against her. Respondent, the husband, testified that he knew nothing of the alleged adulterous acts having been committed of his own

knowledge. He testified that the man Ben Gordon had called upon him and handed him a number of letters which the witness said were in the handwriting of appellant. These letters were introduced in evidence and constituted practically the entire evidence which tended to show that appellant was guilty of the acts of which she was accused. The letters were addressed to the man Gordon at various places and contained terms of endearment and expressions from which it might be fairly deduced that the relations between the writer and Gordon were of an intimate character. There were two letters introduced in evidence written by the man Gordon to appellant at about the time the action for divorce was commenced. These letters were full of malicious and revengeful statements directed by the writer against appellant, and furnished no evidence of the commission of the adulterous acts alleged, either when considered alone or in connection with the letters previously written by appellant to Gordon. The trial judge, at the conclusion of the hearing, announced that he would grant the decree based on the letters alone. Of course, if it appeared from all of the evidence, irrespective of the statement of the court as to the particular items thereof which influenced his decision, that the charge as found against appellant had been made out, it would be the duty of this court to sustain the judgment. But there was no other evidence of a material character which, when considered with the contents of the letters, could be said to make out a case for respondent. It is expressly provided by our statutes, both in the Civil Code and in the Code of Civil Procedure, that such a decree as that rendered herein cannot be based upon the uncorroborated statement, admission, or testimony of the parties to the action. Civ. Code, § 130; Code Civ. Proc. § 2079. The evidence was insufficient to support the decision of the court. Hayes v. Hayes, 144 Cal. 626, 78 Pac. 19.

The order denying the motion for a new trial is reversed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 421

SULLIVAN v. GILLON. (Civ. 1310.)

(District Court of Appeal, Third District, California. Jan. 26, 1915. Rehearing Denied by Supreme Court March 25, 1915.)

LIMITATION OF ACTIONS § 82 — "AFTER CAUSE OF ACTION SHALL HAVE ACCRUED"—STATUTES.

An action for the possession or value of personalty wrongfully taken by defendant after owner's death is within the three years' statute of limitations (Code Civ. Proc. § 338, subd. 3), though no administration was had for more than 16 years after the wrong, notwithstanding section 353, providing that where one entitled to sue dies before the expiration of the time limited to sue, and the cause of action survives, an action may be commenced by his representative

within a specified period, and the statute limiting the commencement of civil actions "after the cause of action shall have accrued"; the quoted phrase not implying in addition the existence of a person legally competent to sue.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 425, 427; Dec. Dig. § 82.]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Anna B. Sullivan, as administratrix of Rose Bartels Sullivan, deceased, against Jennie A. Gillon. From a judgment for plaintiff, defendant appeals. Reversed.

Frank E. Powers, of San Francisco, for appellant. Andrew Thorne and C. J. Goodell, both of San Francisco, for respondent.

CHIPMAN, P. J. The action is claim and delivery to recover possession or the value of certain articles of jewelry, of the agreed value of \$360, alleged to belong to decedent's estate which defendant wrongfully withholds from plaintiff. Plaintiff's intestate died on April 24, 1895, and on August 21, 1911, more than 16 years thereafter, plaintiff was appointed administratrix of the estate of said deceased.

It is alleged in the amended complaint that on the 10th day of May, 1895, and after the death of decedent, defendant wrongfully took possession of said personal property "and has ever since the 10th day of May, 1895, unlawfully and wrongfully withheld all of said goods and chattels"; that no administration upon the estate of said deceased "was ever had, except as hereinbefore alleged"; that plaintiff is the daughter of deceased, and, at the time of the death of deceased, plaintiff was 13 years old.

There are certain averments in the complaint which appellant contends were intended to charge defendant as a trustee either voluntary or involuntary. Respondent, however, claims that the action is simple claim and delivery, and in this we agree with respondent.

Among other defenses, subdivision 3 of section 338, Code of Civil Procedure, is pleaded in bar of the action. This section provides that actions for the detention or recovery of personal property shall be commenced within three years after the cause of action has accrued. The averment of the amended complaint is and the court found on sufficient evidence that the cause of action accrued on May 10, 1895, about two weeks after the death of deceased.

Unless some statute can be found making an exception in cases such as this, the action, in our opinion, is barred by the section of the Code above cited. The only section to which our attention has been drawn by respondent is section 353, Code of Civil Procedure. The precise question was, we think, decided in Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152. That was an action of eject-

ment brought by plaintiff, as administrator of the estate of William D. Bell, deceased, to recover possession of certain land. Defendant took possession under claim of right after the death of decedent, who died in April, 1854, but plaintiff was not appointed administrator until 12 years subsequent to the death of Bell. It was held that the statute of limitations must run in all cases not expressly excepted from its operation. Referring to the statute (section 24 of the act of 1850, which is the same as section 353 of the Code of Civil Procedure), the court, speaking through Chief Justice Sanderson, said:

"No provision is made excepting a case where the party who would have been entitled to sue dies before the cause of action has accrued." "Nor," said the learned judge, "do we perceive any substantial reason why an exception should be made. If the cause of action does not accrue until after the death of the party who would have been entitled to sue, the persons interested in his estate—his creditors, heirs, and devisees—have the full time allowed by the statute in which to move in the matter to obtain a grant of administration and commence an action."

Speaking of the statute which provides that civil actions shall be commenced within certain periods therein prescribed "after the cause of action shall have accrued," it was said:

"The clause 'after the cause of action shall have accrued' does not, in our judgment, imply, in addition, the existence of a person legally competent to enforce it by suit."

Respondent is mistaken in assuming that adverse possession in the Tynan v. Walker Case was taken *before* Bell died. The facts stated show that Walker went into possession at the request of Bell, and after the latter's death Walker set up a claim in his own right, and this was the right litigated. Besides, it was held immaterial whether the right of action accrued before or after the death of Bell, since the exception related exclusively to cases where the action accrued *against* the deceased; there being no exception covering the case of an action accruing in his favor.

Respondent cites several California cases involving section 353, but they are all cases where the cause of action accrued against the deceased either before or after his death. Among them is *In re Bullard*, 116 Cal. 355, 48 Pac. 219, in which the early cases of *Danglada v. De la Guerra*, 10 Cal. 386, and *Smith v. Hall*, 19 Cal. 85, were cited.

The question in the Bullard Case arose under section 353, Code of Civil Procedure, which, as already pointed out, is identical with section 24, Acts of 1850 (Stats. 1850, p. 346), under which the earlier cases were decided, and were all cases where the cause of action accrued against the deceased, which are expressly provided for in the act of 1850 and in section 353, Code of Civil Procedure.

In a concurring opinion by Chief Justice

Beatty, in the Bullard Case, he places his concurrence on the doctrine stated in *Smith v. Hall*, supra, and upon section 1500, Code of Civil Procedure, which forbids the commencement of any action upon a claim against a decedent unless the claim is first presented to an executor or an administrator, etc.; and he adds:

"It seems to have always been considered absurd to hold that the statute would run against a cause of action which could not possibly be put in suit."

Further he said:

"Tynan v. Walker, 35 Cal. 634, 645, 95 Am. Dec. 152, was the converse of this case, in which it was held that the representatives of an intestate could not keep alive a right of action indefinitely by neglecting to take out administration. The reasoning of Judge Sanderson (35 Cal. 643, 644, 95 Am. Dec. 152) does seem to support the contention of the appellant, but the case was different and the point decided was different. *The reason for the exception ingrafted upon the statute in Smith v. Hall, supra, does not exist when the right of action is one in favor of the decedent.*" (Italics ours.)

Respondent cites 18 Cyc. 915, 916, and some cases from other states which appear to give the rule as contended for by her, but we do not find it necessary to examine the statutes elsewhere. Tynan v. Walker, supra, has given us the rule in this state, and, so far as we are aware, it has never been departed from. In *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 24, 134 Pac. 981, 984, it was said:

"This case has been approved in several subsequent decisions, and it must now be deemed to be the established rule in this state."

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

26 Cal. App. 437

HENDERSON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 1688.)

(District Court of Appeal, Second District, California. Jan. 29, 1915.)

PARTIES ⇨95—AMENDMENT—JURISDICTION.

A complaint in an action by "United Mercantile Association," which alleged that it was an individual doing business under that name and style, and had complied with Civ. Code, § 2466, which, as amended by St. 1911, p. 440, requires that one doing business under a fictitious name must file with the county clerk a certificate showing his name in full and his residence, and publish it in a newspaper in the county, in view of the following section, that no one may maintain an action on any contract, etc., until such certificate has been filed, sufficiently alleged that the real plaintiff was an individual, and the court had jurisdiction to allow an amendment to show who that individual was.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 160-166; Dec. Dig. ⇨95.]

Petition for writ of review by Francena E. Henderson against the Superior Court of the State of California in and for the County of Los Angeles, and Charles Wellborn, Judge

thereof, to have order of court annulled. Denied.

Carroll Allen and Bertin A. Weyl, both of Los Angeles (Rupert B. Turnbull, of Pasadena, of counsel), for petitioner. I. R. Rubin, of Los Angeles, for respondent.

JAMES, J. By writ of review petitioner seeks to have an order made by the superior court annulled. The action of the court which it is claimed was in excess of jurisdiction consisted in the making of an order permitting an amendment to be made in a complaint as to the name of the party plaintiff. An action was brought in a justice's court, the plaintiff there being designated as "United Mercantile Association." Plaintiff alleged in the first paragraph of its complaint:

"That it is an individual doing business under the fictitious name and style of the United Mercantile Association, and that it has complied with section 2466 of the Civil Code of the state of California."

The section referred to, which was amended in 1911 (Stats. 1911, p. 440), requires that, where a person is doing business under a fictitious name, he must file with the clerk of the county a certificate showing his name in full and place of residence, and also publish the same for a specified period of time in a newspaper in the county. The following section provides that no such person shall maintain an action upon any account or contract made until the certificate has been filed and published. The action went to trial in the justice's court, and judgment was there rendered in favor of the plaintiff. An appeal was then taken to the superior court. At the time set for trial in the latter court, petitioner as a defendant in said action objected to the introduction of any evidence on the ground, among others, that the plaintiff did not have the legal capacity to sue. The objection was sustained, and the court thereupon made an order allowing an amended complaint to be filed, which changed the title of the suit to read as follows: "I. R. Rubin, suing herein as United Mercantile Association." The complaint was also made to contain the averment that the plaintiff "is an individual, to wit, I. R. Rubin, doing business under the fictitious name and style of United Mercantile Association, and that he has complied with section 2466 of the Civil Code of the state of California."

It is insisted that the decision in the case of *Miller v. Superior Court*, 146 Pac. 72, is authority for the position taken by petitioner in her claim that the superior court acted in excess of its jurisdiction in allowing the amendment to be made. The decision in the case cited declared that where a fictitious name stands alone in its designation of a party to an action and in the title thereof, and which name imports no legal entity, and where the complaint itself is silent as to the

character of the party so designated by a fictitious name, an amendment cannot properly be allowed which will add to the fictitious designation the name of the individual party as being the person in whose favor the action is prosecuted. In the *Miller Case*, while the caption of the complaint carried as the name of the plaintiff the designation "San Jacinto Packing House," the complaint disclosed that the individual named in the body thereof was the owner of the business which he was conducting in the name and style designated. We think that the complaint here contained a sufficient allegation as to the fact that the plaintiff, while designated by a fictitious name in the title, really was an individual and that under such allegation the complaint was properly allowed to be amended to show who the individual was.

Under this view it follows that the prayer of the petition should be denied, and it is so ordered.

We concur: CONREY, P. J.; SHAW, J.

28 Cal. App. 429

PEOPLE v. DYER. (Cr. 367.)

(District Court of Appeal, Second District, California. Jan. 29, 1915.)

1. CRIMINAL LAW $\S$ 1137 — MISTRIAL — RETRIAL — STATUTE.

Where the jury on May 20th disagreed in defendant's case, and it was set for retrial for June 30th, and, at request of defendant's counsel, continued until July 20th, more than the 60 days after the mistrial allowed for retrial by Pen. Code, $\S$ 1382, no claim of prejudice to defendant could be predicated thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S\S$ 3007-3010; Dec. Dig. $\S$ 1137.]

2. CRIMINAL LAW $\S$ 829 — APPEAL — HARMLESS ERROR — INSTRUCTIONS.

In a criminal prosecution, where defendant testified, the refusal to instruct that he was a competent witness in his own behalf, and that it was proper for him to testify, was not prejudicial, where the court fully instructed as to the effect to be given to the testimony and credibility of witnesses, including defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S$ 2011; Dec. Dig. $\S$ 829.]

Appeal from Superior Court, Orange County; Benjamin F. Bledsoe, Judge.

Herbert Dyer was convicted of rape, and he appeals. Affirmed.

Weisel & Dutton, of Anaheim, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of rape. There was judgment of imprisonment and an order denying a motion for a new trial. The appeal is taken from the judgment and from the order.

[1] But two principal propositions are presented for consideration in determining the merits of the appeal. It is first contended that the court erred in denying defendant's

motion to dismiss the information and discharge the defendant from custody because he had not been brought to trial within 60 days after the date of a mistrial which had theretofore occurred. The point is urged in reliance upon section 1382 of the Penal Code. The facts were that on the 20th of May, after considering the evidence introduced at the trial of defendant, the jury disagreed, and the case was then reset for second trial for the 30th day of June, 1914. On the latter date the district attorney moved for a continuance of the trial to another date on the ground of the absence of material witnesses. The case was finally reset for the 20th day of July, which counsel contends was in violation of the right of defendant to be tried within 60 days after the filing of the information, or after a trial and disagreement of a jury has been had. All of the force which might attend upon this contention is taken away when the facts shown by the record touching the matter of the continuance of the trial are taken into view. The fact was that the judge offered to set the case for the 16th of July, which would have been clearly within 60 days after the first trial, but appellant's counsel were not satisfied with that date, and asked that some other date be fixed, because they would be engaged in the trial of another case at that time. So, by reason of the objection of appellant's counsel, the court was compelled to fix a later day, and the 20th day of July appeared to be the earliest upon which appellant's counsel would be disengaged and could proceed. It therefore appears that the postponing of the trial beyond the 16th day of July was caused wholly by appellant's counsel, in which case no claim of prejudice could be predicated thereon.

[2] It is urged that the trial judge committed prejudicial error in refusing to instruct the jury that it was legitimate and proper for a defendant to be sworn as a witness, and that he was a competent witness in his own behalf. The defendant did testify, and the court, without singling out the defendant for special comment, gave a general instruction to the jury furnishing to it the law for its guidance in determining the effect to be given to the testimony of witnesses. This instruction was very full to that point. The California decisions referred to by counsel as sustaining his contention for error were cases where the defendant had complained because he was singled out and note taken by the instructions of the fact that, as a defendant, he was an interested party. The claim of error in those cases was that the special comment, such as the instruction here fairly embraced, should not be given to the jury. Counsel are here taking the opposite of this proposition. In view of the fact that the court instructed very fully as to how the credibility of witnesses might be measured and determined (and this

statement embraced all of the witnesses, including the defendant), it is difficult to perceive how prejudice could have arisen because of the failure to give the specified instruction offered by the defendant. The jury had the witnesses before it, heard all of the testimony, and from a survey of the complete record no error can be discerned which may be said to have worked a miscarriage of justice.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 445

WEINSTOCK-NICHOLS CO. v. COURTNEY
et al. (Civ. 1516.)

(District Court of Appeal, Second District, California. Jan. 30, 1915.)

1. TRIAL $\hookrightarrow$ 393—SIGNING OF FINDINGS.

The amendment of 1913 (St. 1913, p. 58) to Code Civ. Proc. § 634, which provides that, where the court directs a party to prepare findings, a copy shall be served on all parties to the action at least five days before findings shall be signed, and that the court shall not sign any findings prior thereto, does not preclude a judge of one county, who sat in another, from making up and signing findings in a county other than the one in which trial was had.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 920-923; Dec. Dig. $\hookrightarrow$ 393.]

2. COSTS $\hookrightarrow$ 260—FRIVOLOUS APPEAL.

Defendants, who were unsuccessful, did not attack the judgment on the merits, but questioned the right of the judge to make up and sign findings in a county other than the one in which trial was had. The right of the judge to make up the findings as he did had been upheld by several decisions of the Supreme Court. *Held*, that damages for a frivolous appeal would be imposed, where defendants' only claim was that an obviously immaterial amendment to the Code of Civil Procedure changed that rule.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. $\hookrightarrow$ 260.]

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge Presiding.

Action by the Weinstock-Nichols Company, a corporation, against T. F. Courtney and C. L. Schroeder, copartners trading as the Schroeder-Courtney Company. From a judgment for plaintiff, defendants appeal. Affirmed.

Avery & French, of Los Angeles, for appellants. Oscar Lawler and James E. Degnan, both of Los Angeles, for respondent.

JAMES, J. A technical question only is presented on this appeal taken from a judgment entered against the defendants. It is presented on the judgment roll.

[1] Appellants contend that the superior judge of Inyo county, who sat at the trial in Los Angeles county, was without power to settle and sign the findings in the county of his residence. The right of a judge of one county to make up and sign findings in a county other than that in which the trial has

been had has long been settled by the decisions of our Supreme Court. *Comstock Q. M. Co. v. Superior Court*, 57 Cal. 625; *Walter v. Merced Academy Ass'n*, 126 Cal. 582, 59 Pac. 136; *Estudillo v. Security Loan, etc., Co.*, 158 Cal. 66, 109 Pac. 884. Appellants admit the law is so established, but contend that, by reason of an amendment made to section 634 of the Code of Civil Procedure by the Legislature of 1913 (St. 1913, p. 58), the signing of the findings constituted a judicial act, which of necessity, to be valid, should be performed at the place where the cause was pending. The amendment referred to provides as follows:

"In all cases where the court directs a party to prepare findings, a copy of said proposed findings shall be served upon all the parties to the action at least five days before findings shall be signed by the court, and the court shall not sign any findings therein prior to the expiration of such five days."

How this amendment made the signing of the findings any more or any less of a judicial act than it had theretofore been we are unable to comprehend. The amendment related merely to steps to be taken where the court requires counsel to prepare findings, no doubt for the purpose of aiding the court by allowing time within which suggestions might be made by the opposite party. In the end, the court would not be bound to enter either the offered findings or adopt any of the suggestions made, and might discard the whole and proceed to make up its own findings, as theretofore permitted to be done. The Supreme Court has said in the cases cited that the findings become effective as a decision only when filed, and that it matters not where the judge deliberates upon the same, or where he attaches his signature thereto, so long as the findings are filed in the proper court by the proper officer; that the judgment entered by the clerk which follows will then be regular. If the Legislature had any intention of requiring a nonresident judge to make his findings in the county where the trial is had, it could very easily have so directly provided. But no such intention can be gathered from the terms of the amendment quoted.

The decision made by the Supreme Court in the case of *People v. Ruef*, which is printed in volume 14 of the California Appellate Reports, at page 621, 114 Pac. 48, 54, referred to the matter of the regularity of an order of that court granting a rehearing where one of the members of the court concurring in the order was out of the state at the time the order received the required number of signatures. Nothing that is said in that decision can, in our opinion, be taken to overrule in the slightest the cases establishing the law to the contrary of appellants' contention here. The main point of appellants' argument has now been considered. Accompanying that consideration the assumption

has been made that the record fully presents the necessary facts upon which to predicate the contention advanced. As a matter of fact, there was no bill of exceptions, and nothing appears in the record from which it can be deduced that the findings were in fact signed outside of Los Angeles county. There is printed as a part of the judgment roll (it has no place there under section 670, Code of Civil Procedure) what purports to be a written notice given by counsel for the plaintiff to counsel for defendants that on a certain date the findings would be presented to the judge at the county seat of Inyo county. Discarding from consideration this notice, there is absolutely nothing shown which even suggests that the findings *might* have been signed in the county of Inyo. It is consistent even with the terms of the notice to assume that the findings were signed in Los Angeles county. All presumptions must favor the regularity of the judgment.

[2] Respondent insists that the appeal is so devoid of merit as to be properly characterized as frivolous, and asks that a penalty be imposed. This demand has led us to consider the alleged merits of the appeal as broadly as any reasonable view will permit. Had there seemed to be merit in the main contention of appellants, then, even though the record in its imperfect state failed to fully present the question, we would hesitate to enforce a penalty. But the question presented was one which had been directly decided by the Supreme Court and the decisions had stood for many years uniformly to a conclusion flatly adverse to appellants' contention. The amendment to section 634, Code of Civil Procedure, seems not to touch the question on any angle. The trial court determined that a large sum of money had been collected by the defendants for the use of plaintiff, which plaintiff was entitled to, and for which the judgment was entered. There appears to have been no appeal taken whereby the correctness of that determination was controverted.

This appeal appearing to be frivolous and apparently for purposes of delay, it is ordered: That the judgment appealed from be affirmed; that, in addition to the costs provided to be collected by the respondent, respondent recover from the appellants the sum of \$100 as damages.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 432

PEOPLE v. IMAMURA. (Cr. 368.)

(District Court of Appeal, Second District, California. Jan. 29, 1915. Rehearing Denied by Supreme Court March 29, 1915.)

1. FORGERY $\hookrightarrow$ 44—EVIDENCE—SUFFICIENCY. Evidence held to sustain a conviction of forgery.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 117-121; Dec. Dig. $\hookrightarrow$ 44.]

2. FORGERY ⚡7—ELEMENTS OF—INDORSEMENT OF CHECK.

Where accused requested a bank to forward a third person's deposit in the name of the third person, and the bank issued a check payable to the third person, and accused obtained possession of it before delivery to the third person, and forged the indorsement of the third person's name thereon and obtained the cash, he was guilty of forgery, as against the objection that the check was not subject to forgery because not having been delivered to the third person, for the elements of forgery are a false making of an instrument which, if genuine, might injure another and a fraudulent intent.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 2, 3, 8-15; Dec. Dig. ⚡7.

For other definitions, see Words and Phrases, First and Second Series, Forgery.]

3. CRIMINAL LAW ⚡663—DOCUMENTARY EVIDENCE.

Where, on a trial for forgery of indorsement of a check, the check was offered and received in evidence, but not read to the jury, and its contents pointed out and referred to by witnesses and counsel on both sides, the objection that the contents of the check were not fully in evidence was without merit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1602; Dec. Dig. ⚡663.]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Frank B. Imamura was convicted of forgery, and he appeals. Affirmed.

Edward J. Dennison and J. B. Holley, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe and Robert M. Clarke, Deputy Attys. Gen., for the People.

JAMES, J. Defendant was charged with and convicted of the crime of forgery. The appeal is from the judgment of imprisonment which followed, and an order denying a motion for a new trial.

[1] A Japanese, named Maeshima, in the year 1913, was employed at a railway eating house in the county of San Bernardino. Appellant here was a fellow employé and was acquainted with Maeshima. Maeshima had on deposit with the Yokohama Specie Bank at San Francisco a sum of money amounting to \$504.49, evidence of which deposit he held in the form of a passbook. In November of that year the appellant wrote a letter in Japanese characters to the San Francisco bank, to which he signed the name of Maeshima, stating in the letter that the writer was ill and required the money which he had on deposit there, and requesting that it be forwarded to him at The Needles, giving a post office box number to which the letter requested the money to be sent. In due time the bank forwarded a check payable to Maeshima for the amount of the deposit, which check was received by appellant, and the registry receipt was signed by him with the name of Maeshima. The check was thereafter presented to a branch of the same bank in the city of Los Angeles and cashed. Appellant, when he testified at the trial, admitted that he had written the letter requesting

the money to be forwarded in Maeshima's name; admitted that he had signed the name of Maeshima to the registry receipt and had also indorsed the same name upon the back of the check. He denied having presented the check for payment, and attempted to excuse himself for his acts by saying that he did all of the things enumerated at the suggestion of one Sato, who represented to him that he had the right to draw this money, as it belonged to him, Sato. The check when cashed bore the indorsement of the name "Maeshima" spelled in two ways. The first signature, the one which appellant admitted having written, was spelled "Mae-shima," which did not correspond to the payee's name appearing in the body of the check, which was "Maeshima." The evidence tended to show that the second indorsement of Maeshima on the back of the check was made at the suggestion of the bank when the money was paid on the instrument. An expert on handwriting gave it as his opinion that the same hand had written all of the indorsements on the back of the check. There was the further testimony, given by an operator of a detective agency employed by the Bankers' Association, that appellant had admitted that he had gone to the trunk of Maeshima and taken the passbook therefrom, and thereafter received the check from the San Francisco bank and cashed it in the city of Los Angeles. There was further testimony showing that not long after this time various sums of money, aggregating nearly the amount of Maeshima's deposit, had been placed to the credit of appellant in various banks at The Needles. That the evidence was amply sufficient to sustain the verdict admits of no dispute at all.

[2] Complaint is made that the check upon which the indorsements of Maeshima's name were made, not having been delivered to Maeshima, was not the subject of forgery. There are no authorities to be found in this state, or in any other state so far as we are able to discover, which sustain that proposition. Our Supreme Court, in the case of *People v. Munroe*, 100 Cal. 664, 35 Pac. 326, 24 L. R. A. 33, 38 Am. St. Rep. 323, has said:

"But we will take broader ground, and concede the essential ingredients of the crime of forgery to be: (1) A false making of some instrument; (2) a fraudulent intent; (3) if genuine, the writing might injure another. The third element stated is expressly recognized by this court to be the true test as to the nature of the writing."

Because the check upon which the indorsements were afterwards forged was not forwarded at the request of Maeshima is wholly immaterial. If the bank had, without suggestion from any person, decided to return to Maeshima his money in that way, and appellant had unlawfully obtained possession of the check and forged the indorsements thereon, the legal situation would be no different. There is no rule of which we are cognizant

which requires that a valid instrument upon which a liability may be created is not the subject of forgery until it has actually reached the hands of the person for whose benefit it was issued. The check which was made the subject of the forged indorsements in this case was in no sense a nudum pactum; it was a check which, if it had been received by Maeshima, might have been used by him and the sum of money represented thereby have been collected from the bank.

[3] There is no merit in the point that the check described in the information was not read to the jury when offered in evidence as an exhibit. It was offered and received in evidence, and its contents were pointed out and referred to by the witnesses and counsel on both sides. Under such condition of fact, it could hardly be maintained that the contents of the check were not fully in evidence before the jury. Whether all of the indorsements appearing upon the back of the check, particularly the one in Japanese, were set up in the information seems immaterial. The charge against the appellant was that he forged the indorsement of Maeshima, and there was no such material variance between the check described in the information and that offered in evidence as to make the latter inadmissible. As to the confessions claimed to have been made by appellant, the evidence warranted the trial judge in determining that such statements were not made under the influence of coercion or improper inducements. No word of commendation can be given for the acts of the detective who arrested appellant, in keeping the latter within his personal custody for two days at a hotel at The Needles, instead of taking him promptly before a magistrate, as the law required him to do. This act of his was wholly unwarranted, unjustifiable, and deserving of severe censure.

We find no error in the record which warrants an order of reversal to be made in this case.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 448

LEWIS v. LAPIQUE. (Civ. 1261.)

(District Court of Appeal, Second District, California. Feb. 1, 1915.)

1. APPEAL AND ERROR ⇐612—TRANSCRIPT—CERTIFICATE OF JUDGE.

Where the transcript on an appeal attempted to be taken under the provisions of Code Civ. Proc. §§ 953a, 953b, 953c, was not certified by the judge, it cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694–2701; Dec. Dig. ⇐612.]

2. APPEAL AND ERROR ⇐482—STAY—VACATING—DISCRETION OF COURT.

The vacating of a stay of execution pending an appeal is within the discretion of the trial court, and that discretion was not abused

where the stay was vacated after there had been nine months' delay in perfecting the proceedings for the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2259–2263; Dec. Dig. ⇐482.]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Minnie Lewis against John Lapique. From an order vacating a stay of execution granted after judgment was rendered for the plaintiff, the defendant appeals. Order affirmed.

John Lapique, of Orange, in pro. per. C. A. Stice, of Los Angeles, for respondent.

JAMES, J. Defendant in this action, who was substituted after judgment in lieu of the original parties defendant thereto, presents an appeal which purports to have been taken from an order of the superior court dismissing an appeal and from an order of the same court vacating an order staying execution.

[1] The appeal is attempted to be taken under the provisions of sections 953a, 953b, and 953c, Code of Civil Procedure. The transcript (which is typewritten only) is not certified by the judge of the court, and therefore cannot be considered. Credit Clearance Bureau v. Weary & Alford Co., 18 Cal. App. 467, 123 Pac. 548. The appeal is therefore left without a record to support it. It may be remarked, however, that from the improperly authenticated papers shown in the transcript it appears that a judgment was entered in favor of respondent quieting title to certain real property on the 31st day of January, 1912; that various notices were given of intention to move for a new trial on behalf of the defendants; and that on October 28th of the same year, on motion of respondent, an order was made in the superior court dismissing the proceedings on motion for a new trial and vacating the stay of execution theretofore allowed. It is not shown that at that time any appeal had been taken from the judgment quieting title, or from any other order made in the action. Hence, when appellant stated in the notice of this appeal, which he filed, that he was appealing from an order dismissing his appeal in the court below, he described an appeal taken from an order which had not been made, and one which the superior court had no jurisdiction to make.

[2] If his appeal could be here considered on its merits on the imperfect record presented, the only matter which could be reviewed at all would be the action of the court in vacating the stay of execution; and as to that we apprehend there could be no abuse of discretion, as the court might properly have declined to make such a stay pending appeal, or might properly, as it did, have vacated the same where there was an unusual delay on the part of the proposed appellant

in the giving of the notice of appeal. It follows that the order attempted to be appealed from should be affirmed.

The order vacating the order staying execution is affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 436

DE GALLER v. MAIER BREWING CO.
(Civ. 1492.)

(District Court of Appeal, Second District, California. Jan. 29, 1915. Rehearing Denied by Supreme Court March 29, 1915.)

CONTRACTS ⚡274—RESCISSION—OPERATION.

Where defendant contracted with one L. for certain printing, and O.K.'d a notice of his assignment of the contract to a printing firm, and of the collection of the bill to plaintiff, and the original contract was not performed, and notice of rescission was duly served on the firm, the rescission was effective, and the defendant was not answerable to the plaintiff for the compensation paid under a subsequent agreement with L. for the same work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1202-1206; Dec. Dig. ⚡274.]

Appeal from Superior Court, Los Angeles County; F. E. Densmore, Judge.

Action by Henry F. De Galler against the Maier Brewing Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Goldberg & Meily and George L. Greer, all of Los Angeles, for appellant. Mott & Dillon, of Los Angeles (G. C. O'Connell, of Los Angeles, of counsel), for respondent.

JAMES, J. Appeal from a judgment entered in favor of the defendant. On the 6th day of February, 1912, respondent made a written contract with one C. H. Lovell, which provided for the printing of 50,000 baseball schedules upon cards, at the net price of \$10 per 1,000; delivery to be made not later than March 30th of the same year. A few days later a printing firm, doing business under the name of Provident Printshop, notified respondent that its order had been assigned to them by Lovell, and that they would complete the same, and instructing respondent to make payment to appellant, to whom, so the Printshop informed respondent, had been "assigned the collection of this bill." Respondent accepted and "O. K.'d" this notification, but, the printing not having been done within the time specified, respondent gave written notice to the printers rescinding the contract. It later made a second agreement, based upon different terms, with Lovell, and, upon his having furnished the merchandise required under this second contract, they paid him the price agreed upon. Thereafter the appellant made demand upon respondent for the payment to him of the money, and, as a basis for his claim, urged that the contract, as first made, had been performed, which, under the express direction of the Provident printing establishment, was,

so far as concerned the moneys to be collected thereunder, assigned to appellant. Respondent by its answer denied that the first contract had been performed, or that anything had been delivered to it under that contract. The trial judge determined the issues in favor of this contention. There was no dispute made by the evidence but that the original contract was not performed within the time specified, nor that notice of rescission had been duly served upon the printers who had engaged to make performance thereunder. This being the condition of fact, the trial judge properly held that the rescission became effective, and that under the agreement subsequently made with Lovell the respondent was not answerable to appellant for any compensation agreed to be made for that work.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 440

PEOPLE v. YOUTZ. (Cr. 331.)

(District Court of Appeal, Second District, California. Jan. 29, 1915. Rehearing Denied Feb. 25, 1915; Denied by Supreme Court, March 29, 1915.)

1. CRIMINAL LAW ⚡493—EVIDENCE—FALSE REPORTS OF OFFICER OF CORPORATION AS TO CONDITION—VALUE OF STOCK.

In a prosecution for a violation of Pen. Code, § 564, providing that directors, officers, and agents of corporations, who concur in publishing false reports as to the financial condition of their corporations, are guilty of felony, to ascertain the value of stock, reported as assets held by the company, and not dealt in on the market, the jury could consider figures as to the assets of the corporation whose stock was in question, the kind and quantity of its business, and the hazards entertained and the profits which had accrued or probably would accrue, irrespective of what the opinion of any witness as to the value of the stock might be.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1058; Dec. Dig. ⚡493.]

2. CRIMINAL LAW ⚡1159 — APPEAL AND ERROR—REVIEW—VERDICT.

Where the evidence is conflicting, the verdict cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. ⚡1159.]

3. CRIMINAL LAW ⚡1153—APPEAL—EXCLUSION OF EXPERT TESTIMONY—DISCRETION OF COURT.

A judgment will not be reversed for error of a judge in making rulings, unless he has abused his discretion, such as that which he exercises in passing upon the admissibility of expert evidence as to value.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. ⚡1153.]

4. CORPORATIONS ⚡324 — DIRECTORS — CRIMINAL RESPONSIBILITY—FALSE REPORTS.

In a prosecution for violation of Pen. Code, § 564, providing that directors, officers, and agents of corporations who concur in publishing false reports as to the financial condition of their corporations are guilty of felony, where the falsity of a published statement depended

upon the value of certain stock held by the corporation, the representation was not opinion merely, since the stock was not of such a speculative nature as to render its value entirely uncalculable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1441; Dec. Dig. ⚡324.]

5. INDICTMENT AND INFORMATION ⚡125 — DUPLICITY.

Where a statute describes several acts, the doing of any or all of which is a crime, a defendant may be charged with all of them, so that an information charging that defendant, a director of a corporation, violated Pen. Code, § 564, by making false statements as to the financial condition of his corporation, and by concurring in the making of such statements, was not defective as charging two offenses.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. ⚡125.]

6. CORPORATIONS ⚡324—DIRECTORS—CRIMINAL RESPONSIBILITY—FALSE REPORTS—EVIDENCE.

In a prosecution for violation of Pen. Code, § 564, providing that directors, officers, and agents of corporations who concur in publishing false reports as to the financial condition of their corporations are guilty of felony, the introduction in evidence was proper of circular letters and statements shown to have been furnished by defendant to persons selling the stock of the corporation, which statements and letters contained the same false allegations as to its financial condition as did the published statement on which the prosecution was based, since they tended to establish the knowledge and motive of defendant as to the alleged misleading statements promulgated.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1441; Dec. Dig. ⚡324.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Joshua E. Youtz was convicted of crime, and he appeals. Affirmed.

Harriman, Ryckman & Tuttle, of Los Angeles, and Henry W. Nisbet, of San Bernardino, for appellant. U. S. Webb, Atty. Gen., George Beebe, Deputy Atty. Gen., and Robert Mitchell, of Los Angeles, for the People.

JAMES, J. [1, 2] Defendant has appealed from a judgment of imprisonment entered upon his conviction of the crime described in section 564 of the Penal Code. Under the terms of the section noted, directors, officers, and agents of corporations who concur in the making, publishing, or posting of reports or statements of the pecuniary condition of the corporation which are untrue or falsely exaggerated, are guilty of a felony. It was charged that appellant, while holding the position of director and acting vice president of a certain corporation organized under the laws of California, published and concurred in publishing to the stockholders and other persons a financial statement as to the affairs of the corporation, which was false in a material part. The facts as exhibited by the record show that the California corporation was organized as a "holding" concern, and that simultaneously therewith a fire insurance company was organized under the laws

of Arizona; that a large number of shares of stock of the California corporation were sold, the greater part of the price agreed to be paid for which was evidenced by promissory notes given by the purchasers of the stock to the corporation. These notes and a rather insignificant amount of cash were put into the treasury of the Arizona corporation in payment for all of its capital stock, except four shares, which were retained by Arizona directors for the purpose of maintaining the organization under the Arizona laws. Thereupon the insurance corporation proceeded to do business in the state of California, insuring property against loss by fire, which business was in fact handled by the holding corporation, which was legally resident in the state of California. On the 1st day of July, 1912, as the evidence abundantly shows, appellant caused to be issued a financial statement, among the items of which was one which purported to set forth assets of the California corporation as "Stocks, bonds, and secured notes, \$558,360.48." Further down in the statement a deduction was made of the total capital stock from the purported assets, and a surplus was scheduled as being possessed by the California corporation in the sum of \$220,028.78.

The information charged that at that time the corporation did not own stocks, bonds, and secured notes in any sum greater than \$358,360.48, and did not own or possess any surplus whatsoever of assets over liabilities. Included within the item of stocks, bonds and secured notes was the stock of the fire insurance corporation, which had been given a value of twice its par. If the stock was worth that amount, then the statement, as a matter of exemplified bookkeeping, was approximately correct. If the stock of the insurance corporation had no greater value than the par fixed per share, then the statement was misleading to the extent that it overstated assets and surplus by the amount of \$200,000. The entire case, therefore, turned upon the question as to what was the value of the stock of the insurance corporation at the date of the statement. It was shown in evidence that a large part of the stock of the California corporation was sold to persons who would insure their property with the Arizona concern, which insurance was written for about 50 per cent. of the prevailing insurance rate. The stock of the insurance company was not upon the market, and therefore it had no sale value as ordinarily established through trade, for all of it, except the four shares mentioned, was held by the California corporation. This condition was intended to be continued, for the entire business of the California corporation was that of conducting an insurance business through the medium of the Arizona organization.

A number of expert accountants testified as

to the figures ascertainable from the books of the California concern, and stated that the Arizona stock was carried on those books at its par value. The appellant testified that in his opinion the Arizona stock was worth twice par. The jury had before it a very complete history of both corporations as to the conduct of their business and the quantity and kind of it. The circumstances being such as to make it impossible to establish by testimony in the ordinary way the market value of the stock, it was incumbent upon the jury to arrive at such value by considering all of the various elements which would go to make up the worth of that stock. Their conclusion would depend largely upon deductions to be drawn from the figures as to the assets of the corporation, the kind and quantity of its business, the hazards entertained and the profits which had or would probably accrue. They were entitled to make their conclusion from such facts, irrespective that any witness might have, as a matter of opinion, given to the Arizona stock a definite valuation of twice par. We cannot here weigh the evidence, as it was the province and duty of the jury to weigh it in the face of conflict therein. And it may be added that the evidence was ample to sustain the conclusion of the jury as to appellant having made an exaggerated and untrue report of the financial condition of his corporation.

[3] The action of the court in sustaining objections to questions asked of two witnesses who were offered by the defendant to prove the value of the stock, conceding error, as claimed by appellant, is not shown to have amounted to an abuse of discretion on the part of the trial judge. The testimony sought to be elicited necessarily belonged to that classed as "expert," and was subject to the rule announced in many cases, which holds that a judgment will not be reversed unless it clearly appears that the trial judge, in making the rulings complained of, has abused the discretion committed to him. We cite *Howland v. Oakland C. St. Ry. Co.*, et al., 110 Cal. 513, 42 Pac. 983; *Mabry v. Randolph*, et al., 7 Cal. App. 421, 94 Pac. 403; *Perry v. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128; *Evans Ditch Co.*, et al. v. *Lakeside Ditch Co.*, et al., 13 Cal. App. 119, 108 Pac. 1027; *Stewart v. Sloss-Sheffield Steel & Iron Co.*, 170 Ala. 544, 54 South. 48, Ann. Cas. 1912D, 815.

[4] The point is urged also that, conceding the statement as issued by appellant to have been untrue in fact, the misleading portion thereof constituted only an expression of opinion as to value, and not a statement of a definite fact. To this proposition we cannot assent. The appellant definitely stated, not only that the stocks, bonds, and secured notes owned by his corporation had a value of \$558,360.48, but that a surplus was owned by that corporation to the amount of \$220,028.78. The value affixed was applied

to that class of property the worth of which is not generally of such a speculative nature as to excuse a statement in appraisal thereof as being a matter of opinion only. It was held in the case of *Craig v. Wade et al.*, 159 Cal. 172, 112 Pac. 891, that a statement by an officer of the corporation as to the value of oil wells amounted to but an expression of opinion; but the argument of the opinion clearly shows that that case belonged to a class which does not include such as that presented here by appellant.

[5] It is urged further that the information was faulty, in that it charged more than one offense, to wit, that it accused appellant of not only making, but concurring in the making, of statements which were untrue, and which acts would constitute separate offenses. This contention may be answered by reference to the case of *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480, cited in *People v. Kennedy*, 22 Cal. App. 29, 133 Pac. 25.

[6] There was introduced on behalf of the prosecution certain circular letters and statements, some of which were shown to have been furnished to persons engaged in selling the stock of the California corporation, and others which were mailed to the stockholders of the same organization. The statements furnished to be used in selling the stock were testified to have been furnished by the appellant, and, referring to the other class of statements, appellant himself testified that they were prepared at the suggestion of the board of directors, of which appellant was one, and first submitted to him as the manager of the corporation. It was proper for the prosecution to prove, in order to establish knowledge and intent on the part of appellant as to the alleged misleading statements promulgated, a series of such similar acts as would furnish corroborating evidence to the point just mentioned. It may be noted, also, that appellant throughout the trial contended that the alleged misstatements in fact represented the truth, and therefore he could not have been prejudiced by evidence showing that he had reaffirmed the same matter. The record in this case has been subjected to a close and careful scrutiny. The case presented seems to be one of those which clearly fall within the intent of the statute alleged to have been violated. No hardship is imposed upon officers of corporations who wish to express to their stockholders or others their opinion as to the value of the assets, for in such case it would be very easy to designate the several amounts indicated upon such statements as being only estimates, in which case persons receiving the statements would be put upon notice that the figures represented merely the opinion of the person who prepared them, and not such a value of the property of the corporation as a market demand might establish for it. The whole case bears the impression very clearly defined that the intent of appellant

was to present an exaggerated statement of facts for the purpose of enhancing the business of the corporation of which he was then manager.

No points other than those herein considered seem to be of sufficient merit as to demand that a discussion be made of them.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 460

CARRINGTON v. SMITHERS et al.
(Civ. 1277.)

(District Court of Appeal, Third District, California. Feb. 2, 1915.)

1. BROKERS ⇐43 — COMPENSATION — AGREEMENTS — STATUTE.

Civ. Code, § 1624, declares that an agreement employing an agent to purchase or sell real estate for compensation shall be invalid, unless some memorandum thereof is in writing and subscribed by the party to be charged or his agent. Owners of land executed a document reciting that they agreed to pay a broker a certain amount for services rendered in case an exchange of land was had. *Held*, that the agreement was sufficient under the statute.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. ⇐43.]

2. BROKERS ⇐43 — COMPENSATION — CONTRACTS — SUFFICIENCY.

After a broker had introduced one who exchanged lands with defendants, defendants executed a memorandum reciting that in case the exchange was perfected they should pay a stipulated sum. *Held* that, though the services were already rendered, the commission could be recovered, for while an agreement to sell land on a commission is unenforceable, under Civ. Code, § 1624, unless there is some memorandum in writing, such agreements are not immoral, and the services rendered constituted a good consideration within sections 1605, 1606.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. ⇐43.]

3. APPEAL AND ERROR ⇐1039 — REVIEW — HARMLESS ERROR.

Technical inaccuracies in the complaint, and findings which do not affect the merits, are harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. ⇐1039.]

4. BROKERS ⇐64 — COMPENSATION — CONTRACTS — CONSUMMATION.

Where no time limit was fixed for making title good, a party to a contract for the exchange of lands has a reasonable time to satisfy liens, and a broker who effected an exchange cannot be denied commission because one of the parties did not immediately free his property from all liens.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 67, 97; Dec. Dig. ⇐64.]

5. BROKERS ⇐54 — COMMISSIONS — RIGHT TO.

Where defendants agreed to pay a broker a commission for effecting an exchange of land, they cannot, having entered into a valid contract with the party the broker provided, defeat commission on the ground that such person did not at that time have title to the property he agreed to transfer; it appearing he thereafter acquired title and that the exchange was consummated.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75-81; Dec. Dig. ⇐54.]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by B. Carrington against George E. Smithers and another. From judgment for plaintiff, defendants appeal. Affirmed.

T. J. Butts, of Santa Rosa, for appellants.
R. L. Thompson, of Santa Rosa, for respondent.

BURNETT, J. The suit was for a broker's commission for services in effecting an exchange of real property in Sonoma county belonging to defendants for four houses and lots in Berkeley and Oakland. That the exchange was made in accordance with the expressed desire and intention of defendants, that the efforts of plaintiff were the procuring cause of the exchange within the contemplation of the well-settled rules relating to such matters, that plaintiff was employed for the purpose mentioned, and that defendants promised to pay him the amount claimed, cannot be gainsaid, in view of the evidence disclosed by the record. As to the services performed we find the following:

Plaintiff testified:

"On the 29th of September, 1911, Mr. Smithers came in and listed the ranch, and after that date I wrote to C. A. Runels and Alfred Wehe & Co., Oakland, that I had the property for exchange, and Mr. Runels came up, and I took my machine, and we went out to the ranch, and after we came back Mr. Runels took the purchaser up to the ranch and made the deal—closed the deal that day. I made several trips to Oakland. I made one trip to the ranch. After I had been out to the ranch, on or about April 28th, Mr. and Mrs. Smithers came into my office and talked with me about the exchange there. With reference to selling the place to Doyle, I visited the ranch with Runels, and Runels brought Doyle up here. That is the way Runels found out about the ranch through me. He is my correspondent in Oakland. Doyle was his son-in-law. He brought Doyle and Mr. Wehe and Mr. Wehe's brother. I learned about the property that the Smithers were trading their ranch for the day they came up here—the day that Runels and Wehe and Doyle came up in a machine from Oakland, they told me about the property. I saw Mr. Smithers on or about the 29th of September, 1911. At that time we had a written agreement."

C. A. Runels testified:

"My occupation is a real estate broker with Alfred Wehe & Co. I know Mr. and Mrs. Smithers, the defendants in the case. I also know Henry C. Doyle. He is my son-in-law. I know Mr. B. Carrington, the plaintiff. I had some negotiations with Mr. and Mrs. Smithers respecting the exchange of Oakland or Alameda property for their ranch in this county. Mr. Carrington wrote me in regard to their ranch. Mr. Carrington sent a description of this ranch, said it was for exchange, suggested a piece of property which he had seen on Telegraph avenue as a possible exchange, and asked me to see the people and, if I could, bring them up. I went and saw them, and described the ranch to them according to Mr. Carrington's description, and got them to come up and look at that. We met Mr. Carrington here in Santa Rosa at his office, and he took his machine and took us out to the ranch—showed us the ranch. Those people did not make the exchange. Then it was

suggested that we make the exchange on this other property with Mr. Doyle, and we went up and looked at the property. We took our machine from Oakland, came up, and met Mr. Carrington at his office. We talked over the proposition and how the deal could be made, and we went out and looked at the ranch and entered into the contract. I think that was somewhere along in April, about the 28th of April. Each party had a copy of that contract."

There is other evidence to the same effect, including admissions of the defendants; but the foregoing is amply sufficient to show that plaintiff acted as the agent of defendants in the transaction culminating in the exchange.

One question, however, that gives rise to serious contention, is whether the contract of plaintiff and defendants was valid within the statute of frauds. Although pitiable efforts were made by defendants to deny the same, the evidence shows that they executed the following agreement in writing:

"Santa Rosa, Sonoma Co., Cal., April 30th, 1912. This is to certify that we, the undersigned, do hereby agree to pay B. Carrington the sum of seven hundred dollars in cash, or, should we fail to pay the cash by the time we close the deal now pending between us and Henry C. Doyle of Oakland, we will give said B. Carrington a mortgage at 7 per cent. interest on that certain lot owned by us in Oakland, Alameda county, Cal., being on Tenth street, east side, 217 ft. north of Snyder Ave.; or at option of B. Carrington we will make said mortgage on one of the properties we are obtaining from Henry C. Doyle in Oakland or Berkeley, Alameda county, Cal. The above amount is for services rendered. This is provided the trade with Henry C. Doyle is consummated."

[1, 2] The original agreement of September 29, 1911, does not appear in the transcript, although Mr. Carrington, as we have seen, testified that it was in writing. Apparently plaintiff relies upon said writing of April 30th to satisfy the requirement of the statute of frauds. This was executed after plaintiff's services were performed, but before the exchange was fully consummated.

Section 1624 of the Civil Code provides:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: * * * 6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission."

It is manifest that the said agreement in writing is sufficient in form to satisfy the requirement of the statute. A "note or memorandum" of the contract is all that is required. We have here a definite promise to pay the amount of the commission, and the other terms are either certain or can be made certain by reference to the situation of the parties. It is true that it required the exchange to be consummated before the commission should be payable. But we need not stop to inquire whether this requirement would be satisfied if the agent obtained a purchaser ready, willing, and able to make the exchange, for the reason that the evidence shows, as alleged in the complaint, that:

"Plaintiff at his own expense procured an exchange between defendants, to one Henry C. Doyle, of the properties heretofore mentioned, in accordance with the terms of said agreement and upon terms acceptable and accepted by defendants."

In other words, the exchange was entirely effected. But there is undoubtedly some merit in the objection that said written promise to pay the \$700 was executed after virtually all the services of plaintiff had been performed. It is true that the deeds did not finally pass until the latter part of May, but the written agreement of exchange was executed April 27th, and the services of plaintiff reached then their culmination. We think, however, that the rule announced by the Supreme Court of Washington, in *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519, 19 Ann. Cas. 1180, should be recognized as valid. Therein it is said:

"The moral obligation to pay for services rendered as a broker in selling real estate, under an oral contract where the statute requires such contract to be in writing, is just as binding as is the moral obligation to pay a debt that has become barred by the statute of limitations, and there is no reason for holding that the latter will support a new promise to pay while the former will not. There is no moral delinquency that attaches to an oral contract to sell real property as a broker. This service cannot be recovered for because the statute says the promise must be in writing, not because it is illegal in itself. It was not intended by the statute to impute moral turpitude to such contracts. The statute was intended to prevent frauds and perjuries, and to accomplish that purpose it is required that the evidence * * * be in writing; but it is not conducive to either fraud or perjury to say that the services rendered under the void contract, or voluntarily, will support a subsequent written promise to pay for such services."

The services performed by plaintiff would seem to be a sufficient consideration to support the subsequent promise within the contemplation of our own statute. Sections 1605 and 1606 of the Civil Code. Said services constituted a "benefit conferred" upon "the promisor," to which the latter was "not lawfully entitled," and they assuredly created "a moral obligation originating in some benefit conferred upon the promisor," as well as in "prejudice suffered by the promisee." In an extended note to the *Muir Case*, 55 Wash. 131, 104 Pac. 153, as reported in 26 L. R. A. (N. S.) 519, may be found an interesting discussion of the question, wherein it is said:

"The courts, however, should be astute to find some means of enabling one to recover under such circumstances, where there was not merely the detriment to him, but a positive benefit of a material and pecuniary nature to the other party; and it seems like flying in the face of Providence to reject the opportunity to do substantial justice between the parties, afforded by the subsequent express promise."

And the author thinks that, to make the subsequent promise binding, where the services were performed under an invalid contract, it should appear: (1) That the service moving from the promisee conferred an actu-

al material or pecuniary benefit on the promisor; (2) that the promisee expected to be compensated therefor, and did not intend it as a mere gift or gratuity; (3) that the circumstances were such as to create a moral obligation on the part of the promisor; (4) that the benefit received has not constituted the consideration for another promise already enforced or still legally enforceable.

The foregoing conditions are all present in the case at bar, and it is believed that the promise is not invalidated by the fact that the original agreement may have rested in parol. In support of this view we may also cite *Mohr v. Rickgauer*, 82 Neb. 398, 117 N. W. 950, 26 L. R. A. (N. S.) 533, and *In re Balfour & Garrette*, 14 Cal. App. 261, 111 Pac. 615. The last case seems decisive of this controversy. Therein the question of the statute of frauds is thoroughly considered, and it is said:

"The provisions of the statute, in other words, affected the remedy—that is, in effect deprived the party seeking to enforce a contract coming within their purview of his right of action if such contract were not in writing."

And it was held that although the creditor was originally employed under an invalid oral contract to sell lands upon commission, yet when, after certain sales were made, the debtor gave him a written memorandum setting forth the sales made and the commission allowed therefor, such written memorandum was sufficient to relieve the whole transaction of sales from the operation of the statute of frauds.

[3-5] It is true that the complaint proceeds upon the theory that the services were performed under said contract of April 30th, instead of before, and the findings in that respect follow said pleading; but this would seem to be a technical inaccuracy that resulted in no substantial injustice. In fact, appellants did not make the point in the court below, nor was any question of variance submitted to the trial judge. The motion for a nonsuit was made on the ground and for the reason appearing in the record as follows:

"The law is elementary in this case that, to enable a broker to recover his commission for the service rendered, he must furnish a buyer that is ready, able, and willing. They did not furnish any buyer that was ready, able, and willing. They furnished a man who, it is admitted, did not have any interest in it at all to make a contract, who did not have any title to the land—never did have. The lands were exchanged. He never had any title. He was not able to contract; and before he can collect his commission he must furnish a man that is a purchaser, who is ready, able, and willing to buy."

This motion of defendants was based upon the fact that at the time the trade was negotiated by Doyle he did not own the property in Alameda county, but it is not apparent what possible difference it could make to appellants, since the trade was actually consummated and the title to said property vested in them in accordance with their said agree-

ment with Doyle. The fact is that Doyle represented the owners, and by them the property was conveyed afterward to him who in turn conveyed it to Smithers. The effect, of course, is the same as though the negotiations were had directly with the owners and they had executed the conveyance to Smithers without the intermediation of Doyle. The exchange of the property, it may be said, also, was no less the result of plaintiff's efforts than if he had in the beginning brought the owners of the Alameda county property face to face with appellants, and his claim for commission is no less meritorious.

There is some contention that the title conveyed to Smithers was subject to a certain lien contrary to the agreement of the parties; the contract between Doyle and Smithers providing that, save certain mortgage liens therein specified, "titles to above properties are to be good, and certificates of title to each property to be arranged by the respective owners thereof." There was a lien for some \$600 for taxes against a part of the Alameda county property, and the evidence shows that it was paid and discharged, before this suit was brought, by the parties whom Doyle represented. So that, before the beginning of this action, title was vested in Smithers in accordance with his contract. He had entered into possession of the property and was enjoying the rents thereof, and he was not injured by the delay in the discharge of said lien. As a matter of fact, its existence was probably unknown to all the parties, as the abstracts showed the title clear. It was the fault of the abstract company that the tax liens did not appear. At any rate, as no time limit for making the title good was prescribed in the contract, a reasonable time would be allowed, and this requirement of the law was satisfied.

But, aside from the foregoing, as far as this point is concerned, plaintiff would be entitled to recover under the principle stated in *Roche v. Smith*, 176 Mass. 595, 58 N. E. 152, 51 L. R. A. 510, 79 Am. St. Rep. 345, as follows:

"A broker, through whose efforts a binding contract is made for land between his principal and the owner of the land, has earned his commission, notwithstanding the fact that the owner cannot make a good title to the land because of incumbrances not known to the broker, as the remedy of the principal is against the other party to the contract."

The contract was made in this case after an examination of the title by defendants' attorney, and there is no question that plaintiff acted in good faith in the transaction. The ground upon which the liability attaches in such instances is stated to be that:

"By entering into a valid contract with the customer produced by the broker, the principal accepts the customer as able, ready, and willing to buy the land and pay for it. In such a case, the decision would have to be the other way, were it not that by entering into the contract with him the principal accepts the customer produced by the broker."

A similar statement of the controlling principle is found in 19 Cyc. 270, as follows:

"If the principal and the customer found by the broker enter into a valid contract and the broker acts in good faith, the broker is not deprived of his right to a commission by the fact that the customer fails to carry out the contract."

To such a situation is also applicable the doctrine of estoppel set forth in 4 R. C. L. p. 309, as follows:

"Once the customer procured by the broker is accepted by the employer, the latter is thereafter estopped from denying the purchaser's ability or willingness to complete the contract, inasmuch as he is not bound to accept the offer of such person without a reasonable opportunity to inquire and satisfy himself in relation to it. Consequently his acceptance should estop him from alleging anything against the claim, except fraud on the part of the broker in inducing the acceptance."

In the case at bar there was not only no fraud on the part of the broker, but all parties seem to have acted in the utmost good faith. It is not claimed, indeed, that there was any advantage taken of defendants or any deceit practiced. In fact, they had investigated the property in Alameda county and were anxious to make the exchange.

Some criticism is made of the findings of the court, but we do not think extended notice of this is required. There are manifestly some clerical errors therein, and it is not strictly accurate that plaintiff's services were performed under said contract of April 30, 1912; but sufficient facts are found, within the theory already suggested, to support the judgment. It may be said, indeed, that the action was tried upon the assumption that that theory was embraced within the pleadings, as no objection was made upon the ground of variance, or that said written promise was for services already performed, and not for those to be performed in the future.

We think the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

26 Cal. App. 449

PEOPLE v. KAHLER. (Cr. 361.)

(District Court of Appeal, Second District, California. Feb. 1, 1915.)

1. FALSE PRETENSES ⇨31—INFORMATION—RELIANCE ON MISREPRESENTATIONS.

An information, which charged that defendant falsely represented to the prosecuting witness that he owned a number of orchestras in theaters, that he sold to the witness a set of drums and traps and promised to give witness' son instruction in their use and then to employ him in an orchestra, and that witness, relying upon the statements made, paid to the defendant a sum of money, does not show that the money was paid upon the reliance of the only misrepresentation of fact alleged, the ownership of the orchestras, and charges no crime.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 38-41; Dec. Dig. ⇨31.]

2. FALSE PRETENSES ⇨7—NATURE OF OFFENSE.

A "false pretense" is such a fraudulent representation of an existing or past fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5-12, 25; Dec. Dig. ⇨7.]

For other definitions, see Words and Phrases, First and Second Series, False Pretense.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

W. T. Kahler was convicted of obtaining money by false pretenses, and he appeals. Reversed.

J. G. Rossiter, of Pasadena, Bert L. Cooper, of Pomona, and A. C. Labrie and Tom L. Johnston, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted upon an information charging him with the crime of obtaining money under false pretenses. He prosecutes this appeal from the judgment and an order of court denying his motion for a new trial.

The offense with which defendant is charged is alleged in the information to have been committed as follows:

"That the said W. T. Kahler, * * * with intent then and there to cheat, wrong, and defraud Richard J. Cogan out of his money and property, did * * * represent and pretend to the said Richard J. Cogan that he, the said W. T. Kahler, had contracts for furnishing orchestras for 42 moving picture shows and theaters in the city of Los Angeles, * * * and that particularly he, the said W. T. Kahler, had the exclusive contract for furnishing orchestras for Hamburger's Café, for Clune's Broadway Theater and for the Princess Theater, each of said theaters hereinbefore mentioned being located in the city of Los Angeles, Cal. (2) And he, the said W. T. Kahler, then and there sold to the said Richard J. Cogan a set of drums and traps for the use of one William J. Cogan, a minor son of Richard J. Cogan. And he, the said W. T. Kahler, then and there promised to give the said William J. Cogan instructions as to playing the said drums and traps, and then and there promised and agreed to and with the said Richard J. Cogan that when the said William J. Cogan had become sufficiently proficient in the playing of said drums and traps he, the said W. T. Kahler, would give the said William J. Cogan a position in one of his many orchestras. (3) And the said Richard J. Cogan, then and there believing and relying upon the statements so made to him as aforesaid by the said W. T. Kahler, then and there paid to the said W. T. Kahler \$75 in lawful money of the United States, the same being then and there the personal property of said Richard J. Cogan. (4) And the said Richard J. Cogan then and there believed the said representations and pretenses, so made to him as aforesaid by the said W. T. Kahler, to be true, and then and there relied upon the same, and was then and there induced thereby to and did then and there deliver and turn over to the said W. T. Kahler the said sum of \$75, lawful money of the United States, as aforesaid."

Continuing, it is alleged that "each and all and every of the said representations and

pretenses so made by the said W. T. Kahler to the said Richard J. Cogan were then and there false and untrue," to the knowledge of Kahler.

[1] Defendant's demurrer to the information, upon the grounds that it not only failed to state facts which constituted a public offense, but failed to conform to the requirements of sections 950, 951, and 952 of the Penal Code, was overruled. It should have been sustained.

The only fact which it is alleged defendant represented to exist is that he had contracts for furnishing orchestras for certain cafés and theaters. That part of the information which we have designated "(2)" consists merely of promises made by defendant, together with the statement that he sold to Cogan a set of drums and traps for the use of his minor son. It is not alleged, however, that Cogan was induced to buy the drums and traps from defendant upon the strength of the representation that defendant had contracts for furnishing these orchestras; indeed that part of the information designated as "(2)" is wholly disconnected with the alleged false representations, and should be disregarded as surplusage. Disregarding this redundant matter, it is merely alleged that defendant, knowing the same to be untrue, falsely represented to Richard J. Cogan, that he had contracts for furnishing orchestras to certain cafés and theaters; that Cogan, believing the representations to be true and relying thereon, paid and delivered to defendant the sum of \$75. For what purpose is not disclosed. Conceding the representation made by defendant to have been false, there is no causal connection between the payment of the money and the representation.

[2] Bishop (2 Crim. Law, § 415) defines a false pretense as "such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." We are unable to perceive any connection between the alleged false representation and the paying or giving to defendant the \$75; nor how, in the absence of further allegations, such representations should have induced, or were calculated to induce, Cogan to pay defendant \$75 in money. While not alleged, it is no doubt true that Cogan was induced to buy the drums and traps in reliance upon defendant's promise to give his son musical instruction and to secure him employment as soon as he was sufficiently proficient. It was this promise which induced the prosecutor to deal with him, and not the representation of existing facts in reliance upon the truth of which Cogan believed that defendant would fulfill his promise. *People v. Morphy*, 100 Cal. 84, 34 Pac. 623; *People v. Hart*, 35 Misc. Rep. 182, 71 N. Y. Supp. 492.

This view renders it unnecessary to dis-

cuss errors predicated upon want of sufficient evidence to justify the verdict, and the reception of improper evidence, in both of which contentions we find much merit.

It is apparent, we think, from an examination of the instructions given, when taken in connection with the information, that the jurors were of the opinion that the unfulfilled promises made by defendant constituted a "deception deliberately practiced (by defendant) for the purpose of gaining an unfair advantage of another," which the court stated to them "was fraud," and that "one deprived of his property by such means is defrauded."

The judgment and order are reversed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 453

IRVINE & MUIR LUMBER CO. v. HOLMES
et al. (Civ. 1098.)

(District Court of Appeal, Third District, California. Feb. 1, 1915.)

1. APPEAL AND ERROR ⇐1078—REVIEW—
WAIVER OF OBJECTION.

Objections to the admissibility of testimony not noticed in appellant's brief will be considered waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. ⇐1078.]

2. PARTNERSHIP ⇐55—ACTIONS—EVIDENCE—
SUFFICIENCY.

In a suit against two persons as members of a partnership, evidence held to warrant a finding that they were partners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 75, 78, 79, 81; Dec. Dig. ⇐55.]

3. PARTNERSHIP ⇐44—PRESUMPTIONS.

Under Civ. Code, § 2404, an understanding that members of a firm should divide the profits by implication shows that they were also to divide the losses.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 61-63; Dec. Dig. ⇐44.]

4. PARTNERSHIP ⇐46—EVIDENCE.

In determining the existence of a partnership, if the agreement be partly in writing, partly oral, and partly evidenced only by conduct, all steps taken by the parties in connection with the common purpose should be considered.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 64, 68-72, 74; Dec. Dig. ⇐46.]

5. PAYMENT ⇐41—APPLICATIONS.

Where one member of a firm notified a creditor that he would not thereafter be liable for any debts, and the remaining partner, to whom credit was thereafter extended, made payments, it is proper for the court, either under Civ. Code, § 1479, subd. 3, par. 3, or under general principles of law, to apply those payments on the debt incurred after notification.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 115-120; Dec. Dig. ⇐41.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the Irvine & Muir Lumber Company against S. O. Holmes and W. P. White, copartners doing business as the San Hedrin Summer Resort. From a judgment for plaintiff, defendant Holmes appeals. Affirmed.

Wm. H. Schooler, of Chico, for appellant.
Thomas & Thomas, of Ukiah, for respondent.

CHIPMAN, P. J. This is an action to recover a balance of \$494.27 alleged to be due from defendants to plaintiff for goods, wares, and merchandise which, it is alleged, were sold by plaintiff to defendants as copartners in business. Defendant White made no answer. Defendant Holmes answered, and denied that he was at any time a copartner of White, or that he was ever indebted to plaintiff in any sum whatever. The cause was tried without a jury, and the court found that White and Holmes were associated together in business under the firm name of San Hedrin Summer Resort, that, on August 3, 1909, defendant Holmes notified plaintiff that he would no longer be responsible for goods furnished to said resort, or for goods sold to White, that the balance due on the portion of said account that had accrued prior to said 3d day of August, 1909, was the sum of \$373.20, and rendered judgment against defendant for that amount. Defendant Holmes appeals from the judgment, and from the order denying his motion for a new trial.

Appellant presents but two objections to the judgment calling for notice: First, that the evidence failed to establish a copartnership; second, that the court erred in its application of payments on the account.

[1] Some objections were made to the admissibility of certain testimony given by defendant White and plaintiff's bookkeeper, Barnett, but no notice is taken of these objections in appellant's brief, and we assume that they are waived.

[2-4] 1. Appellant's contention is that the only relation existing between himself and White was that of landlord and tenant, and he places his reliance upon a written instrument which was executed by White and Holmes in July, 1908.

It appeared that Holmes was the owner of the property known as the San Hedrin Summer Resort, situated in Mendocino county, and consisting of 240 acres of land partly devoted to farming purposes, and in connection therewith was a hotel conducted as a pleasure resort. The written instrument signed by the parties is quite a lengthy document, and pointed out in great detail the respective rights and duties of the parties, and provided:

"That all profits, gain, and increase that shall rise from the crops or products of the land or from the stock leased hereunder and all proceeds from the hotel and saloon and from the employment by the parties of the second part during the term of this lease in any business other or different from the business exercised under this lease shall be equally divided."

We are satisfied from the provisions found in this document that it imports a lease rather than a partnership, and, if the relation of the parties in their subsequent dealings with each other and with the public had been

in accordance with the terms of the lease, the findings of the court could not be sustained.

Defendant White testified as follows:

"I came from Oakland up to Mr. Holmes' place in answer to a letter he wrote me saying he wanted me to come up and see him. When I got there he made a proposition to manage his place for him, and we were to share the profits of the place, what I could make out of it as a ranch and as a summer resort. I told Mr. Holmes that I had no money—no means—but that I had experience in that business, and I had good references as to my capability, honesty, and industry, and he said that was satisfactory, and I told him that the only way that I could go into it, that I would have to have the living for the family and myself; that I was willing myself, my sons and wife and daughter, to labor, and put that, together with my knowledge of the business against his capital, time, and property, and he said he would do that. I told him that we had nothing to live on, no money, and the place the first year I was satisfied would not pay expenses. I told him that he would have to guarantee a living for myself and family, and we would put in our whole time and work for him, and would try to make the place pay as a ranch and as a resort; that it would take all our time, and we would have no chance to make any money on the outside, and therefore he would have to assure me a means of living there for myself and family. He said he would do so, and if there was any month that the income from the place did not pay expenses he would make up the deficiency, and on that understanding I went into business with him. He said that the understanding was that I was to run that end of the business—the family and I—and the summer resort and the saloon and bar, and he said that he would look after the city end; he would attend to all the advertising and securing the guests in any way he could. Said he had a large business connection in the city, and a large acquaintance, he and his sons, and that he would use his utmost endeavor to send as many people up to me each season and the year around as he could; that he would do all the advertising, and make all contracts for the advertising, and would buy the liquor for the saloon and the tobacco, which he did, during the time I was there. * * * Whatever money I could make on the place as a ranch or a summer resort was to be divided between us after paying the running expenses of the resort and ranch. I rendered him a monthly statement each and every month and made a settlement. Would send him what was coming to him; any shortage I would state, and he would send it to me. Mr. Holmes worked there on the place and made himself generally useful; and, if I was in the city or in town here or away, he would wait on people at the bar and saloon, and sell them liquor—those that wanted it. * * * Mr. Holmes made contracts for hay and for seed grain and paid them. Our relations continued the same all of the time we were there; up to the time Mr. Holmes repudiated these bills the relations between Mr. Holmes and myself were exactly the same up to the day I left the place."

It appears from the testimony that the parties carried on the enterprise independently of the written agreement and upon the understanding testified to by White. Holmes spent a large part of his time at the resort, and participated in its management; he bought and paid for supplies used there, regulated the running of the stages which carried passengers to and from the resort, paid deficiencies in plaintiff's monthly bills against

White. Plaintiff's bills for supplies were charged to White, and there is no evidence that Holmes gave any direct authority to plaintiff to furnish White or the resort with supplies or told plaintiff personally that he would be responsible for White's purchases. But plaintiff's bookkeeper, Barnett, testified that, when White opened the account, he stated that his arrangement with Holmes was that if the business did not pay expenses he (Holmes) "would make up the shortage each month." Settlements of bills were made monthly for several months, and White testified that Holmes contributed to their payment by making up deficiencies. This condition continued until the account with plaintiff had reached quite an amount and, White not being able to pay it, Barnett, on August 3, 1909, went to Holmes for a settlement. He testified:

"I said, 'Mr. Holmes, you have been paying these bills heretofore,' and he said, 'Yes; I have been, but I will pay them no longer.'"

Holmes wrote many letters to White at times when he (Holmes) was in Oakland, where his family lived, which tend to show that the two men were engaged in a common enterprise to share the profits, to which White contributed his services and the services of his family, and applying all the earnings to the expenses attending the venture.

We think the evidence was sufficient to justify the court in finding the existence of a copartnership. Appellant invites attention to the fact that there was no agreement, either oral or written, that the parties should share the losses. So far as the evidence shows, this is true. But we think where the understanding was, as in this case, that the parties were to share equally the profits, and that the expenses should be paid out of the proceeds of the business, there was an equal liability for the losses which the law will imply. Civ. Code, § 2404; Quinn v. Quinn, 81 Cal. 14, 22 Pac. 264. Speaking of the rule as to what may constitute a partnership and how it may be created, it is stated, in 30 Cyc. 360:

"If the agreement is partly in writing, partly oral, and partly evidenced only by conduct, then all the steps taken by the parties in connection with the enterprise are to be considered, for whatever was done in furtherance of the common purpose, understanding, and agreement must be treated as part of one common transaction."

[5] 2. The remaining question pertains to the application of payments. The court found that the balance due on that part of the account accruing prior to August 3, 1909, was \$373.20, and that all payments made prior to that date "should be applied to that portion of the account which accrued prior to that date, that is, upon the partnership account, and that all payments made subsequent to said 3d day of August, 1909, should be applied on the individual account of defendant W. P. White, and being that portion of said

account which accrued after said 3d day of August, 1909."

We do not understand that there is any controversy in regard to the amounts paid on the account or the times when paid. It is not claimed that when payments were made any direction was given as to their application, and the court so found, and that it remained for the law to make the application.

Appellant's contention is that all payments should have been applied to the partnership account, whether made before or after the partnership had ceased. Appellant overlooks the distinction between the account created while the partnership was in existence and the account which ran against White after Holmes had given notice that he would not longer be liable. Here, then, were two classes of obligation, and if section 1479, Civil Code, has any application, it would seem that subdivision 3, par. 3, of that section authorized the application made by the court. But, if section 1479 does not apply, the rule is as stated in *Murdock v. Clarke*, 88 Cal. 384, 390, 26 Pac. 601, 603, that:

"Where there are different debts due from the debtor to the creditor, the law will make the application in such a manner, in view of all the circumstances of the case, as is most in accordance with justice and equity, and will best * * * maintain the rights of both parties."

The principle thus stated, it seems to us, fully justified the course pursued by the court in applying payments.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

26 Cal. App. 424

BARLOW v. LANDE. (Civ. 1443.)

(District Court of Appeal, First District, California. Jan. 28, 1915. Rehearing Denied by Supreme Court March 29, 1915.)

1. ASSIGNMENTS ⇐50—RIGHTS OF PARTIES.

Drawing and delivering a nonnegotiable order for payment of a part of a debt operates as an equitable assignment pro tanto as between the assignee and payee, though the assignment does not, as between the drawee and payee, obligate the former to recognize it; for the drawee may insist on his right to discharge the debt in toto by a single payment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99-105; Dec. Dig. ⇐50.]

2. ASSIGNMENTS ⇐94—RIGHTS OF PARTIES.

Where an order by a creditor of a debtor for payment of a part of the debt to a third person is accepted by the debtor, the debtor thereby admits the original debt, and, to the amount called for in the order, becomes the debtor of the third person.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 162-165; Dec. Dig. ⇐94.]

3. ASSIGNMENTS ⇐55—ORDER FOR PAYMENT OF MONEY—ACCEPTANCE—CONSIDERATION.

Where a debtor accepts an order drawn by his creditor directing payment of a part of the debt to a third person, the original indebtedness is a sufficient consideration for the debtor's acceptance and liability to the third person.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 113-115; Dec. Dig. ⇐55.]

4. ASSIGNMENTS $\hookrightarrow$ 126 — ACTION BY ASSIGNEE — DEFENSES — WANT OF CONSIDERATION FOR ASSIGNMENT.

Want of consideration for an assignment by a creditor of a part of the debt is no defense to an action by the assignee against the debtor accepting the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 195-197; Dec. Dig. $\hookrightarrow$ 126.]

5. ASSIGNMENTS $\hookrightarrow$ 59 — ACCEPTANCE — RESCISSION BY ASSIGNOR.

An assignment of a debt which has been accepted cannot be rescinded or annulled at the option of the assignor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 160; Dec. Dig. $\hookrightarrow$ 59.]

6. ASSIGNMENTS $\hookrightarrow$ 132 — ACTIONS — ISSUES, PROOF, AND VARIANCE.

A variance between a complaint in an action against an acceptor of an order directing him to pay a specified sum to plaintiff which alleges that the maker of the order had been personally allowed the fees referred to in the order and the proof that the fees had been allowed as the law requires to the acceptor as executor is immaterial, where it was stipulated that subsequent to the execution and acceptance of the order defendant had actually paid the maker of the order a sum in excess of the amount of the order.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 227, 228; Dec. Dig. $\hookrightarrow$ 132.]

7. INTEREST $\hookrightarrow$ 38 — JUDGMENT.

A money judgment which provides for the allowance of interest on the principal sum at 12 per cent. per annum until paid may be construed to mean that the principal shall bear interest at 12 per cent. per annum until paid, and, so construed, violates Civ. Code, §§ 1918, 1920, and must be reformed to conform to the statute permitting allowance of agreed interest only to the time of entry of judgment, and limiting interest on judgments to 7 per cent. per annum.

[Ed. Note.—For other cases, see Interests, Cent. Dig. §§ 79-82; Dec. Dig. $\hookrightarrow$ 38.]

Appeal from Superior Court, City and County of San Francisco; A. J. Buckles, Judge.

Action by C. U. Barlow against Edward Lande. From a judgment for plaintiff, defendant appeals. Affirmed.

Marshall B. Woodworth, Howard Harron, and Gerald C. Halsey, all of San Francisco, for appellant. William F. Herron, of San Francisco, for respondent.

LENNON, P. J. The plaintiff's cause of action was based upon the alleged liability of the defendant as the acceptor of a written order drawn upon him for the payment of a certain sum of money, which order reads as follows:

"San Francisco, Cal., March 8, 1910.

"To Edward Lande, Esq., Executor Julius Friedman Estate, San Francisco, Cal.—Dear Sir: Kindly pay to C. U. Barlow or order the sum of \$551.20, with interest thereon at the rate of 1 per cent. per month till paid, out of the next fees allowed by order of court and ordered paid by executors by order of court.

"Marshall B. Woodworth.

"I hereby accept the within order as requested in the foregoing sum, March 8, 1910.

"Edward Lande,

"As Executor of the Estate of Julius Friedman, Deceased.

"March 15, 1910."

The answer of the defendant, while admitting the making, delivery, and acceptance of the order, denied that it was made, delivered, and accepted for a valuable consideration, and pleaded as a special defense to the action that there was no consideration for the making of the order in the first instance, nor for its subsequent acceptance by the defendant, and that prior to the happening of the condition expressed in the order the maker thereof gave notice to the defendant not to pay the plaintiff the sum of money called for by the order. The judgment upon the verdict of a jury was entered in favor of the plaintiff, from which and from an order denying a new trial the defendant has appealed.

It was an admitted fact in the case that the order in question was executed and delivered to the plaintiff by Woodworth, the maker; that it was thereupon accepted in writing by the defendant; that subsequent to the date of the defendant's acceptance a sum of money greatly in excess of the amount called for by the order had been allowed to the defendant and actually paid to Woodworth for and on account of the latter's professional services rendered as an attorney at law to the defendant as the executor of the estate of Julius Friedman, deceased.

The trial court rightly refused to permit the defendant to show in evidence: (1) That he had never received any consideration for the acceptance of the order; (2) that there was no consideration for the order as between Woodworth, the drawer, and plaintiff, the payee of the order; and (3) that after its acceptance the order was canceled by written notice to that effect from Woodworth to the defendant.

[1-3] It is the rule of law in this state that the drawing and delivery of a nonnegotiable order for the payment of a part of a debt operates as an equitable assignment pro tanto as between the assignee and payee, although such an assignment in and of itself does not, as between the drawee and payee, obligate the former to recognize the assignment and pay the sum called for therein. Being only for a portion of a debt, the drawee may insist upon his right to discharge the debt in toto, and by a single payment. But by accepting the assignment, even though it be for only a part of the debt, the debtor admits the original debt, and to the extent of the sum called for in the assignment becomes the debtor of the assignee, and assumes the obligation to pay only him. In such a case the original indebtedness of the drawee will be deemed a sufficient consideration for the drawee's acceptance of the assignment and consequent liability to the assignee thereof.

[4] It is no defense to an action by the assignee of a debt that there was no consideration for the assignment. Owing the debt, it is immaterial to the debtor to whom he pays it, providing he be protected against the demand of the original creditor for the payment

of the same debt. This the assignment and its acceptance would fully do. Consequently the purpose and consideration of the assignment in the present case were no concern of the defendant.

[5] And an assignment of a debt which has been accepted cannot be rescinded or annulled at the mere option of the assignor.

These conclusions are fully supported, we think, by numerous authorities, among which may be noted the following: *Caulfield v. Sanders*, 17 Cal. 569; *Kelley v. Hampton*, 22 Cal. App. 68, 133 Pac. 339; *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913; *Goldman v. Murray*, 164 Cal. 419, 129 Pac. 462; *Robinson, etc., v. Johnson*, 10 Colo. App. 135, 50 Pac. 215; *Toplitz v. King*, 20 Misc. Rep. 576, 46 N. Y. Supp. 418; *Welch v. Mayer*, 4 Colo. App. 440, 36 Pac. 613; *Hackett v. Martin*, 8 Greenl. (Me.) 77; *Chapman v. Haley*, 43 N. H. 300; *Sevier v. McWhorter*, 27 Miss. 442; *Blin v. Pierce*, 20 Vt. 25; *Vanstrum v. Liljengren*, 37 Minn. 191, 33 N. W. 555; *Chamberlin v. Gilman*, 10 Colo. 94, 14 Pac. 107.

[6] Appellant insists that there was a fatal variance between plaintiff's pleadings and proof, because the complaint alleged that Woodworth, the maker of the order, had been personally allowed the fees referred to in the order, whereas the proof showed that, in fact, such fees had been allowed, as the law requires, to the defendant as the executor of the estate of Friedman. The variance may be conceded; but that it did not mislead the defendant, and therefore was immaterial, is evidenced by the fact that it was stipulated at the trial by counsel for the respective parties that subsequent to the execution and acceptance of the order the defendant had actually paid Woodworth, pursuant to the order of the court, a sum for attorney's fees in excess of \$1,000.

[7] Complaint is made of the judgment in so far as it provides for the allowance of interest upon the principal sum sued for "at the rate of 12 per cent. per annum from the 8th day of March, 1910 [the date of the order], till paid." While the judgment, in effect, embraces, and properly so, the principal sum found to be due the plaintiff, together with the agreed rate of interest thereon, nevertheless, as written and entered, it might be construed to mean that it was to bear interest at the rate of 12 per cent. per annum until paid; and, so construed, it would be in violation of those statutory provisions which permit the allowance of an agreed interest only up to the time of the entry of the judgment, and limit the allowance of interest upon judgments to a rate of 7 per cent. per annum. Civ. Code, §§ 1918, 1920.

Our conclusion concerning and confirming the correctness of the rulings of the trial court practically disposes of the defendant's objections to the charge of the trial court, which when read and considered in its entire-

ty, consistently and correctly stated the law of the case.

The judgment is modified by striking therefrom the words "till paid," and, as modified, the judgment will stand affirmed, without costs to the appellant, and the order denying a new trial is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

26 Cal. App. 1

LIMA v. LIMA. (Civ. 1308.)

(District Court of Appeal, Third District, California. Nov. 19, 1914. Rehearing Denied by Supreme Court Jan. 18, 1915.)

1. PROCESS — 96 — SUMMONS — PUBLICATION — AFFIDAVIT.

Under Code Civ. Proc. § 412, providing that, where defendant is a nonresident, or has departed from the state, or cannot be found therein, and the fact appears by affidavit, and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant, or that he is a necessary or proper party, the court may order service by publication of the summons, such publication must be made in strict observance of the terms of the statute, and, unless there has been such an observance, the order for publication is void, and the court is without jurisdiction.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. — 96.]

2. PROCESS — 96 — SERVICE — PUBLICATION — AFFIDAVIT — REQUISITES.

Such provision means that the ultimate facts alleged in a verified complaint, if stating a cause of action, give the court jurisdiction to order publication on summons, but that, if the complaint is not verified, the affidavit relied upon must state probative facts from which the court may infer the existence of a cause of action in favor of the plaintiff; and hence neither an unverified complaint in an action for divorce and for an award of community property nor an affidavit alleging the filing of the complaint, that defendant had previously departed from the state, that on due diligence her whereabouts could not be ascertained, that plaintiff had fully and fairly stated the facts to his counsel and was informed and believed that he had a good cause of action against defendant as would fully appear from his complaint, and that defendant was a necessary and proper party defendant, gave the court no jurisdiction to order service by publication, and its decree awarding plaintiff a divorce and the community property was void.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. — 96.]

3. PROCESS — 96 — SERVICE — PUBLICATION — AFFIDAVIT — FACT OR CONCLUSION.

A statement in such affidavit that the plaintiff was advised by counsel and that he "verily believes" that he had a good cause of action was only a conclusion of the affiant or his counsel, and neither the statement of an ultimate fact required in a pleading, nor of a probative fact from which such ultimate fact may be deduced, nor a fact of any sort which in any way legally tended to prove such ultimate or probative fact, or from which it might be inferred.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. — 96.]

4. DIVORCE — 33 — ABATEMENT BY DEATH OF PARTY — EFFECT AS TO PROPERTY RIGHTS.

While the death of one of the parties to a divorce suit extinguishes the action and the

cause of action, yet, in a divorce action in which the property rights of the parties are involved, the decree adjudicates the question of such property rights as effectually as if they were the principal object of the action, and the death of plaintiff in divorce after a decree dissolving the marriage and adjudicating property rights did not abate the action so that it could not be revived and reopened to determine whether the court erred in such adjudication.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 269-272; Dec. Dig. ¶ 83.]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action for divorce by Antonio F. Lima against Isabel F. Lima, in which, after the death of plaintiff, his widow, Annie S. Lima, on petition, was permitted to be represented by counsel. Decree for plaintiff awarding him certain community property, and from a denial of her motion to vacate the decree, defendant appeals. Reversed.

Rehearing denied in Supreme Court, 147 Pac. 237.

Gonsalves & Keller, of Oakland, for appellant. R. B. Tappan, of Alameda, for respondent. Gehring & Wyman, of Oakland, amici curiæ.

HART, J. On the 21st day of June, 1909, Antonio F. Lima instituted this suit for a divorce against his wife, Isabel F. Lima, in the superior court of Alameda county. The complaint, which was not verified, alleged that the defendant had been guilty, on divers occasions, one of which is specifically stated, of acts of adultery with one Manuel Drack, and further alleged that she "is now living and cohabitating with the said Manuel Drack, the place where being unknown to this plaintiff." The complaint declared that the plaintiff and the defendant were the owners of certain real estate, which was community property, situate in the county of Alameda, the same consisting of several town lots in Brooklyn township of said county, and being specifically described in the complaint. The prayer of the complaint was for a decree dissolving the bonds of matrimony existing between the parties and assigning, setting over and awarding to the plaintiff all the community property described in the complaint.

Service of summons was attempted by publication, and, the defendant having failed to make any appearance within the time prescribed by law in such cases, her default was thereupon entered. On the 27th day of October, 1909, and after due proceedings, an interlocutory decree was made and entered declaring the plaintiff to be entitled to a decree of divorce against the defendant on the ground of adultery, and assigning, distributing, and awarding to the plaintiff the community property described in the complaint. On the 31st day of October, 1910, a final decree granting plaintiff a divorce and awarding to him the community property referred

to in the complaint was rendered, and was filed on the 1st day of November, 1910.

On the 19th day of December, 1912, the defendant filed and served upon R. B. Tappan, Esq., attorney for the plaintiff, a notice of motion "to set aside the judgment heretofore rendered herein, upon the ground that said court never acquired and never had jurisdiction of the subject-matter of this action or of the person of the defendant herein." Said motion having been duly heard by the court, the same was denied, on the 10th day of January, 1913.

Thereafter the defendant, after due notice thereof upon the attorney for the plaintiff, submitted a motion to set aside and vacate and annul the order made herein for the publication of summons and the interlocutory and final decrees of divorce, upon the ground that the court never acquired or had jurisdiction to order the publication of the summons, and therefore no legal authority to enter the interlocutory and final decrees herein. This motion, having been duly heard by the court, was denied.

Although the defendant has appealed from both the orders above mentioned, the points submitted for decision here may be effectually reviewed and decided on the appeal from the order denying the second motion above referred to, and we shall therefore confine ourselves in the consideration and decision of this cause to that order.

It is conceived proper to explain at this point that, on the 19th day of August, 1911, and prior to the time at which were instituted the proceedings culminating in the orders appealed from, the plaintiff, Antonio F. Lima, died. His widow, Annie S. Lima, to whom he was married on the day succeeding that upon which he was granted a final judgment for divorce from the defendant, and to whom, after said marriage, he conveyed by deed the property described in the complaint as having been the community property of himself and the defendant, petitioned the court below for permission to be represented in these proceedings by her attorneys, Messrs. Gehring & Wyman, setting out in her petition that, since she was not a party to this action, it was necessary that she should be so represented in order that her rights in the property described in the complaint be protected. The court allowed her petition and counsel appearing here as amici curiæ are, in fact, representing the interests of the said Annie.

The specific point made by the defendant is that:

"The order for publication of summons is void because there is no affidavit of merits and no showing by any verified paper on file wherefrom it can be found that plaintiff had a cause of action against defendant."

[1] As stated in the opening brief of counsel for the defendant, the rule is well settled that substituted service of summons,

being purely of statutory origin and in derogation of the common law, can be made effectual only by a substantially strict observance of the terms of the statute authorizing it. If, therefore, there has not been such a compliance with the statute, the service is void, and the court fails to acquire jurisdiction of the person of the defendant, and is for that reason without jurisdiction to render and enter judgment against him in the action in which such summons has been issued.

Section 412 of the Code of Civil Procedure is the source of the authority in this state for substituted service of summons or service thereof by publication. So much of said section as is pertinent to the inquiry submitted by this appeal reads as follows:

"Where the person on whom service is to be made resides out of the state; or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons; * * * and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; * * * such court or judge may make an order that the service be made by the publication of the summons. * * *

Thus it will be observed that one of the essential prerequisites to conferring upon the court the authority or jurisdiction to make an order for the publication of summons is a showing, either by a verified complaint that has been filed, or by an affidavit, that a cause of action exists against the defendant in respect to whom the service is to be made. It, of course, necessarily follows that, in the absence of such a showing by either of the modes prescribed by said section, an order for the publication of summons would be nugatory and therefore absolutely void. And, obviously, if the court was without jurisdiction to make the order for the publication of the summons, there was no legal publication, and hence no service of summons, and, obviously, a judgment rendered and entered against the defendant on such a publication of summons would be *coram non iudice*, and consequently void *ab initio*.

[2, 3] The question here, then is: Was it made to appear, by either of the two ways pointed out by section 412 of the Code of Civil Procedure, that a cause of action existed against the defendant?

The complaint confessedly states a cause of action for divorce upon the ground of adultery, but, as seen, it is unverified, and upon it, manifestly, the court would be without authority to make an order for the publication of the summons directed to the defendant. It remains to be seen, therefore, whether the affidavit filed by the plaintiff meets the requirement of the statute in the respect referred to, and was therefore suffi-

cient to clothe the court with the authority to make the order.

After alleging that a suit for divorce had been instituted by the plaintiff against the defendant by the filing of a complaint for that purpose in the superior court of Alameda county, that the defendant had, previously to the filing of said complaint, departed from the state of California, and that her whereabouts were then unknown, and could not, after due diligence, be ascertained, the affidavit proceeds:

"I have fully and fairly stated the facts of this case to R. B. Tappan, whose office is at the northeast corner of Santa Clara avenue, in the city of Alameda, in said county and state, who is my counsel, and I am by him informed and I verily believe that I have a good cause of action in this suit against the said defendant, as will fully appear by my complaint now on file herein, to which reference is hereby made, and the said defendant, Isabel F. Lima, is a necessary and proper party defendant thereto, as I am advised by my said counsel, after such statement made as aforesaid, and as I verily believe."

It requires no argument to show that nowhere in said affidavit is it made to appear that a cause of action for divorce existed in favor of the plaintiff against the defendant. The complaint is not even made a part of the affidavit, assuming that such a course with respect to an unverified complaint would be sufficient to include the averments of said pleading as among the facts sworn to in the affidavit. Nor does plaintiff, in the affidavit, either expressly or upon information and belief declare that the facts alleged in the complaint are true. The statement that the plaintiff is advised by his counsel, and that he "verily believes," that he has a good cause of action, is only a conclusion of the affiant or his attorney, upon whose advice in that regard he relies. "Such an averment is neither the statement of an ultimate fact, such as is required to be stated in a pleading, nor of a probative fact from which such ultimate fact may be deduced, nor a fact of any sort which in any way legally tends to prove such ultimate or probative fact, or from which it may be inferred. It is not the statement of a fact at all." *Forbes v. Hyde*, 31 Cal. 342, 354; *County of Yolo v. Knight*, 70 Cal. 431, 435, 11 Pac. 662. Nor does the mere fact that in the affidavit the plaintiff refers to the complaint on file measure up to the requirement of the statute that it must be made to appear by the affidavit (in the absence of a verified complaint showing the fact) that "a cause of action exists against the defendant in respect to whom the service is to be made," for such reference is to an unverified complaint, and to hold this to be sufficient would simply be to say that the essentially jurisdictional fact of the existence of a cause of action in favor of the plaintiff may be found by the court from ultimate facts not sworn to by the plaintiff or his attorney. Such a practice is clearly not contemplated by the statute, and, if sanctioned by the

courts, would render nugatory the requirement in question, a result following the exercise of a power wholly beyond that of judicial cognizance.

The Code section is in clear and simple language, and plainly means that the ultimate facts alleged in a verified complaint, if they state a cause of action, are sufficient to vest in the court the jurisdiction to make an order for the publication of a summons, but that, where the complaint is not verified, and an affidavit is relied upon, the latter instrument must, within the real contemplation of said section, state probative facts from which the court may infer the fact of the existence of a cause of action in favor of the plaintiff. *County of Yolo v. Knight*, 70 Cal. 431, 11 Pac. 662; *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 446, 71 Pac. 498; *People v. Mulcahy*, 159 Cal. 34, 112 Pac. 853. If, however, the averment of ultimate facts in an affidavit might rationally be held to be a compliance with the mandates of the statute, such facts so stated must, equally with the complaint, clearly disclose the statement of a cause of action in favor of the plaintiff.

But counsel for the plaintiff undertake to differentiate this case from the case of the *Columbia Screw Co. v. Warner Lock Co.*, supra, upon the proposition that in the latter case the affidavit was by the attorney for the plaintiff, whereas in the present case the affidavit is by the plaintiff himself. There is no legal or logical ground for any such distinction, and the court in the case referred to makes none upon that ground. There the attorney made the affidavit in which he alleged facts sufficient to disclose that a cause of action existed in favor of his client, but he completely destroyed the force and effect of those allegations by asserting in the affidavit:

"That the matters and things hereinbefore alleged concerning the indebtedness of said defendant to plaintiff are stated upon information received by me from said plaintiff."

The court held the affidavit to be insufficient, not because it was made by the attorney, rather than by the plaintiff, but upon the ground that it was wholly insufficient as an affidavit such as is contemplated by section 412 of the Code of Civil Procedure. Of the affidavit in that case the court has this to say:

"The attorney does not pretend to know the facts himself; he does not state what information he received from plaintiff, but that the statements are made upon information received from plaintiff. It is substantially the same as if the attorney had said, 'Plaintiff has told me that the defendant was indebted to plaintiff in the sum of \$646.90 for goods sold and delivered by said plaintiff to said defendant.' If the plaintiff had relied upon the affidavit as a verified complaint, it would then clearly have been insufficient. * * * The affidavit in this case does not state why it was not made by plaintiff or some officer thereof. Code Civ. Proc. § 446. It does not state that the facts were within the knowledge of affiant, but, on the contrary, shows that they were not within his knowledge, and even then there is no statement that he believed

the 'matters and things' to be true. When the statute uses the words 'appears by affidavit,' it means more than an affidavit as to what some one told the party making the affidavit. There must be an oath to some fact at least."

Thus it clearly appears that, as stated, the court was dealing entirely with the question of the sufficiency of the affidavit, and not with the fact that the attorney in place of his client had made the affidavit. Parenthetically, we may suggest that we are not to be understood, from anything said in this opinion, as deciding the question whether an attorney may, for and in behalf of his client, as may be done under certain indicated circumstances in the verification of a pleading, make the affidavit mentioned in section 412 of the Code of Civil Procedure. That question is not before us here.

[4] Another point sought to be maintained by the respondent is that the action has abated by reason of the death of the plaintiff since the rendition and entry of the final decree, and that there is, therefore, no power in the court to revive it for any reason or purpose. It is obviously true that the effect of the death of one of the parties to a divorce suit whose sole and only object is to sever the matrimonial bonds existing between them is to extinguish the action and the cause of action. It is also true in this state that the settlement of property rights between the parties is regarded merely as "an incident of every decree for divorce, where there is any property involved." *Mott v. Mott*, 82 Cal. 413, 22 Pac. 1140, 1142; *Kirschner v. Dietrich*, 110 Cal. 502, 505, 42 Pac. 1064. But it is equally true that when, in a divorce action, the property rights of the parties are adjusted and settled by the court, the legal result is that the decree adjudicates the question of such property rights as effectually and definitively as though such question were the paramount object of the action, and, "where some property right hinges on the question, the past status of these parties may become the subject of judicial investigation." *Lawrence v. Nelson*, 113 Iowa, 277, 85 N. W. 84, 57 L. R. A. 583, and cases cited in the last-mentioned volume. Or, as the rule is stated in 1 Cyc. p. 64:

"Where the consequences of the divorce are such as affect the property rights of the parties in the suit, the heirs or personal representatives may have such an interest in the litigation as that the cause will survive, not for the purpose of continuing the controversy touching the right of divorce itself, but for the ascertainment of whether the property has been rightfully diverted from its appropriate channel of devolution."

Counsel for the respondent cite, as supporting their position in this case upon the question of the effect of the death of a party to a suit for divorce upon the action, the following California cases, viz.: *Kirschner v. Dietrich*, 110 Cal. 502, 42 Pac. 1064; *Begbie v. Begbie*, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141; *Hite v. Mercantile Trust Co.*, 156 Cal. 765, 767, 768, 106 Pac. 102. We will not

take the time to review those cases. It is enough to say that in none of them, except, perhaps, in the case of Hite, etc., were the property rights of the parties made a subject of or an issue in the action, and they were, therefore, not included in the adjudication, nor did it appear that the decree in any way affected such rights. As to the Hite Case, there is nothing said therein in conflict with the rule laid down in *Cyc.*, supra. In that case, it may be proper to explain, the action was to vacate a decree of divorce, and was instituted after the death of the defendant, the victorious party. The trial court found and adjudged in the divorce action that the plaintiff, prior to the filing of the suit, had, in consideration of a lump sum of money paid to her by her husband, the defendant in said action, subscribed to a written agreement with the latter by the terms of which she released all claims against her said husband and her present and future interest in the community property. The court in that case said:

"If plaintiff could establish her status as his lawful wife at the time of his death, she would be entitled to a widow's share in the community property. But the effect of the agreement aforesaid was to release and extinguish all the rights she then had in his property as his wife, and all she might thereafter have as his widow. * * * As she has shown no right to have this agreement set aside or disregarded, it follows that she fails to show that the setting aside of the judgment would give her any right or interest in the property, the only remaining subject of the litigation."

Clearly there is nothing in the quoted language and much less is there in the other cases cited by counsel and above mentioned, which lends support to the view that the death of a party to a divorce action, after a decree therein has been entered whereby, besides dissolving the bonds of matrimony, the property rights of the parties have been adjudicated, will operate to abate the action so that it cannot be revived and reopened, if proceedings to that end be properly instituted, for the purpose of determining whether the court erred in its adjudication of such property rights.

Our conclusion is that the court was wholly without jurisdiction to make the order for the publication of the summons, and that consequently all the proceedings thereafter had in the cause and depending upon said order of publication were likewise beyond the jurisdiction of the court and void, and that therefore this is not a case where there is mere error of judgment, but no defect of jurisdiction, as was true in the case of *Dusy v. Helm*, 59 Cal. 188, cited by the respondent in support of that view. As stated, there is here an entire absence of a showing of a jurisdictional fact, or a fact without the existence and showing of which the court could not make a valid order for the publication of

the summons, and that the proceedings in the case following the making of said order are affected with the same infirmity that destroys its vital force.

The orders appealed from are reversed.

We concur: CHIPMAN, P. J.; BURNETT, JJ.

28 Cal. App. 1

LIMA v. LIMA. (S. F. 6562.)

(Supreme Court of California. Jan. 19, 1915.)

In Bank. Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action for divorce by Antonio F. Lima against Isabel F. Lima. Judgment for plaintiff, and defendant appealed to the District Court of Appeal, which reversed the decree (147 Pac. 233). Motion for hearing in Supreme Court denied.

Gonsalves & Keller, of Oakland, for appellant. R. B. Tappan, of Alameda, for respondent. Gehring & Wyman, of Oakland, amici curiæ.

PER CURIAM. Rehearing denied.

ANGELLOTTI, C. J. I dissent from the refusal to grant a hearing in this court, after decision by the District Court of Appeal for the Third District. If the decree of divorce was void for want of the jurisdictional prerequisites to an order for publication of summons, the defect is one that is apparent on the face of the judgment roll, and the defendant's interests can be fully protected without any order setting the judgment aside. In any proceeding involving her status as a wife, or her property rights, she may assail such judgment collaterally, and successfully object to its use against her. Since the plaintiff in the action died before the making of these motions, there was no one upon whom the defendant could serve notice of motion to set aside the judgment. The trial court may no doubt upon its own motion set aside a judgment void on its face. If it had so acted here, and we were satisfied from an inspection of the judgment roll that the judgment was void, the order made would not have been reversed on appeal. But this is a matter within the discretion of the court below. Its refusal to set aside the void judgment should not be reviewed, for the sufficient reason that the defendant is not aggrieved by such refusal; her rights being, as above pointed out, already fully protected. All of this, of course, is on the assumption that the judgment is void, a question that in my view it is not necessary here to decide, and that should be left for decision in a case in which the parties interested may appear and be heard.

Of course, the alleged second wife of the original plaintiff, not being a party to this proceeding, is in no way bound by any disposition which may be made thereof. In a proper action to which she is a party, she may assert or defend her claim to the property involved absolutely regardless of such disposition. It may well be that in such an action as one to quiet title to this property, to which she and defendant are parties, it may develop that for some reason defendant is estopped to assert any claim to the property, or is barred by laches, notwithstanding that the judgment may be void on its face. No useful purpose is subserved by a reversal of the action of the trial court on these motions.

We concur: SLOSS, J.; LAWLOR, J.

(169 Cal. 545)

VALLEJO & N. R. CO. v. REED ORCHARD CO. et al. (Sac. 2077.)(Supreme Court of California. March 5, 1915.
Rehearing Denied April 1, 1915.)**1. APPEAL AND ERROR** ⇨1002, 1031, 1032, 1170—**QUESTIONS REVIEWABLE—PREJUDICIAL ERROR.**

The Supreme Court on appeal must, under Const. art. 6, § 4½, prohibiting new trials for misdirection to the jury, improper admission or rejection of evidence, or any other error, unless after examination, including the evidence, the court is of the opinion that error complained of has resulted in miscarriage of justice, review conflicting evidence to ascertain whether error resulted in a miscarriage of justice, and must disregard a manifest error when, on such examination, it is of the opinion that the error has not prevented justice, and injury is not presumed from error, but must appear affirmatively to the court after the required examination, or from the nature of the error itself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937, 4032, 4038-4051, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. ⇨1002, 1031, 1032, 1170.]

2. CONSTITUTIONAL LAW ⇨106 — **VESTED RIGHTS—REMEDIES.**

Const. art. 6, § 4½, prohibiting a new trial for misdirection of the jury, erroneous rulings on evidence or for any error as to any matter of procedure, unless after examination of the case, including the evidence, the court is of the opinion that error complained of has resulted in a miscarriage of justice, affects the remedy only, and applies to pending appeals, though submitted prior to its adoption, for a party has no contractual or vested right to have the judgment reversed because of an error which the court cannot say has produced a miscarriage of justice.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 186, 212, 238-245, 252-257, 259; Dec. Dig. ⇨106.]

3. JURY ⇨12—**RIGHT OF JURY TRIAL—CONSTITUTIONAL PROVISIONS.**

Code Civ. Proc. § 592, providing that in actions for the recovery of property or for money claimed as due on a contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury unless a jury trial is waived, gives the right to trial by jury as guaranteed by Const. art. 1, § 7, declaring that the right of trial by jury shall remain inviolate, which applies only to common-law actions, and does not secure the right in special proceedings.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 27-34, 82, 99, 101, 103; Dec. Dig. ⇨12.]

4. TRIAL ⇨374—**CONCLUSIVENESS OF VERDICT—TRIAL BY THE COURT.**

A verdict in a case where a jury trial is not a matter of right is advisory to the court, and findings are necessary to complete the record.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 884; Dec. Dig. ⇨374.]

5. EMINENT DOMAIN ⇨198—**JURY** ⇨19—**NATURE OF PROCEEDING—"SPECIAL PROCEEDING"—TRIAL BY JURY.**

A condemnation proceeding is a "special proceeding" not included in the classes enumerated in Code Civ. Proc. § 592, in which a jury trial is required, but the section is made applicable to condemnation suits by section 1256, and

all issues are for the court, except the issue of compensation, which is for the jury.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 525, 526, 528, 535-539; Dec. Dig. ⇨198; Jury, Cent. Dig. §§ 104-133; Dec. Dig. ⇨19.]

For other definitions, see Words and Phrases, First and Second Series, Special Proceeding.]

6. EMINENT DOMAIN ⇨262—**HARMLESS ERROR—RULINGS ON INSTRUCTIONS.**

Errors, in instructions in a condemnation proceeding on other issues than that of compensation and on which the court has weighed the evidence and made findings, are not reversible unless on the whole case, including the evidence, there has been substantial injury.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. ⇨262.]

7. EMINENT DOMAIN ⇨211 — **ISSUES—COMPENSATION—FINDINGS.**

In proceedings by a railroad company to condemn land for a right of way, the cost of fences along the right of way and of cattle guards must, as required by Code Civ. Proc. § 1248, be determined to adjust compensation; and, where the issues submitted to the jury do not include that question, the court, making a finding that no fences or cattle guards are necessary, completes the findings required for a preliminary judgment.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 550; Dec. Dig. ⇨211.]

8. EMINENT DOMAIN ⇨211 — **JUDGMENT—PREMATURE JUDGMENT.**

A judgment in eminent domain proceedings, entered by the clerk on the general and special verdicts of the jury, which recites the verdicts and adjudges that plaintiff shall have a judgment and that the owner shall recover the compensation awarded, is premature, and the court may disregard it and make full findings on the evidence and render its own judgment thereon and determine for itself all questions of fact, excepting that of compensation, found by the jury.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 550; Dec. Dig. ⇨211.]

9. JURY ⇨97—**QUALIFICATIONS OF JURORS—EXAMINATION.**

A juror who admitted on voir dire in condemnation proceedings by a railroad company that the fact of his employment by another railroad company might influence his verdict was properly excused on challenge, and the mere fact that he contradicted his statement in other parts of his examination did not affect the question on appeal.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 431-433, 435-437; Dec. Dig. ⇨97.]

10. APPEAL AND ERROR ⇨968—**JURY** ⇨137—**CHALLENGE—RIGHT TO EXERCISE—DISCRETION OF COURT.**

It is within the discretion of the court to permit a party to exercise his remaining peremptory challenge after the panel is filled and all the jurors have been examined and passed for cause by both parties, and its ruling will not be disturbed except for abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3843; Dec. Dig. ⇨968; Jury, Cent. Dig. §§ 619-623; Dec. Dig. ⇨137.]

11. JURY ⇨131—**VOIR DIRE EXAMINATION—QUESTIONS.**

A question, asked a juror on his voir dire examination in condemnation proceedings, as to how in the absence of evidence on the subject he would determine how much plaintiff could afford to pay for the land sought to be taken,

was properly excluded; for the jury must consider and determine the value of the land without reference to the ability of plaintiff to pay.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 561-582; Dec. Dig. ¶131.]

12. TRIAL ¶109—ARGUMENT OF COUNSEL—OPENING STATEMENT—ISSUES.

Where, in proceedings by a railroad company to condemn land for a right of way, the owner alleged that the company did not intend to construct any railroad, but began the action to acquire the land not for any public use nor in good faith, the opening statement of the company's attorney, wherein he referred to diverse previous occurrences tending to show that the company had encountered opposition and difficulty in building its line to the land, but it had persisted in its purpose, was not misconduct, though the difficulties and opposition referred to might tend to excite sympathy for the company and animosity toward the owner.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 91, 270, 367, 388, 395; Dec. Dig. ¶109.]

13. CORPORATIONS ¶28—"DE FACTO CORPORATION"—WHAT IS.

A railroad company obtaining from the Secretary of State a certificate of incorporation and thereafter claiming in good faith to be a legally organized corporation and doing business as such under its corporate name is at least a "de facto corporation," claiming to be a de jure corporation within Civ. Code, § 358, providing that the due incorporation of any company claiming in good faith to be a corporation and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which it may be a party.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 26, 70; Dec. Dig. ¶28.]

For other definitions, see Words and Phrases, First and Second Series, De Facto Corporation.]

14. CORPORATIONS ¶29—RIGHT TO ATTACK INCORPORATION.

Under Civ. Code, § 358, providing that due incorporation of any company claiming in good faith to be a corporation and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally, an owner whose land is sought to be condemned by a de facto corporation claiming to be a de jure corporation may not object to the introduction in evidence of the company's articles of incorporation on the ground that its name so closely resembles the name of a pre-existing corporation that it tends to deceive, so that, under section 296, the Secretary of State should have refused to file articles of incorporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 77-79, 2504; Dec. Dig. ¶29.]

15. CORPORATIONS ¶32—CORPORATE EXISTENCE—EVIDENCE—DE FACTO CORPORATION—CONDEMNING LAND FOR RAILROAD.

Where, in proceedings by a railroad company to condemn land for a right of way, the owner denied the corporate existence of the company, deeds conveying to the company land to be a part of its line and franchises to it over parts of its line, and plans and specifications for the work along the line and at terminals, and judgments condemning other property along the line, was admissible to show that the company was a de facto corporation, though its articles of incorporation introduced in evidence prima facie showed its legal corporate existence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 106-118, 2086, 2087; Dec. Dig. ¶32.]

16. EMINENT DOMAIN ¶196—PROCEEDINGS TO CONDEMN LAND FOR RAILROAD RIGHT OF WAY—EVIDENCE—ADMISSIBILITY.

Where, in proceedings by a railroad company to condemn land for a right of way, the owner denied that the company intended to construct any railroad, evidence that the company had planned a railroad system, including a line over the land sought to be taken, and that in pursuance of the plan it had constructed other parts of the line and obtained franchises and rights of way and was endeavoring to complete the system, was relevant on the question of the company's good faith in proposing to build its line on the land sought to be taken, and thereby show that it sought to take the land for a public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529-534; Dec. Dig. ¶196.]

17. EMINENT DOMAIN ¶196—ACQUISITION OF LAND FOR A RAILROAD RIGHT OF WAY—NECESSITY—EVIDENCE—ADMISSIBILITY.

A railroad company, seeking to condemn land for a right of way, may show on the contested issue of necessity for the taking, that it has planned a railroad system, including a line over the land sought to be taken, and that in pursuance of the plan it has constructed other parts of the line and obtained franchises and rights of way therefor, and that it is endeavoring to complete the same.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529-534; Dec. Dig. ¶196.]

18. EVIDENCE ¶146—ADMISSIBILITY—COLLATERAL EFFECTS.

Evidence, properly admissible under issues presented, cannot be excluded because it may have collateral effects detrimental to the party objecting.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 429; Dec. Dig. ¶146.]

19. EMINENT DOMAIN ¶196—ACQUISITION OF LAND FOR RAILROAD RIGHT OF WAY—EVIDENCE—ADMISSIBILITY.

In proceedings by a railroad company to condemn land for a right of way, the court properly permitted the president of the company to testify as to his efforts to overcome obstacles to the building of the proposed road by other corporations and persons, and in detailing the opposition to the enterprise to show that it sought to acquire the land for railroad purposes, though it might create prejudice against the owner.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529-534; Dec. Dig. ¶196.]

20. EMINENT DOMAIN ¶20—RIGHT TO CONDEMN LAND FOR FREIGHT SHEDS—STATUTES.

Under Civ. Code, § 465, empowering railroad companies to erect and maintain necessary buildings and to acquire lands therefor, a railroad company may condemn land for freight sheds for the convenient operation of its road in the transportation of freight.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 59-67; Dec. Dig. ¶20.]

21. EMINENT DOMAIN ¶20—CONDEMNATION OF LAND FOR WHARVES—"NECESSARY TO SUCCESSFULLY WORK AND CONDUCT THE BUSINESS OF THE ROAD"—STATUTES—CONSTRUCTION.

Under Civ. Code, § 465, empowering every railroad company to acquire such real estate as may be "necessary to successfully work and conduct the business of the road" and to condemn land therefor, a railroad company, intending to establish a railroad extending to a navigable river on which there is steamboat traffic,

may condemn land for wharves as reasonably necessary to successfully conduct its business.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 59-67; Dec. Dig. ☞20.]

22. EMINENT DOMAIN ☞167—RIGHT TO EXERCISE—STATUTORY PROVISIONS—CONSTRUCTION.

Civ. Code, §§ 528-531, relating to the construction of bridges, ferries, wharves, etc., on authority being obtained therefor, embodied in title 6, part. 4, div. 1, must be construed in connection with title 3, relating exclusively to railroad corporations and declaring in section 465 thereof that a railroad may condemn land for purposes necessary to successfully work and conduct the business of its road, and when so construed, title 6 applies only to corporations organized to conduct a public bridge, ferry, wharf, etc., and does not apply to railroad corporations, and the restrictions therein do not apply to railroad corporations seeking to condemn land for railroad purposes.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 451-456; Dec. Dig. ☞167.]

23. EMINENT DOMAIN ☞169—ACQUISITION BY RAILROAD COMPANIES OF LAND FOR WHARVES—STATUTORY PROVISIONS.

Pol. Code, § 2921, authorizing boards of supervisors to grant to any railroad corporation the right to construct any wharf in front of any lands owned by it bordering on navigable waters with license to take tolls for the use of the same, gives a board of supervisors discretion to grant a franchise to a railroad company to enable it to carry on a public wharf and charge tolls thereon, but does not prohibit a railroad company from constructing and operating wharves for its own business without authority from the board at places where its railroad extends to navigable water and where it finds such wharves necessary for the successful operation of its road, and it may, without any authority from the board, condemn land for such a wharf.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 461; Dec. Dig. ☞169.]

24. EMINENT DOMAIN ☞45—ACQUISITION BY RAILROAD COMPANIES OF LAND FOR WHARVES—STATUTORY PROVISIONS.

The use of land along a navigable river front by a railroad company extending its line to the river for wharves as an adjunct to its road, is not prohibited by Const. art. 15, § 2, and prohibiting any corporation possessing the frontage of navigable water to exclude the right of way to the water when it is required for any public purpose, where the land acquired for wharves belonged to private individuals, and the wharves were to be used for a public purpose in operating the railroad, and if a more necessary public purpose may arise, the land can be taken from the company as authorized by Code Civ. Proc. § 1241.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 94-100, 102, 106; Dec. Dig. ☞45.]

25. EMINENT DOMAIN ☞222—RIGHT TO EXERCISE—CORPORATIONS—ARTICLES OF INCORPORATION—OBJECTIONS.

In proceedings by a railroad company empowered by its articles of incorporation to own and operate steamers, if necessary for the operation of its railroad, to condemn land for wharves on a navigable river to which its road extended, an instruction that the company could own and operate steamers in connection with its railroad and condemn land necessary for the accommodation of steamers owned by itself or other persons for the delivery of freight and passengers to and from the railroad was not prejudicial to the owner of the land sought to be taken, for it was proper to consider the prob-

able needs of the company to have wharves for the passage of freight and passengers to and from its cars and steamers on the river in determining the area necessary for wharves.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 562-567; Dec. Dig. ☞222.]

26. EMINENT DOMAIN ☞20—ACQUISITION OF LAND—PLEADINGS.

A railroad company, seeking to condemn land for a right of way extending to a river on which steamers were plying and for wharves necessary for its business may, under the complaint alleging generally that the land sought to be taken was necessary for its proposed railroad, and specifically alleging that parts of the land so to be taken were necessary for specified uses, such as the construction and operation of the road and freight wharves and sheds, could acquire land for such wharves as were reasonably necessary to accommodate its future business in delivering and receiving freight to and from its cars to the steamers as would probably be plying on the river.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 59-67; Dec. Dig. ☞20.]

27. EMINENT DOMAIN ☞196—ACQUISITION OF LAND BY RAILROADS—NECESSITY—EVIDENCE.

On the question of the necessity of the taking of land for railroad purposes, evidence of the nature of the country through which the proposed road will pass, of the territory which will probably contribute trade and passengers to the road, and the amount and character of the products which the territory will probably yield is admissible.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529-534; Dec. Dig. ☞196.]

28. EMINENT DOMAIN ☞196—ACQUISITION OF LAND FOR RAILROAD PURPOSES—EVIDENCE—ADMISSIBILITY.

Where, in proceedings to condemn land for railroad purposes, the president of the railroad company testified on cross-examination that another railroad company had projected a line of railroad connecting with the company's road near its bridge on land sought to be taken, and that the company proposed to receive the cars of the other company at the place of connection and carry them over its own line, it was proper to permit him, on redirect examination, to explain that the other company was then constructing its line, and to show that the company would obtain business when its road was completed.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529-534; Dec. Dig. ☞196.]

29. EVIDENCE ☞515—OPINION EVIDENCE—"TRADE."

A civil engineer who has had 10 years' experience in the construction and operation of interurban railroads in the state, and who is familiar with the effect of such roads in developing a new region and increasing the traffic therein and in drawing freight and passenger business from established steam railroad lines, and who had traveled over a great part of the counties through which a railroad company's road ran, and had made investigations of the products and capabilities of production of the territory and the probability of shipments therefrom, may give his opinion as to the proportion of the products that would probably be shipped over a steam railroad when completed, for the effect of electric railroads in the settlement and development of the country and in obtaining traffic previously given to steam railroads is not a matter of common knowledge, but may well

be termed a "trade" within Code Civ. Proc. § 1870, subd. 9, allowing opinion evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2324; Dec. Dig. ¶515.]

For other definitions, see Words and Phrases, First and Second Series, Trade.]

30. EVIDENCE ¶508 — OPINION EVIDENCE — EXPERTS.

Witnesses skilled in any science, art, trade, or occupation may give their opinions as experts on a subject-matter not within the common experience of men.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2311; Dec. Dig. ¶508.]

31. EVIDENCE ¶333 — "OFFICIAL DOCUMENT" — WHAT IS.

A report of the State Agricultural Society, required by Pol. Code, §§ 332, 705, 2326, to collect information and statistics, is, when printed as a public document as required by section 334, an "official document" within Code Civ. Proc. § 1918, subd. 6, and admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247-1257, 1259-1265; Dec. Dig. ¶333.]

32. EMINENT DOMAIN ¶196 — ACQUISITION OF LAND FOR RAILROAD PURPOSES — EVIDENCE — ADMISSIBILITY.

In proceedings by a railroad company to condemn land for railroad purposes, a civil engineer, familiar with the country by reason of personal observation and use of official governmental reports, may testify approximately as to the respective areas of reclaimed and unreclaimed land, and a map prepared by him, disclosing the areas, may be received to aid the court and jury.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529-534; Dec. Dig. ¶196.]

33. EMINENT DOMAIN ¶196 — ACQUISITION OF LAND FOR RAILROAD PURPOSES — EVIDENCE — ADMISSIBILITY.

A witness may testify, in proceedings to condemn land for railroad purposes, as to approximate quantity of freight handled at a city, based on investigations made by inquiries of shippers and others engaged in the freighting business, and on testimony of other witnesses, and on reports of United States engineers investigating the subject to ascertain the advisability of reclamation works by the United States, as bearing on the question of necessity.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529-534; Dec. Dig. ¶196.]

34. EMINENT DOMAIN ¶196 — ACQUISITION OF LAND FOR RAILROAD PURPOSES — EVIDENCE — ADMISSIBILITY.

Where, in proceedings to condemn land for railroad purposes, the engineer, who had laid out the plan of tracks and other structures to be placed on the land sought to be condemned, stated on cross-examination that a report of a third person made to the railroad company had been furnished him for use in fixing the quantity of land necessary for railroad purposes, and that he used the report in estimating the structures and quantity of land that would probably be required, and had made his plan accordingly, the report was properly received on redirect examination in explanation of the testimony.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529-534; Dec. Dig. ¶196.]

35. APPEAL AND ERROR ¶971 — EVIDENCE ¶498½ — OPINION EVIDENCE — QUALIFICATION — DECISION OF TRIAL COURT.

Whether a witness is qualified to give an opinion on a matter in issue is, in the first in-

stance, for the trial judge, and his ruling will not be disturbed except for abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. ¶971; Evidence, Cent. Dig. §§ 2290, 2291; Dec. Dig. ¶498½.]

36. EVIDENCE ¶498½ — OPINION EVIDENCE — COMPETENCY OF WITNESSES.

A witness who had no actual knowledge of any sales of land in a neighborhood, and who until two years before had lived on a ranch and had never been on the land in controversy except during a flood a few months before the trial, and who at most had only such general knowledge of the subject of value as any ordinary citizen in the vicinity might have, was properly prevented, within the discretion of the trial court, from giving his opinion as to the value of the land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2290, 2291; Dec. Dig. ¶498½.]

37. APPEAL AND ERROR ¶1058 — HARMLESS ERROR — ERRONEOUS EXCLUSION OF EVIDENCE.

Where a party had called seven witnesses who testified on the subject of value of land, error, if any, in excluding the opinion of another witness was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. ¶1058.]

38. TRIAL ¶240 — ACQUISITION OF LAND FOR RAILROAD PURPOSES — INSTRUCTIONS.

An instruction, in proceedings to condemn land for railroad purposes, that the power of eminent domain is necessary for the public good, and that it would be unjust to the public that plaintiff should be required to pay the owner more than a fair indemnity for the loss sustained by the taking of his property for the general good, and that on the other hand, the owner, being compelled to part with his property, should be allowed just compensation, was not objectionable as argumentative, but properly cautioned the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. ¶240.]

39. EMINENT DOMAIN ¶222 — VALUE OF LAND TAKEN — INSTRUCTIONS.

Where, in proceedings to condemn land, the jury were many times charged that they must determine the facts in accordance with the evidence, an instruction, directing the jury to weigh the testimony of witness, giving opinion as to value by reference to the whole situation of the property and its surroundings and circumstances and by applying to it their own experience and knowledge, and that while they could not act on particular facts resting in their private knowledge, but should be governed by evidence adduced, they should judge of the weight and force of the evidence on their own general knowledge of the subject, was not objectionable as leading the jury to fix the value by their own knowledge of the subject, irrespective of the evidence.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 562-567; Dec. Dig. ¶222.]

40. EMINENT DOMAIN ¶222 — TRIAL — INSTRUCTIONS.

An instruction, in proceedings to condemn land for railroad purposes, that in determining the questions of necessity the jury should consider the character of the business proposed to be done by the company and the manner of doing it and the future needs of the communities which the company would serve, and should consider the number of persons to be served by the

company, was proper as bearing on the probable area required by the company.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 562-567; Dec. Dig. ☞ 222.]

41. EMINENT DOMAIN ☞262—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where the court, in proceedings to condemn land for railroad purposes, found that a strip 165 feet wide was required for the main line and necessary side tracks, error in an instruction, directing the jury that in determining the question of necessity they should consider that the railroad company was entitled to take a strip 165 feet wide across the land solely for railroad purposes, though the entire width was not required, was not prejudicial.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 681-686; Dec. Dig. ☞ 262.]

42. CONSTITUTIONAL LAW ☞208 — CLASS LEGISLATION—STATUTES—CONSTRUCTION.

Code Civ. Proc. § 1249, providing that for the purpose of ascertaining compensation for land sought to be taken the right to take should be deemed to accrue at the commencement of the proceeding, provided that if the issue was not tried within one year, unless the delay was caused by defendant, the compensation should be deemed to have accrued at the trial, but that nothing in the section should be construed to affect pending litigation, is not objectionable as class legislation for the fact that cases were pending at the time of the enactment of the section, concerning which rights may have accrued or negotiations have been in progress, sufficiently distinguishes such cases as a separate class, entitled to different provisions from those prevailing in actions to be taken thereafter.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 649-677; Dec. Dig. ☞ 208.]

43. EMINENT DOMAIN ☞262 — QUESTIONS REVIEWABLE—PRESUMPTIONS.

In the absence of anything to show whether a delay in the trial of a proceeding to condemn land was caused by the owner, the presumption that the delay was caused by him prevails, so that the court, under Code Civ. Proc. § 1249, properly charged that in determining the compensation the jury must consider the value of the land as of the date of the commencement of the proceeding.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 681-686; Dec. Dig. ☞ 262.]

44. EMINENT DOMAIN ☞317 — ACQUISITION OF LAND—EASEMENTS—TITLE—"PERMANENT BUILDINGS."

Under Code Civ. Proc. § 1239, providing that a fee may be taken when land is condemned for a public use, requiring the erection of "permanent buildings" thereon, a railroad company may acquire the fee to land to be used for a storehouse, blacksmith shop, machine shop, wharves, offices, and other purposes requiring the construction of substantial buildings, for the structures are "permanent buildings."

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 834-840; Dec. Dig. ☞ 317.]

In Bank. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by the Vallejo & Northern Railroad Company against the Reed Orchard Company, to condemn property of defendant, in which S. Komano, lessee, and the People's Savings Bank, a mortgagee, were made defendants. There was a judgment

for plaintiff, and defendants separately appeal. Affirmed.

Arthur C. Huston, of Woodland, and White, Miller & McLaughlin and White, Miller, Needham & Harber, all of Sacramento, for appellants. T. T. C. Gregory, of San Francisco, Elmer W. Armfield, of Woodland, and John S. Partridge and C. J. Goodell, both of San Francisco (Pillsbury, Madison & Sutro and Heller, Powers & Ehrman, all of San Francisco, of counsel), for respondent.

SHAW, J. This is an action to condemn for public use certain real property belonging to the Reed Orchard Company. S. Komano, a lessee of parts of the land, and People's Savings Bank, a mortgagee, were made defendants and suffered default. Reed Orchard Company answered the complaint, there was a trial by the court and jury, resulting in a general verdict and also a special verdict upon a part of the issues and findings by the court, and thereupon divers judgment and orders were entered. The verdict was rendered on March 22, 1912. The record shows that on the following day, March 23d, a judgment was entered by the clerk, reciting the verdicts in full and adjudging that the plaintiff do have judgment, condemning, for the uses of said plaintiff as specified in the complaint, a certain parcel of land described, and that the defendants recover of the plaintiff the sum of \$104,100, being the value of the parcel of land as fixed by the verdict, together with costs. From this judgment the defendants separately appeal, each of said appeals being taken by a notice filed less than 60 days after the entry of said judgment. After the trial, the court proceeded to make elaborate findings, embracing the verdicts of the jury and many other facts in issue. These findings were filed on April 18, 1912, and thereupon, on the same day, there was entered an order entitled "Preliminary Order and Judgment of Condemnation," signed by the judge. This order declared that there were condemned for plaintiff a number of parcels of the property, embracing all the land sought to be condemned, describing them, each to be used for a specified purpose, and, further, that, upon the payment or deposit in court by plaintiff of \$104,100 for the defendants, the plaintiff would be entitled to a final order and judgment of condemnation. From this order the said defendants also appeal. On April 29, 1912, a final order of condemnation was filed and entered. This order recited that the plaintiff had, on April 18, 1912, paid into court for the defendants the said sum of \$104,100, together with the costs as taxed, and further alleged that the parcels of property, describing them, be condemned for plaintiff for certain specified purposes. From this order the said defendants each appeal.

[1, 2] 1. Before considering the points presented, it is important to note that since this case was submitted to this court the people have adopted an amendment of section 4½ of article 6 of the Constitution, whereby that section is made applicable in civil as well as criminal cases. It now reads as follows:

"No judgment shall be set aside, or new trial granted in any case on the ground of misdirection of the jury or of the improper admission or rejection of evidence, or for any error as to any matter of procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

It has always been the desire and policy of this court to disregard unimportant and unsubstantial errors appearing in the record, and to reverse causes only for reasons affecting the merits of the case and the substantial rights of the parties. Our power to do this has hitherto been somewhat limited by the limitations upon our jurisdiction to consider the evidence. *San Jose Ranch Co. v. San Jose, etc., Co.*, 126 Cal. 324, 58 Pac. 824. An important result of the aforesaid amendment is that it enlarges our jurisdiction in that particular. Prior to its adoption, if the evidence was in substantial conflict as to a fact in issue, we were concluded by the decision of the trial court thereon for all purposes of the case, unless the error entered into and affected the consideration of that evidence. Under the above section, we have the power to review conflicting evidence for the purpose of ascertaining whether or not an error "has resulted in a miscarriage of justice." It is indeed made our duty to do so, and the further duty is imposed to disregard a manifest error when, upon such examination, we shall not "be of the opinion that the error complained of has resulted in a miscarriage of justice." It is no longer the case that injury is presumed from error; the injury must appear affirmatively to the mind of the court after the examination required, or from the nature of the error itself. *People v. O'Bryan*, 165 Cal. 66, 130 Pac. 1042. This amended section is now in force and binding upon the Courts of Appeal. And as it affects the remedy only, it applies to pending appeals, although they may have been submitted prior to its adoption. A party has no contractual or vested right to have a judgment reversed because of an error which the court cannot say has produced what that section describes as a "miscarriage of justice." *People v. Campbell*, 59 Cal. 245, 43 Am. Rep. 257; *Kerckhoff, etc., Co. v. Olmstead*, 85 Cal. 85, 24 Pac. 648. Doubtless the people could, by constitutional amendment, abolish the right of appeal and require the dismissal of appeals remaining undetermined. Just what may be included in the phrase, "miscarriage of justice," must remain to be decided in

each case as it is presented. No precise definition can be given to it.

[3, 4] It is also necessary, in the same connection, to determine a question relating to the right to a jury trial in condemnation suits and the procedure followed in this case.

Section 14, article 1, of the Constitution provides that in condemnation cases compensation to the owner shall be ascertained by a jury unless a jury trial is waived. So far as that issue is concerned, therefore, the defendants had an absolute right to a jury trial. But the section says nothing concerning the mode of determining the other facts necessary to establish the right of the plaintiff to take the property in question. In effect, it leaves the Legislature free to provide the method of trial of all questions except that of compensation. The legislative provision on the subject is found in section 592 of the Code of Civil Procedure.

In *Wilmington v. Dominguez*, 50 Cal. 505, the court decided that the owner, under this section, as it then stood, was entitled to a jury trial of all the issues in a condemnation suit. At the time of the trial in that case, section 592, on this subject read thus:

"An issue of fact must be tried by a jury, unless a jury trial is waived, or a reference be ordered, as provided in this Code."

The court held that this provision governed the case, and that the trial court could not disregard the verdict of a jury and make findings of fact contrary thereto upon the question of the necessity of the taking. This case was followed in *Cummings v. Peters*, 56 Cal. 597, without discussion. The record in the latter case does not show when the trial took place. In 1874, section 592 was amended to its present form, which is as follows:

"In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived or a reference is ordered, as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code."

It is evident that this amendment made a radical change regarding the right to a jury trial. Under its provisions, in all actions except those enumerated in the opening clause, the issues of fact are to be tried by the court. The language is too clear on this point to require interpretation or to permit construction. The amendment was evidently framed with a view of adopting the principle decided in *Koppikus v. State*, 16 Cal. 248, that is, that the constitutional guaranty of the right to jury trial, in section 7 of article 1, applies only to common-law actions, and that it does not confer such right with respect to any action as to which it did not previously exist. Accordingly it has always

been held that this guaranty does not secure the right in special proceedings. *Dorsey v. Barry*, 24 Cal. 453; *Heyneman v. Blake*, 19 Cal. 596. The *Koppikus Case* and many others hold that the verdict of a jury, in a case where a jury trial is not a matter of right, is advisory to the court, and that findings by the court are necessary to complete the record. *Warring v. Freear*, 64 Cal. 55, 28 Pac. 115; *McLaughlin v. Del Re*, 64 Cal. 473, 2 Pac. 244; *Curnow v. Blue Gravel, etc., Co.*, 68 Cal. 264, 9 Pac. 149; *Santa Cruz, etc., Co. v. Bowie*, 104 Cal. 288, 37 Pac. 934; *McCarthy v. Gaston*, 144 Cal. 546, 78 Pac. 7.

[5] A condemnation suit is a special proceeding. It is not included in the classes mentioned in section 592, in which a jury trial is required. That section is expressly made applicable to condemnation suits. Code Civ. Proc. § 1256. It follows that, except those relating to compensation, the issues of fact in a condemnation suit are to be tried by the court, and that if the court submits them to a jury, it is nevertheless required to make findings either by adopting the verdict thereon or by making findings in its own language.

Subsequent decisions recognize the fact that the aforesaid amendment changed the effect of the section as applied to condemnation suits, so that a jury trial is imperative, if not waived, only with respect to the issue of compensation. Thus, in *Cal. S. R. R. Co. v. S. P. R. R. Co.*, 67 Cal. 62, 7 Pac. 123, 125, which appears to have been a closely contested case, the court says:

"So far as the assessment of the value of the property to be taken is concerned (while perhaps a new trial of the question of value may be allowed by the court) the verdict of the jury is conclusive. Const. art. 1, § 14. As to other issues of fact made by the pleadings, the court is authorized by the Code of Civil Procedure to submit them to a jury."

In *Weber v. Santa Clara*, 59 Cal. 266, the court says:

"The owner of the property is entitled to a jury trial for the purpose of ascertaining the amount of damages which he will sustain by the appropriation of his property to public use" (citing section 14, article 1, aforesaid).

The context shows that the court was referring only to the issue of compensation. In other jurisdictions having substantially identical constitutional and statutory provisions on the subject, it has been held that all the issues, except that of compensation, must be determined by the court. *Bigelow v. Draper*, 6 N. D. 166, 69 N. W. 570; *In re Bradley*, 108 Iowa, 478, 79 N. W. 280.

The decision in *Santa Ana v. Gildmacher*, 133 Cal. 395, 65 Pac. 883, might seem contrary to these views, but an examination of the opinion shows that the point upon which our conclusion rests was neither discussed nor decided in the case. The opinion merely applies the familiar rule that a direction to the jury to render a verdict on a question of fact submitted to it, where there was sub-

stantial evidence to justify a contrary decision thereon, is an invasion of the province of the jury and contrary to the constitutional provision that judges shall not charge juries with respect to matters of fact. The judgment was reversed for that reason alone. The action was a suit in condemnation, but the point that the court was not required to follow the decision of the jury on the issue of necessity, nor to submit that issue to the jury at all, was not mentioned, nor was section 592 referred to. We are unwilling to believe that the court would have gone so far as to disregard its plain language if that section had been called to its attention. The case cannot be regarded as a decision that the owner is entitled as of right to a jury trial upon all the issues that may be presented in an action of condemnation. It does not purport to decide that question. If it so held we should feel obliged to overrule the decision as contrary to the statutory law on the subject.

[6] As a result of these propositions the conclusion follows that error in instructions, in a condemnation suit, upon other issues than that of compensation, and upon which the court has itself weighed the evidence and made findings, would not justify a reversal, unless upon the whole case, including the evidence, we find that it has caused substantial injury, or a miscarriage of justice.

In the present case, while the court submitted most of the questions in issue to the jury, it did not consider itself bound thereby, with respect to other propositions than that of value, but proceeded thereafter to make its own findings and conclusions of law, covering many facts not expressly included in the special verdict. These were filed on April 18th, as above stated, and judgment was accordingly entered thereon.

[7] The Code requires, in a case of land taken for a railroad, that the jury, or the court, shall find the cost of fences along the line of the road and of cattle guards where fences cross the line. This is necessary, in order to adjust the amount of compensation the owner may receive. Code Civ. Proc. § 1248. The interrogatories submitted to the jury did not include these questions, and there is no finding by the jury on those points. The court made a finding that no fences or cattle guards were necessary. This completed the findings required in order to lay the foundation for the preliminary judgment.

[8] We regard the judgment entered by the clerk on March 23, 1912, as premature and without authority or effect, for, upon the facts stated, the trial was not then concluded. Probably it would have become effective if the court below had adopted and ratified it and the regularity of the proceedings was not attacked by an appeal. But it is evident that the court below did not regard it as effective, for it held the case under advisement for several weeks and then, as above stated, made full findings upon the

evidence and gave its own judgment thereon. We must therefore presume that the court itself weighed the evidence and determined all questions of fact, except that of compensation.

A large number of the rulings of the court are assigned as error. We will take them up, as nearly as possible, in the order in which they occur in appellants' briefs.

2. We first take up the rulings made during the selection of the jury.

[9] Upon the examination of the jurors on their voir dire, the juror Cook admitted that the fact of his employment by another railroad company might influence his verdict. This being the case, he was properly excused on the challenge of the plaintiff. The fact that he contradicted this in other parts of his examination does not affect the question, so far as the action of this court on appeal is concerned.

[10] It was within the discretion of the court to permit the plaintiff to exercise its remaining peremptory challenge after the panel was filled and all the jurors had been examined and passed for cause by both parties. *Silcox v. Lang*, 78 Cal. 123, 20 Pac. 297. *Vance v. Richardson*, 110 Cal. 416, 42 Pac. 909, decides nothing contrary to this. Of course, the discretion might, in some cases, be abused, but there is no showing of any abuse here.

[11] The juror Roth was asked how, in the absence of evidence on the subject, he would determine how much the plaintiff could afford to pay for the land to be taken. This question was properly excluded. The jury were to consider and determine the value of the land. The ability of the plaintiff to pay such value was wholly irrelevant to that issue.

[12] 3. The answer alleged that the plaintiff did not intend to construct the proposed railroad, or any railroad whatever, and that it had begun the action for the purpose of acquiring the defendant's land, and not for any public use whatever, nor in good faith. In the opening statement plaintiff's attorney referred to divers previous occurrences tending to show that the plaintiff had encountered opposition and difficulty in building its line to this land, but that it had persisted in its purpose nevertheless. The difficulties and opposition referred to might also, in some degree, have tended to excite sympathy for the plaintiff and animosity toward the opposition. The defendants' objection to the statements was overruled. They assign the ruling as error and the statements as misconduct of the prevailing party. The facts referred to were proper for the purpose of showing that the plaintiff in good faith intended to build the proposed railroad over the lands sought to be taken. The circumstance that it might also produce other collateral consequences harmful to the defendants did not make the statements misconduct or the ruling erroneous, at all

events, not unless the statements were made in bad faith for the purpose of improperly influencing the court or jury against the defendants. Bad faith was not shown.

[13, 14] 4. The defendants objected to the introduction of the articles of incorporation of the plaintiff, on the ground that the name of the plaintiff so closely resembled that of a pre-existing corporation, that it would tend to deceive, and that, therefore, under section 296 of the Civil Code, the Secretary of State should have refused to file said articles. The court was correct in overruling the objection. Whether or not the state of California could, in a proper action, dissolve the corporation or compel it to change its name, on the ground of the misleading character of its name, we need not determine. The evidence showed that the Secretary of State had issued the certificate of incorporation. It also appears that thereupon and thereafter the plaintiff company claimed, in good faith, to be a legally organized corporation under the law, and was doing business as such under said corporate name. These facts were not disputed. Under these circumstances the plaintiff must be deemed to be, at least, a de facto corporation claiming to be a de jure corporation. Section 358 of the Civil Code provides that:

"The due incorporation of any company claiming in good faith to be a corporation under this part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the state on information of the Attorney General."

It follows that the defendant had no authority to interpose this objection to plaintiff's corporate existence. The state alone could do so. *Lakeside Ditch Co. v. Crane*, 80 Cal. 186, 22 Pac. 76; *Martin v. Deetz*, 102 Cal. 66, 36 Pac. 368, 41 Am. St. Rep. 151; *Oroville, etc., Co. v. Plumas Co.*, 37 Cal. 361; *Mokelumne, etc., Co. v. Woodbury*, 14 Cal. 426, 73 Am. Dec. 658; *Los Angeles v. Spires*, 126 Cal. 544, 58 Pac. 1049; *San Diego Gas Co. v. Frame*, 137 Cal. 443, 70 Pac. 295. There are many other similar cases. The case of *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386, is not in conflict with these decisions. There the company had no de facto existence, that is, it was not "doing business as such," or "claiming in good faith to be a corporation under this part," and therefore it did not come within the conditions prescribed in section 358, aforesaid. Here these conditions do exist, and the section controls.

[15] 5. Over the objection of the defendants a number of instruments and deeds were admitted purporting to convey to the plaintiff the railroad, of which the line over the condemned land was to be a part and other property connected therewith, and to grant franchises to the plaintiff over other parts of its line. There was also admitted the plans and specifications adopted by the plaintiff for work to be done along the line of the

railroad and at the terminals thereof and judgments condemning other property along the line for the use of plaintiff in building and operating said railroad. The defendants had denied the corporate existence of the plaintiff. This evidence tended at least to show that the plaintiff was a corporation de facto. The mere fact that the plaintiff had introduced its articles of incorporation, as aforesaid, and that they were sufficient prima facie to show its legal corporate existence, would not justify us in holding that the court erred in admitting other evidence tending to show the de facto existence of the corporation. Such proof, for reasons above stated, was necessary.

[16] The evidence also tended to show that the plaintiff had planned a railroad system, including a line from Vallejo to Sacramento, that the proposed route over defendant's land was a part of the Sacramento line, and that in pursuance of the plan it had constructed other parts of the line and obtained franchises and rights of way therefor, and that it was endeavoring to complete the same. These facts were relevant to the question of the good faith of the plaintiff in proposing to build its road on the land sought to be acquired. This issue was presented by the answer of the defendants, as above stated, and the record shows that the case was tried upon the theory that the question was in issue. We think that it was competent for the defendants, if they were able to do so, to show as a defense that the plaintiff did not really intend to build the proposed road, but were merely proposing to do so as a means whereby to acquire the land through a condemnation suit. Land can only be taken for a public use and if, in fact, the plaintiff claiming a right to condemn land for a public use really intends to devote it to a private use, this, if proven, would be sufficient to defeat the action. *Beveridge v. Lewis*, 137 Cal. 621, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581, 92 Am. St. Rep. 188. Having presented the issue, the defendants cannot be allowed to predicate error upon the admission of evidence to disprove it.

[17] The evidence was also proper to be considered upon the sharply contested question as to the necessity for the taking of the land in controversy. The question whether all of it was necessary depended very much upon the length and character of plaintiff's road and its probable future business. The evidence objected to had some bearing upon these questions. The fact that it may have tended to prove the issue only in a remote degree does not make it inadmissible.

[18, 19] The same reasons apply to the ruling of the court allowing the president of the plaintiff to testify describing his efforts to overcome the obstacles thrown in the way of the building of the road by other corporations and persons, and in defeating the opposition to the enterprise. It all

tended to show that the plaintiff had been and was diligently endeavoring to build the portions of the plaintiff's road leading up to the boundaries of the land in question, and it had a direct bearing on the contention that the plaintiff was seeking to acquire the land for other purposes than a railroad.

It may be as claimed, that some of this evidence would tend to create or arouse prejudice against the defendants in favor of the plaintiff by creating a suspicion that other railroad corporations were instigating the defense or obstructing the building of the proposed railroad. But it is a well-established rule that if evidence is properly admissible upon the issues presented, it cannot be excluded because it may have ulterior or collateral effects detrimental to one of the parties. It is also very apparent that much time was consumed by counsel, both in examination in chief and on cross-examination of the respective witnesses, in inquiries concerning minute details of these various transactions and matters, and that because so much time was devoted to this subject, the opposition of other corporations was greatly emphasized. We cannot say, however, that plaintiff's counsel were greater sinners in this respect than those of the defendants. In any event, it does not constitute misconduct sufficient to call for a reversal of the judgment. In view of the persistent and very numerous objections made by defendants' counsel at every stage of plaintiff's case, we cannot say that the plaintiff's counsel transgressed the bounds of propriety in making the proof so full and elaborate.

[20, 21] 6. It is earnestly contended that the plaintiff failed to show any right to condemn any part of the land to be used as freight wharves and sheds. The plaintiff's articles of incorporation enumerated, among its powers, the power to build and operate the railroad in question, and for that purpose to acquire, own, construct, and use all necessary wharves, docks, and chutes and the land required therefor. The proposed line of railroad was 62 miles long, extending from Vallejo in Solano county to and into the city of Sacramento. It was to have four branches, one from the town of Fairfield to Suisun, 2 miles long, one from the town of Cement to Woodland, 35 miles long, one from Davisville to Woodland, 17 miles long, and one to the town of Dixon, 3 miles long. The line crossed the Sacramento river at a point opposite the city of Sacramento and the bridge for that purpose had its west abutment on the land sought to be condemned. The complaint alleged that the land sought to be taken was necessary for the proposed road and, among other things, for freight wharves and sheds to be used for the said railroad purposes. The plat of the land, annexed to the complaint showed that the strip of land abutting on the Sacramento river immediately below the said bridge was to be used for these wharves and sheds. This strip was divided

into three parcels by passageways or spaces 100 feet wide extending from the river to the railroad tracks to be laid along and next to the wharves, and the jury, in answer to a special interrogatory, found that it was necessary for the plaintiff to take all of these parcels of land for the said purposes, for the said railroad. The findings of the court are to the same effect. The claim is: First, that the law confers upon a railroad company no right to maintain wharves as a part of the railroad, or for any purpose whatever, or to condemn land for such purposes; and, secondly, that in order to obtain such right, the company must first obtain a wharf franchise, in pursuance of sections 528 to 531, inclusive, of the Civil Code, and section 2921 of the Political Code.

Section 1238 of the Code of Civil Procedure authorizes the condemnation of land for wharves, docks, piers, and chutes (subdivision 4). Section 465 of the Civil Code empowers every railroad company to acquire, "hold and use all such real estate and other property as may be absolutely necessary for the construction and maintenance of such railroads, and for all stations, depots and other purposes necessary to successfully work and conduct the business of the road" (subdivision 3); to construct and maintain such road, "with such appendages and adjuncts as may be necessary for the convenient use of the same" (subdivision 4); "to erect and maintain all necessary and convenient buildings, stations, depots, fixtures and machinery for the accommodation and use of their passengers, freight and business" (subdivision 9); and to acquire by condemnation the lands and other property "to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts" thereto (subdivision 7).

There can be no doubt of the right of the plaintiff to condemn land for freight sheds to be used for the convenient operation of its road in the transportation of freight. Such sheds would be a necessary adjunct to the road in carrying on the business of the transportation of freight thereon. There is no serious contention that this would not be so. We think it is equally obvious that where a railroad, intended for the carriage of freight, extends to a navigable river running through a large area of highly productive land, and upon which river there is a heavy steamboat traffic in carrying such products, as is the case here, wharves for the convenient transfer of freight between the cars upon the railroad tracks and the boats plying upon the river may reasonably be said to be necessary for the convenient operation of such railroad, and a necessary appendage or adjunct thereto. See *Central P. R. Co. v. Feldman*, 152 Cal. 306, 92 Pac. 849. Land for such purpose is reasonably "necessary to successfully work and conduct the business of the road" within the meaning of section 465, aforesaid, and therefore by that section the railroad company is authorized to maintain

such wharves and to acquire by condemnation the land necessary for that purpose.

[22] The next contention is that it must first obtain a wharf franchise and that it has failed to do so. Sections 528 to 531 constitute title 6, part 4, division 1, of the Civil Code. The Code distinguishes this title by the subtitle "Bridge, Ferry, Wharf, Chute, and Pier Corporations." Section 528 declares that:

"No corporation must construct, or take tolls on, a bridge, ferry, wharf, * * * chute, or pier until authority is granted therefor by the supervisors, or other governing body having authority in that behalf."

Section 529 declares that "every such corporation ceases to be a body corporate" if, within six months from filing its articles of incorporation, it does not obtain such authority from the proper governing body, or if, within one year thereafter, it has not commenced the construction of the bridge, wharf, chute, or pier, and expended thereon 10 per cent. of the amount of its capital stock, or if, within three years from filing its articles, the said proposed structure is not completed. Section 530 provides that the "president and secretary of every bridge, ferry, wharf, chute, or pier corporation" must annually make a report to the supervisors or other governing body which granted its franchise, showing the cost of construction, the moneys expended since construction, the capital stock paid in, the yearly receipts, the dividends declared, the indebtedness incurred, and such other facts as may be required by such body. Section 531 provides that if such bridge, ferry, wharf, chute, or pier is built, operated, or owned by a natural person the provisions of the title are applicable to such person. These provisions are to be construed in connection with title 3, which relates exclusively to railroad corporations, and in which section 465 is found, and also in connection with the Code titles relating to other classes of corporations, and all are to be construed in such a manner as to make them harmonious if such construction is reasonably apparent. The terms of the provisions of title 6 show that this title, so far as it applies to corporations, was intended to apply only to corporations formed for the purpose of carrying on the business of conducting a public bridge, ferry, wharf, chute, or pier, and that they were not intended to have any application to corporations formed under title 3 for the purpose of constructing and operating a railroad. The language throughout is entirely consistent with the subtitle, indicating its exclusive application to corporations for the particular purposes named, and is inconsistent with any other interpretation. It cannot reasonably be supposed that the Legislature intended, with respect to railroad companies, that they should, within six months after filing their articles of incorporation, obtain wharf franchises from the proper governing authority in control of every naviga-

ble river over which the railroad should pass and of every terminal at tide water, and cease to be corporations if they failed to do so. To require this as a condition of its corporate existence would be, in practical operation, to prevent the carrying on of any railroad enterprise. This is a strong indication that no such intent was contemplated by the title referred to. This construction is further indicated, and indeed rendered almost imperative, by a consideration of the other titles included in part 4. Title 1 contains general provisions only. Then follow titles numbered from 2 to 22 consecutively, besides two titles interpolated subsequent to the original enactment. Each of these titles relates to particular classes of corporations exclusively. Thus title 2 relates to insurance corporations, title 3 to railroad corporations, title 4 to street railroad corporations, title 5 to wagon road corporations, title 6 to bridge, ferry, wharf, chute, and pier corporations, title 7 to telegraph and telephone corporations, title 8 to water and canal corporations, and so on through the list. From this it is quite clear that title 6 applies only to corporations organized for one or more of the purposes indicated in its subtitle, that they are entirely distinct from the railroad corporations organized under title 3, and therefore that the restrictions and provisions of title 6 have no application to railroad corporations organized and operating under title 3.

[23] Section 2921 of the Political Code provides that boards of supervisors "may grant to any railroad corporation authority to construct a wharf, or pier on or in front of any lands owned by it" bordering on navigable water, with a license to take tolls for the use of the same. It is clear from this language that the purpose of the section was to give authority to the board of supervisors to grant franchises for public wharves to be used by the public generally in consideration of tolls to be exacted therefor. This is not only indicated by the language, but it is further emphasized by the subsequent provision that the board may do so when it finds the use of such wharf or pier necessary to the exercise of the franchise of the railroad corporation for terminal purposes. There is nothing in the language of the section which purports to prohibit a railroad company from constructing and operating wharves for its own business, without authority from the board, at places where the railroad extends to navigable water and where it finds such wharves necessary for the successful operation of its road. It is clear, we think, that the section was intended to give the board of supervisors discretion to grant an additional franchise to such railroad, enabling it to carry on a public wharf and charge tolls thereon, where the board finds that such public wharf is necessary to the railroad franchise, and that it was not intended to forbid the railroad from maintaining a wharf for its own pur-

poses without the additional authority to be granted under this section by the board of supervisors.

[24] The additional claim is made that the use of the land along the river front by the plaintiff for wharves as an adjunct to its railroad is forbidden by the clause of section 2, article 15, of the Constitution, declaring that no corporation claiming or possessing the frontage of navigable water "shall be permitted to exclude the right of way to such water whenever it is required for any public purpose." The land taken for wharves did not belong to the state, but to the defendants. The wharves were to be used for a public purpose, else the suit to condemn it would not lie. Such wharves would not exclude the right of way for a public purpose, because their use as such would constitute one of the public purposes which the constitutional provision was designed to protect. If a more necessary public purpose should arise for the land, it could be taken from the plaintiff therefor. Code Civ. Proc. § 1241. This sufficiently answers the argument.

[25] 7. In immediate connection with this question of wharves it is proper to consider an exception to one of the instructions. The articles of incorporation of the plaintiff confer upon it, among other things, power to own and operate steamers if necessary, proper, or convenient for the convenient use, accommodation, maintenance, and operation of its railroad. Its right to exercise this power could not be questioned here. Civ. Code, § 358. The court instructed the jury that a railroad company had a right to own and hold steamers and run them in connection with its railroad and condemn land necessary for the accommodation of steamers owned by itself or other persons for the delivery of freight and passengers to and from the railroad.

As an abstract proposition there may be some doubt of the power of a corporation organized solely for railroad purposes to own and run steamers. The instruction, for this reason, may have been too broad (*Vandall v. South S. F. Co.*, 40 Cal. 88), but in view of the express power given by the articles, as above mentioned, it could not have been prejudicial in the present case; for the articles gave plaintiff that power. It was proper to take into consideration the probable needs of the plaintiff to have wharves for the passage of freight and passengers to and from its cars and steamers upon the river, in determining the area necessary for such wharves.

[26] 8. Other instructions directed the jury that they could allow such quantity of land for wharves as they should believe reasonably necessary to accommodate the future business of the road in delivering and receiving freight to and from its cars to such steamers as they believed would probably be plying upon the river. These instructions were also objected to, and a like objection

was made to all evidence as to the probability of business from that source. We think the instructions were properly given and the evidence properly admitted. The objection is based upon the proposition that there is no allegation in the complaint that the land, or any part of it, was needed for the use of steamers or steamer lines. Such specific allegation was not necessary. There was a general allegation that the land to be taken was all necessary for the proposed railroad, and there were specific allegations that certain parts of the tract were necessary for certain specified uses pertaining, respectively, to the construction or operation of the road, including freight wharves and sheds. This, of course, referred to the needs of the plaintiff's railroad, and not to the needs of any connecting railroad or of any steamers delivering or receiving freight to or from its cars. It was appropriate for the plaintiff to procure and maintain all facilities necessary for the accommodation of its customers, whether those customers were freight producers or public carriers. In support of its averments the plaintiff might show that steamers were, or probably would be, plying upon the river, that they would wish to receive freight from plaintiff's cars, or deliver freight to them, and that it would be reasonably necessary for the conduct of said railroad business that the plaintiff should have sufficient wharves whereon to place such goods temporarily in the course of such delivery, and by means of which to pass them to and from the cars and steamers, respectively. We find no error in these rulings.

[27] 9. On the question of the necessity of the taking, evidence was also admissible of the nature of the country through which the road would pass and of the territory which would probably contribute freight and passengers to the road for carriage, of the amount and character of the products which such territory would probably yield at the present time and in its probable future growth and development, and of the volume of passenger traffic probable from such territory, and, generally, of all other facts that would tend to show the amount of traffic to be handled by the plaintiff's railroad within a reasonable time in the future. The plaintiff has undertaken to serve the general public as a carrier of freight and passengers over its lines. It is entitled to take the necessary land to enable it to perform its full duty in that regard, both at the present time and in the future, so far as the present and future demands upon its facilities can be determined with reasonable probability. It was largely a matter within the discretion of the trial court how far the plaintiff should be allowed to go into minute details on this subject. We perceive no abuse of discretion in its action.

These propositions cover many objections to the admission of evidence. They include the evidence of the probable production of

factories and quarries, arrangements with connecting roads for freight and passenger traffic, the feasibility of reclaiming swamp and overflowed lands and thereby increasing their production, the probability of such reclamation, with the means whereby it could be accomplished and the measures taken by others for that purpose, the needs from probable traffic to and from the city of Sacramento over plaintiff's wharves and its cars, the area required for yardage, and comparisons with the yards of other similar railroad systems in actual operation, accompanied with proper explanations of the differences between the two systems, and also of the uses to be made of the spaces or passageways aforesaid between the wharves. There may be other details to which objection was made which come within the same rule which have escaped our notice because of the large number of such objections. We need not enumerate them.

[28] 10. On defendants' cross-examination of Mr. Gregory, president of the plaintiff, he had testified, in effect, that the Sacramento & Woodland Railroad Company had projected a line of railroad from Woodland to Sacramento, connecting with plaintiff's road near the bridge of the plaintiff on the land in controversy, and that plaintiff proposed to receive the cars of said company at this said connection and run them from thence to the city of Sacramento and other places over plaintiff's line. Defendants endeavored to have him testify that a part of the land to be taken was to be used by said company as its own property and for the construction and operation of its own road instead of the plaintiff's road, but he insisted that this was not true. In view of this cross-examination, it was proper to permit him, on re-direct examination, to explain that the Woodland Company was then constructing its line, and to show that the plaintiff's road would obtain business from the Sacramento and Woodland Railroad when it was completed.

[29, 30] 11. Mr. Dozier, a witness for plaintiff, testified at great length, the record thereof covering 254 typewritten pages. His testimony showed that he was a civil engineer by education and occupation; that he had had some 10 years' experience in the laying out, construction, and operation of interurban railroads in California, that he was familiar with the effect of such roads in building up and developing a new region and increasing the traffic therein and in drawing freight and passenger business from established lines of steam railroads; also that he had traveled over a great part of the counties through which plaintiff's road ran, and had made investigations as to the products and capabilities of production of said territory and the probability of shipments therefrom. A report of the State Agricultural Society purporting to show the amount, in tons, pounds, or measures, of the products of those counties was introduced in connection with

his testimony. He was then asked to state his opinion as to the proportion of these products that would probably be shipped over the plaintiff's road when constructed. The court, over the objection of defendants, allowed him to answer. We think his opinion was admissible. The effect of electric roads in the settlement and development of the country they penetrate and in obtaining traffic previously going to other railroads is not a matter of common knowledge. The subject is comparatively new, and the mass of the people have had no occasion to inquire concerning it or become familiar with it. The operation of railroads is a business of itself, and its effects are not well known, except by those who have actual experience and have studied the subject in connection therewith. Especially is this true with respect to inter-urban railroads which are the result of recent inventions. It may well be termed a "trade" within the meaning of subdivision 9 of section 1870 of the Code of Civil Procedure, allowing opinion evidence.

"Witnesses who are skilled in any science, art, trade or occupation, may not only testify to facts, but are sometimes permitted to give their opinions as experts. This is permitted because such witnesses are supposed, from their experience and study, to have peculiar knowledge upon the subject of inquiry which jurors generally have not. * * * To warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have." *Ferguson v. Hubbell*, 97 N. Y. 513, 49 Am. Rep. 544; *Young v. Johnson*, 123 N. Y. 233, 25 N. E. 363; *Excelsior, etc., Co. v. Sweet*, 57 N. J. Law, 231, 30 Atl. 553. "When this experience is of such a nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference. * * * It is not because a man has a reputation for superior sagacity and judgment, and power of reasoning, that his opinion is admissible. * * * It is because a man's professional pursuit, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt." *New England Glass Co. v. Lovell*, 61 Mass. (7 Cush.) 321. See, also, *Ellis v. Tone*, 58 Cal. 302; *Judson v. Giant Powder Co.*, 107 Cal. 561, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; *Greenleaf v. Stockton, etc., Works*, 78 Cal. 610, 21 Pac. 369; *Howland v. Oakland, etc., Co.*, 110 Cal. 521, 42 Pac. 983; *Barnum v. Bridges*, 81 Cal. 607, 22 Pac. 924; *Chico Bridge Co. v. Sacramento, etc., Co.*, 123 Cal. 184, 55 Pac. 780.

The jurors in the present case could have little or no knowledge on this subject. The amount of such business had a direct bearing on the question of the necessity of taking the whole of the land, a proposition which the defendants stubbornly contested, and without aid from those conversant with such matters the court and jury would have been left almost entirely to conjecture. The testimony was properly admitted.

[31] The State Agricultural Society is a state institution and among its duties prescribed by law is that of collecting information and statistics relating to the agricultural resources and material interests of the state and making a report of the same to the Governor. Stats. 1880, 49; Pol. Code, §§ 332, 705, 2326; Stats. 1863, 49; Stats. 1871-72, 442. When so ordered by the state board of examiners, this report must be printed as a public document. Pol. Code, § 334. Such report is an official document and is admissible in evidence as such. Code Civ. Proc. § 1918, subd. 6; *People v. Hagar*, 52 Cal. 186. It constituted legal evidence of the facts therein stated regarding the products of the state and its subdivisions, although, of course, not conclusive thereon. 3 Wigmore on Ev. § 1671, subd. 7; *People v. Williams*, 64 Cal. 498, 2 Pac. 393; *People v. Wang*, 92 Cal. 280, 28 Pac. 270. It is not necessary to say whether or not judicial notice would be taken of it, for the portions of the report relied on were formally introduced in evidence.

12. Many expressions have come under our observation in reading over the evidence showing circumstances indicating that the railroad of plaintiff, when completed, was to be operated by electricity. The fact could be shown by circumstantial evidence as well as direct. The objections based on the assertion that there was no evidence of such fact are therefore without foundation, and need not be further considered.

[32] 13. A map prepared by the witness Tibbetts, purporting to show the land below the flood line in the Sacramento valley, was admitted in evidence over the defendants' objection that it was not proven to be correct, or to have been compiled from legal or official sources. Parts of this map had been colored yellow, parts green, and parts red, by the witness. He testified that he was a civil engineer, that he had been many times up and down the Sacramento river, had seen most of the lands contiguous thereto, was familiar with all the reclaimed lands delineated upon the map and with most of those in process of reclamation and susceptible of reclamation as marked thereon, that in a general way he was familiar with the country lying along the Sacramento river, and had been over it many times, that the map on which the colors were displayed was a printed map issued by a firm in San Francisco, and that, aside from the coloring, it was an accurate map of the lands lying along the river so far as he knew; that he had been the engineer for a number of railroad and other corporations, having headquarters in Sacramento for some years; that studies had been in process for a year or more in his office to determine the amount of land reclaimed, being reclaimed, and capable of reclamation, respectively; that the data he had put on the map was based partly on personal observation, partly on data gathered by surveying parties under his immediate

direction, and partly on a compilation from various reliable sources; and that he had been over most of the land personally. He then testified that the part in yellow correctly showed the reclaimed land, that not all of it was compiled from his personal observation, but that the part not so prepared was made from the most accurate sources of information he could get, and that he could point out the parts that had come under his personal observation; that all of many reclamation districts and some portions of every district had been seen by him; that he had been over every one of the tracts in green representing the land then being reclaimed, and that they correctly showed such land; that the red parts showed the unreclaimed land subject to overflow; that he had delineated the outline of lands subject to overflow in large part from original surveys, in large part from observation, and the balance from data from the principal reports bearing upon the reclamation in the Sacramento valley. He then stated that from his own observation and surveys he could state that all land marked as susceptible of reclamation, but not reclaimed, except 125,000 acres, was susceptible of reclamation. He was not asked to point out the parts of the reclaimed land that had come under his personal observation. But on cross-examination, it appeared that he had used official governmental reports in compiling the map, and that he was very familiar with the condition of the country shown on the map. Taking his evidence as a whole, we are of the opinion that a sufficient foundation was laid to qualify the witness to state approximately the respective areas of reclaimed and unreclaimed land and for the introduction of the map for the information of the court and jury. The evidence had some bearing upon the question or the future business of the road and the necessity for the proposed taking. It was not a subject upon which accurate and precise information or evidence could easily be produced, and for the purpose of the case an approximate estimate of the respective areas of the different kinds of land was all that the law would require to be shown. It was within the discretion of the court to allow the evidence, although its bearing on the question at issue was somewhat remote.

[33] 14. The witnesses Jubb and Hecke were properly permitted to testify to the approximate quantity of freight handled at Sacramento. They based their estimates on investigations they had made by inquiries of shippers and others engaged in the freighting business, on the testimony of other witnesses in the case, and on the reports of United States engineers appointed to investigate the subject and ascertain the advisability of reclamation works by the federal government. As we will presently show, the question of the qualifications of a witness to testify to his opinion on such subjects is a

matter largely within the discretion of the court. The facts shown should not be proven in detail by calling on the producers and shippers engaged in the trade at Sacramento, without prolonging the trial to an unreasonable length. In any event, an approximate estimate was all that could or need have been procured. We think, therefore, that the opinion of these witnesses, after the investigation they had made, was proper evidence of the facts which the court and jury would be called upon to review in determining the question of necessity. Its bearing on the question was remote, but as it had some tendency to show the necessity, it was admissible for that purpose, though of small consequence.

[34] 15. The court did not err in admitting in evidence the report of J. G. White & Co., made to the plaintiff company. The objection appears to be based on the fact that it contained statements of the probable tonnage of freight coming from the counties through which the plaintiff road will run. It appears, however, that it was not offered to show those facts but for a limited purpose. Wallace, the engineer who laid out the plan of tracks and other structures to be placed by plaintiff on the land in controversy for the operation of its road and upon which the plaintiff based its claim to condemn the land, testified to the various uses to which the several tracts comprised in the land were to be put. On cross-examination by defendants, he stated that this report was furnished him by plaintiff to use in fixing the quantity of land necessary for a terminal for the railroad at that place and in laying it out, and that he used the same in estimating the structures and quantity of land that would probably be required, and made his plan accordingly. The general purpose of the cross-examination appeared to be to show that he had made the plans larger than necessary, so as to occupy more ground than the road would use. On redirect examination the report was admitted in evidence in explanation of the witness' previous testimony. It was competent for that purpose, though unimportant in its bearing on the case. It would be incompetent as evidence of the tonnage of freight, but we do not understand that it was offered as evidence of those facts. On the contrary, it was explicitly stated that it was offered only to explain why it was that Wallace had fixed upon the land sought to be condemned as the area of land necessary for the plaintiff's use.

[35-37] 16. A number of persons called as witnesses for plaintiff were allowed to give opinions as to the value of the property, after an examination to disclose their qualifications to give such opinion. To this ruling defendants excepted. One Johnson was called as a witness for the defendants on the same subject. He was examined concerning his qualifications, and the court thereupon refused to allow him to give his opinion. To

this ruling also defendants excepted. It is claimed that his testimony as to his qualifications was not materially different from those of the aforesaid witnesses for the plaintiff, and that one or the other of the rulings must necessarily be erroneous.

The question whether or not a witness is qualified to give his opinion, as evidence upon a matter in issue, is submitted to the trial judge in the first instance, and is to be determined by him before such opinion may be given. *Fairbank v. Hughson*, 58 Cal. 314. It is, in itself, in the nature of a trial of a question of fact, by evidence addressed to the judge alone, and, as in other decisions on questions of fact by a trial court, his ruling thereon is a matter of discretion, and will not be overturned on appeal unless there was an actual want of evidence to support it or a clear abuse of discretion in ruling upon the evidence given on the subject. *Howland v. Oakland, etc., Co.*, supra, 110 Cal. 521, 42 Pac. 983; *Mabry v. Randolph*, 7 Cal. App. 427, 94 Pac. 403. If there is any substantial evidence to sustain the ruling, the exception thereto will be disallowed. *Conness v. Commonwealth*, 184 Mass. 544, 69 N. E. 341; *Klous v. Commonwealth*, 188 Mass. 152, 74 N. E. 330; *Omaha, etc., Co. v. Douglas County*, 62 Neb. 7, 86 N. E. 936; 1 *Wigmore on Ev.* § 560; 1 *Gr. on Ev.* (16th Ed.) § 430f; 2 *Elliott on Ev.* §§ 1036, 1037; 17 *Cyc.* 31. The witness Johnson had less knowledge of values than the witnesses testifying for the plaintiff. He had no actual knowledge of any sales of land on the Yolo side of the Sacramento river. Until two years before the trial he had lived on a ranch five miles north of Sacramento. He had never been on the land except during a flood a few months before the trial. At most he had only such general knowledge of the subject as any ordinary citizen of Sacramento might have. It may be admitted that if the court had decided the other way the decision would, in like manner, be sustained, but we must sustain the decision unless an abuse of discretion appears, and we cannot say that it is here shown. It does not appear that qualified witnesses on the subject were at all difficult to obtain. Before this witness was called the defendants had already called seven witnesses who had testified on the subject of value. Hence, even if the ruling had been clearly erroneous, we cannot say that it was sufficiently prejudicial to warrant a reversal.

The foregoing comprise a small proportion of the exceptions taken to the rulings during the trial, and mentioned in appellants' briefs. Those not here noticed are either covered by what has been said, or they are so trivial as to require no mention.

[38] 17. Objection is made to an instruction stating that, as the power of eminent domain is necessary for the public good:

"It would be unjust to the public that the plaintiff should be required to pay the owner more than a fair indemnity for the loss he sus-

tains by the appropriation of his property for the general good. On the other hand, the owner being compelled to part with his property, whether he desires to sell or not, the law allows him just compensation therefor."

The criticism of this instruction is that it is argumentative. The proposition stated in the instruction is correct, and we see no objection to the jury being so informed. It was not improper to instruct the jury that they should allow the owner of the land just compensation and that the public interest demanded that he should receive no more. This was the substance of the instruction.

[39] The next objection is to an instruction regarding opinion evidence. It directed the jury to weigh the testimony of witnesses giving opinions as to value—

"by reference to the whole situation of the property and its surroundings, and all the surrounding circumstances, and by applying to it your own experience and knowledge. While you cannot act in any case upon particular facts material to its disposition resting in your private knowledge, but should be governed by the evidence adduced, you may and should judge of the weight and force of the evidence upon your own general knowledge of the subject of the inquiry."

It is argued that this would lead the jury to fix the value of the land by their own knowledge of the subject irrespective of the evidence in the case. The jury were many times instructed that they must determine the facts in the case in accordance with and upon the evidence. The instruction quoted forbids them from acting on particular facts resting in their own knowledge. It is evident from the other instructions referred to that this instruction as a whole could reasonably be understood to mean nothing more than that it was that knowledge and experience which the jurors had in common with men in general that they were to apply in weighing the evidence. This proposition is conceded to be correct.

[40] There was no error in instructing the jury that in determining the questions of necessity they should take into consideration the character of the business proposed to be done by plaintiff's railroad and the manner of doing it and the future needs of the communities which the plaintiff would serve, and that in so doing they could consider the number of persons to be served by the plaintiff and its road. All these things had a direct bearing upon the probable area required by the plaintiff for its terminal at Sacramento.

[41] The appellants complain of certain instructions which, it is contended, directed the jury that, in determining the question of necessity, they should consider that plaintiff was entitled to take a strip 165 feet wide across the land solely for the purpose of placing its main tracks and necessary side tracks thereon, although they should find that the entire width was not required for such tracks, and that for other purposes, the adjuncts and appendages, they could allow the additional land necessary, without re-

quiring plaintiff to use any of the said strip for such other purposes, although they might believe that it could do so without injury to its business. The most that can be said in favor of this objection is that the instructions, considered together, are not entirely clear. One of them expressly declares that the plaintiff is entitled to a 165-foot strip, "if necessary for its right of way." We do not think the instructions need be construed, as the appellant claims and as the court itself, after several weeks of consideration, found that the strip was required for the main line and necessary side tracks, the error, even if the instruction had been clear to the effect asserted, would not justify a reversal of the judgment. The latter proposition applies to other instructions, which we do not expressly mention, on the subject of necessity for the taking. But we are not to be understood to say that they are in fact erroneous. Some of them may be ambiguous, but we do not think they were misleading to the jury.

[42, 43] 18. The action was commenced and the summons issued on May 5, 1910. In this connection the court instructed the jury that in determining the compensation to be given the defendant, they must consider the value of the land as it was at the date of the commencement of the action. This was in exact accordance with the provisions of section 1249 of the Code of Civil Procedure as the section stood at the time the action was begun. It then provided that, for the purpose of asserting the compensation, the right should be deemed to accrue at the date of the summons, and that the actual value of the property at that date should be taken as the measure of compensation. Afterwards, by an amendment taking effect June 9, 1911 (St. 1911, p. 842) the following clause was added to the section:

"Provided, that in any action in which the issue is not tried within one year after the date of commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. Nothing in this section contained shall be construed or held to affect pending litigation."

If the last sentence of this proviso is to be given effect, the amendment does not apply to the case at bar, inasmuch as it was pending at the time the amendment was enacted. The argument on this point is that the provision is unconstitutional because, if allowed to be effective, it would constitute class legislation; that persons whose property was taken by actions begun before the amendment would have the compensation fixed by the value at the time the action was begun, whereas those whose property was taken by

actions begun after the amendment would come under the proviso, if the case was not tried within one year after its commencement. We think this argument is without merit. The fact that cases were pending at the time the amendment was enacted, concerning which rights may have accrued or negotiations may have been in progress, sufficiently distinguishes such cases as a separate class, entitled to different provisions from those prevailing in actions to be begun thereafter. *Gridley v. Fellows*, 166 Cal. 769, 138 Pac. 355. Furthermore, there is nothing in the record to show whether or not the delay in the trial was caused by the defendant. Since it was incumbent upon the appellant to show error by the record, the presumption must be that the delay was caused by the defendant, and that the action of the court below was proper under the circumstances then appearing, if we concede that the provision is to be taken as valid. If it is invalid, then the entire proviso on that subject must be eliminated and the section would stand as it was before the amendment. In either case, the instruction would be correct.

[44] 19. For the right of way for main tracks and the necessary side tracks and other tracks for chutes, yards and storage purposes, the judgment gives the plaintiff only an easement in the land. For that part of the land to be used for a storehouse, a blacksmith shop, a machine shop, wharves, offices, and other purposes requiring the construction of substantial buildings thereon, a fee-simple estate was condemned. We perceive no error in this. Section 1239 of the Code of Civil Procedure provides that a fee may be taken when land is condemned for a public use requiring the erection of "permanent buildings" thereon. The structures necessary for the purposes thus designated would be of as permanent a character as buildings for any ordinary use, and we think they are "permanent buildings" within the meaning of that section.

The purported judgment of March 23, 1912, is declared a nullity, but appellants do not recover costs on appeal on account thereof. The judgments of April 18, 1912, and of April 29, 1912, are affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.; LENNON, J., pro tem.

NOTE.—Justice SLOSS being disqualified, Justice LENNON, the presiding justice of the District Court of Appeal for the First Appellate District, participates herein pro tempore, pursuant to section 4, art. 6, of the Constitution.

26 Cal. App. 274

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO., Inc., v. JAMES J. STEVINSON. (Civ. 1250.)

(District Court of Appeal, Third District, California. Jan. 9, 1915. Rehearing Denied Feb. 8, 1915. Denied by Supreme Court March 8, 1915.)

1. APPEAL AND ERROR $\hookrightarrow$ 1195—**LAW OF THE CASE.**

A decision of the Supreme Court is the law of the case on a subsequent trial, unless there is a different state of facts or a material conflict as to the extent the decision may be conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. $\hookrightarrow$ 1195.]

2. STATUTES $\hookrightarrow$ 211—**CONSTRUCTION—HEADNOTES.**

The court, in construing sections of the Code, may consider the headnotes of the sections as a part thereof to ascertain the legislative will.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. $\hookrightarrow$ 211.]

3. EMINENT DOMAIN $\hookrightarrow$ 195—**ACQUISITION OF WATER RIGHTS—EVIDENCE—ADMISSIBILITY.**

In proceedings to condemn a right to divert water of a stream as against riparian lands of defendant, evidence of defendant's scheme of prospective reclamation and irrigation of its lands and evidence of damage to other lands than those described in the complaint, was inadmissible, where the issue tendered by the complaint involved merely the riparian right of the lands described therein, though defendant could show any damage to other lands by the diversion.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 524; Dec. Dig. $\hookrightarrow$ 195.]

4. EMINENT DOMAIN $\hookrightarrow$ 222—**EVIDENCE—INSTRUCTIONS—MISLEADING INSTRUCTIONS.**

Where, in proceedings to condemn right to divert 500 second feet of water of a river as against described riparian lands of defendant, there was evidence that plaintiff had, for many years, been taking and diverting the quantity of water sought to be taken, and had thereby acquired the right to the quantity of water against every one except defendant, an instruction that by diverting a greater quantity of water than 760 cubic feet per second plaintiff could acquire no right against the lands of defendant, but plaintiff could acquire, as against other riparian owners, the rights by prescription to take such excess of water, and if plaintiff acquired the rights of the other riparian owners by prescription, defendant had a right to use the entire flow of the river in excess of the 760 cubic feet per second, without regard to the rights of those riparian owners whose rights had been acquired by prescription, was misleading because capable of being applied to all the water of the stream except the 760 feet, which would imply that if plaintiff acquired a prescriptive right to 500 feet of water as against riparian owners except defendant, the latter had a right to all the balance of the river, without regard to the claim of any other riparian owner, and thereby tending to increase the compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 562-567; Dec. Dig. $\hookrightarrow$ 222.]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Proceeding by the San Joaquin & Kings River Canal & Irrigation Company, to ac-

quire the right to divert water of a river as against riparian lands of James J. Stevinson, a corporation. From a judgment entered on the verdict of the jury, plaintiff appeals. Reversed.

See, also, 165 Cal. 540, 132 Pac. 1021.

Frank H. Short, of Fresno, F. G. Ostrand-er, of Merced, and Edward F. Treadwell, of San Francisco, for appellant. J. C. Campbell, of San Francisco, and James F. Peck, of Oakland, for respondent.

BURNETT, J. The proceeding was in eminent domain to acquire the right to divert 500 second feet of water of the San Joaquin river as against certain described riparian lands of defendant. On the first trial it was held that the use shown was not a public use, and a nonsuit was granted, but the judgment was reversed by the Supreme Court. 164 Cal. 221, 128 Pac. 924. The court below also allowed litigation of certain rights to the waters of the San Joaquin other than the riparian right sought to be condemned, and this was likewise held by the Supreme Court to be improper. On the second trial the court submitted to the jury the question whether the use was a public use, and also whether the property was necessary to such use. As to the former the jury disagreed, but found for the defendant on the question of necessity. While the trial court struck out the answers held improper by the Supreme Court, it is claimed by appellant that it allowed one of the defendants to file an amended answer, setting up substantially the same matter—that is, alleged riparian rights of lands other than those described in the complaint, and allowed proof thereof on the trial. The appeal is from the judgment entered on the verdict of the jury.

Many of the points urged by appellant in its opening brief are unnoticed by respondent upon the theory that they are immaterial by virtue of the fact that the finding as to necessity is supported by the evidence. At least some of these questions, however, quite probably affected the jury in its determination that no necessity existed for the condemnation, and for that reason, if for no other, they deserve consideration. For instance, the relation of the question of "public use" to that of "necessity" is aptly suggested by appellant as follows:

"If the jury or any member thereof was of the opinion that the use in question was not a public use, it would certainly vote that the taking of the property was not necessary for a public use, and counsel on the argument admitted that since the jury disagreed on the question as to whether or not the use was a public use, some of the jurors at least who constituted the nine who concurred in the verdict that it was not necessary for a public use must have been of the opinion that it was not in fact a public use."

But, on the former appeal, it was said by the Supreme Court:

"The proof shows that the plaintiff proposes to distribute the water generally to the inhabitants of a very large area of the three counties mentioned chiefly for the irrigation of their lands, and also for domestic uses and for the watering of stock, and incidentally to some towns and villages which have grown up along the routes of its canals. It is one of the largest irrigation enterprises in the state, and serves water to over 150,000 acres of land. We think the use it proposes to make of this water is one for which it is authorized to exercise the right of eminent domain under section 1238" of the Code of Civil Procedure.

[1] The foregoing declaration of the Supreme Court applies with equal force to the facts revealed on the second trial. As to the public character of the use, therefore, the law was settled by said decision, and the lower court should have so held and declared. Of course, if a different state of facts had been shown or if there had been a substantial or material conflict as to the purpose and extent of said use, the said decision might not be conclusive, but we do not so read the record.

[2] Indeed the statute seems to contemplate that the question as to whether the use is a "public use" is one for the court and not for the jury. The headnote of section 1241 of the Code of Civil Procedure is: "Facts necessary to be found by court before condemnation." Among the facts therein stated is: "1. That the use to which it is to be applied is a use authorized by law." Section 1248, however, provides that "the court, jury or referee" must assess the damages. These headnotes are a part of the law, and should be consulted in interpreting the will of the Legislature. *Barnes v. Jones*, 51 Cal. 303; *Sharon v. Sharon*, 75 Cal. 16, 16 Pac. 345.

The weight of authority also seems to be in favor of the position that this question is to be determined by the court and not by the jury. In *St. Joseph Terminal Co. v. Ry. Co.*, 94 Mo. 535, 6 S. W. 691, it is said:

"It is open to the trial court, in these proceedings, to condemn property for public use, to determine whether the use sought to be made of the property is really a public use."

Other cases to the same effect from various states are cited by appellant.

Our statute defines, or at least catalogues, the various public uses for which the privilege of eminent domain may be exercised, and whether the facts disclosed by the evidence bring the case within any of these enumerated uses would seem to be a question of law to be resolved by the court. However, as already intimated, in case of a material conflict in the evidence, a mixed question of fact and of law might be presented, to the solution of which the aid of a jury could properly be called.

It is also urged by appellant that the question of necessity was one for the court and not for the jury. It is conceded, however, that the decisions in this state hold to the contrary. *Wilmington Canal & Reservoir Co. v. Dominguez*, 50 Cal. 505; *California Central Railway Co. v. Hooper*, 76 Cal.

411, 18 Pac. 599; *Spring Valley Waterworks v. Drinkhouse*, 92 Cal. 532, 28 Pac. 681; *City of Santa Ana v. Goldmacher*, 133 Cal. 395, 65 Pac. 883; *Central Pacific Ry. Co. v. Feldman*, 152 Cal. 303, 92 Pac. 849. Attention is called, however, to the fact that at the time of the earliest decisions section 592 of the Code of Civil Procedure provided as follows:

"An issue of fact must be tried by a jury unless a jury trial is waived, or a reference is ordered, as provided in this Code."

But that section was amended at the session of the Legislature in 1873-74 so as to read:

"In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, * * * or for injuries, an issue of fact must be tried by a jury unless a jury trial is waived, or a reference is ordered as provided in this Code. * * * In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code."

It is declared by appellant that:

"A proceeding in eminent domain is not one of the specific actions mentioned in the first part of section 592 of the Code of Civil Procedure but is one of the 'other cases' mentioned in the latter part of the section, and which are to be tried by the court and not by the jury. This change in the statute has been apparently overlooked in later decisions, and the decision in the *Wilmington Case* has been followed without observing that the entire basis of it has been long since removed by this change in the statute."

There is persuasive force in appellant's contention, but we do not feel at liberty to depart from the interpretation of the law as so often made and declared by the Supreme Court.

[3] There is merit, we think, in the claim that the court erred in permitting the defendant to introduce an elaborate scheme of prospective reclamation and irrigation of its lands and in allowing evidence of damage to other lands than those described in the complaint. As pointed out by appellant, by the rulings of the court the defendant was permitted to lay before the jury 7,400 acres of land not described in the complaint, for which it claimed damages in the sum of \$250 an acre, amounting to \$1,850,000. The issue tendered by the complaint involved simply the riparian right of the land described therein. The necessity for the condemnation of the right and the damage to this particular land, if said right should be taken, were all that concerned the jury. And the damages to this particular land were to be ascertained by deducting from the market value of the land as it existed at the time of the issuance of the summons the market value it would have if deprived of this riparian right. It is manifest that these values would rest largely for their support upon the opinion of qualified witnesses, and the method of proof is simple and familiar. The vast range of inquiry permitted upon this ques-

tion of damages must have been confusing and disconcerting to the jurors, and, since the comparative cost of acquiring the property, and of cementing the canals so as to prevent seepage, was made an important element in the determination of necessity for the taking, it is believed that said errors were prejudicial.

We do not mean, of course, to say that respondent is without redress for any damage that may be done to other lands by the diversion of the 500 second feet of water, but that question, as we conceive it, is not in this case. It is as important, probably, in a condemnation suit as in any other to confine the trial to the issues involved. The peculiar circumstances of this case, not necessary to detail, seem, indeed, to emphasize the propriety of confining the evidence within the well-defined limits of juridical procedure.

Much time at the trial was devoted to the effort to show that it was practicable and feasible for plaintiff to cement its canal or canals and thereby prevent waste of the water to such extent that the additional 500 second feet would not be required. By the instructions of the court the jury was left free to adopt this theory, and it is quite probable that the verdict reflects this view. It is the contention of respondent that there is no law which determines whether a canal shall be lined to prevent seepage. The question is one of law and of fact. The "public use" does not consist of the canal or conduit, but it does mean the use of the water by the public and the canal is a mere incident to the use. "The law contemplates that water may be conducted by means of canals, ditches, dams, impounding, flumes, aqueducts, and pipes. But whether in one or the other of these the means must be 'reasonably fit' for the purpose to be served." And it is urged that this principle that the means must be reasonably fit for the purpose furnishes the elasticity as to the expense to be incurred in various parts of the state. The law applies alike to all sections, but the facts surrounding the condemnation in each locality will determine the character of the conduit to be required and the amount of expense in its construction that may be exacted. "The conservation of water at great expense under some circumstances would be unreasonable. The waste of water under some circumstances would not be reasonable, and a canal constructed under such circumstances that would permit of waste would not be reasonably fit for its purpose." Respondent contends that condemnation would not be permitted of a large quantity of water when the proposed canal is "reasonably unfit" simply because loss will be unavoidable in the particular canal, that an unfit canal has no right to condemn more water than a reasonably fit canal, and that the question for the jury was what quantity of water would be necessary to supply the public through a

"reasonably fit" canal. On the other hand, it is the contention of appellant that:

"The right to condemn water for canals gave plaintiff the right to condemn on behalf of earthen canals and loss by seepage and evaporation is necessarily incident to such canals."

It is claimed that subdivision 3, § 1238, of the Code of Civil Procedure, under which the proceeding was brought, provides that the right of condemnation may be exercised on behalf of "canals, aqueducts, flumes, ditches or pipes," and that this was enacted in 1872 when earthen ditches and canals were practically the only means of carrying water for irrigation, and said section must therefore have contemplated that character of conduit. *Barrows v. Fox*, 98 Cal. 63, 32 Pac. 811, is quoted, wherein it is said:

"Plaintiffs have the right to divert from the stream a quantity of water sufficient to yield at the place of use the quantity required after the loss by absorption and evaporation of so much thereof as is necessarily so lost in a ditch or flume well constructed and kept in good condition. Ditches and flumes are the usual and ordinary means of diverting water in this state, and parties who have made their appropriations by such means cannot be compelled to substitute iron pipes, though they may be compelled to keep their flumes and ditches in good repair so as to prevent any unnecessary waste."

Middelkamp v. Bessemer I. Co., 46 Colo. 102, 103 Pac. 280, 23 L. R. A. (N. S.) 801, is also cited, wherein it is held:

"That seepage from an irrigation ditch may be prevented by fluming or cementing the portions where the seepage occurs does not render the ditch without such protection a nuisance to neighboring property."

Neither of said cases involved the exercise of eminent domain, but the principle therein announced would no doubt apply generally to the condemnation of water to be conducted in a canal already constructed. But, after all, the circumstances of a particular case might be such that a court could say that the canal was not "reasonably fit" or "in good repair," unless it were lined with cement or other impervious material. The condition of the soil, the development and progress of the community, the comparative cost of the condemnation, and the proposed improvement of the conduit, and probably other elements, should be considered in determining whether it is reasonable to exact such utilization of the available resources in order to prevent waste. It is difficult to believe that the law would permit extravagant waste of water where it is scarce and valuable if such waste could be prevented by any reasonable and practicable improvement to the canal through which it is distributed and, under some circumstances, it would be fair and just to require such canal to be cemented in order that the water might be utilized to the fullest extent. The rule can be stated only in general terms, of course, and probably respondent's designation of the required canal as "reasonably fit" can be accepted. The general principle is well expressed in *Spring Valley Waterworks v. San Mateo Waterworks*,

64 Cal. 133, 28 Pac. 447. Therein it was said:

"Unquestionably, where the object of public use is a supply of fresh water, the public have the right to an unstinted supply, and the corporation to whom has been granted the franchise to furnish the supply has the capacity to appropriate private property for that purpose. But its capacity is limited to the real necessity which exists for the appropriation."

The court proceeds to state that by the evidence it appeared that plaintiff had unutilized sources that were available, and that it was entirely practicable for it so to utilize them as to increase the supply to a comparatively unlimited extent, and that it was the duty of plaintiff to do so before taking additional private property. It was also declared that a corporation in charge of such use could not condemn whatever it might find convenient and profitable to acquire, on the ground merely that it might save expense. The principle stated in that case seems no different from the rule contended for by respondent that there should be utilization and conservation of sources of supply and of the supply itself by every means available, practicable, and reasonable. The rule is, of course, elastic, as suggested by respondent. Indeed, it is so elastic that in view of the variant circumstances of different cases the decision in one case may be of little assistance in the determination of another.

But respondent concedes that the question whether the corporation in charge of the public use can be required to cement its canal is one of comparative cost and the question is affected also by the abundance or scarcity of water. It would seem to be a reasonable view that if the damage done to the property owner were trivial or small in comparison with the cost of the improvement to the canal, or if the property owner were not appreciably injured by the delivery of the water through earthen canals, he would be in no position to demand the more expensive and economical method or system. Herein is an additional reason for confining the evidence of damage within proper bounds. If this had been done, it might have appeared, as claimed by appellant, that the remuneration to which respondent was entitled was so small as to render it absurd to contend that appellant should be subjected to the great expense of cementing its waterway.

Again, it is urged by appellant that:

"The evidence in this case shows that during the spring and summer months there is a flow of from 5,000 to 10,000 second feet of water in the San Joaquin river past the swamp and overflowed lands of the defendant, and that that amount of water has constantly flowed during the 40 years during which the defendant has owned the lands. Not a drop of it has ever been diverted or artificially used to irrigate the land, but, so far as the evidence in this case is concerned, flows over and past the land and then to the sea. * * * If the question is to be determined upon any rule of plentifulness of water, we would ask the court if it knows of

any place in the state where any greater showing of plentifulness could be shown?"

This consideration is certainly entitled to careful attention if the question of whether the canals should be cemented or otherwise lined is to be submitted at all to the jury. If a sufficient supply of water is available to defendant at a trifling cost that will compensate or more than compensate for the loss of the riparian right in controversy here, the public should not be burdened with the great expense involved in the reconstruction of plaintiff's canals. On the contrary, this improvement should be deferred until the advancing necessities and the increased and increasing appropriation and utilization of the water make such demand reasonable and just.

[4] Appellant indulges in a great deal of criticism as to instructions given and refused. With reference to this feature of the case the general observation may not be inappropriate that the instructions given cover more than 100 pages of the transcript, and if, after being hurriedly led by the court through this maze of intricate and technical law, the jurors emerged with a clear and accurate conception of the essential principles of the case, they are certainly entitled to commendation as men of more than ordinary acumen. It does seem unfortunate that, in a cause involving two or three simple issues, it should be deemed necessary or advisable to request such voluminous and multitudinous instructions. It may be remarked, also, that, in view of the difficult and embarrassing situation presented to the trial court, it would not be strange if some error could be found in the selection by the court of those deemed proper to submit to the jury. We cannot undertake to notice specifically the various assignments of error in that respect. We content ourselves with referring to this instruction given on request of the defendant:

"By diverting a greater quantity of water than 760 cubic feet per second, the plaintiff could acquire no right against the lands of defendant, that are described in the complaint, but plaintiff could acquire, as against other riparian owners, the rights by prescription to take such excess of water. And if the plaintiff did acquire the rights of the other riparian owners by prescription, or otherwise, then the defendant would have a right as between it and plaintiff to use the entire flow of San Joaquin river in excess of said 760 cubic feet per second, and, that too, without regard to the rights of those riparian owners whose rights had been acquired by prescription by the plaintiff."

The occasion for this instruction is stated by appellant to have grown out of the circumstance that the evidence showed that the plaintiff had, for a great many years, been taking and diverting the quantity of water here sought to be taken, and it was argued by the plaintiff that it had already acquired the right to do this against every one except the defendant as to the riparian right described in the complaint. If the instruction had been confined to the said 500 feet, plaintiff could not complain, because it is certain-

ly true that defendant's riparian right to said water could not be adversely affected by plaintiff's prescriptive title as against other riparian owners. Of course, though, it may be said that it should not be necessary to give such an instruction. But the instruction seems quite capable of application to all the water of the stream except the said 760 feet. That would imply that if the plaintiff acquired a prescriptive right to said 500 feet of water as against all other riparian owners except defendant, the latter would have the right to all the balance of the river without regard to the claim of any other riparian owner. That proposition was doubtless not intended, but it may have been so understood by the jury, and it may have been a factor in magnifying the damages to defendant and thereby affecting the theory of comparative cost already adverted to.

Many questions that we have not considered have been discussed by counsel, but it is deemed inadvisable to notice them at this time.

We consider it just that a new trial should be had, and we express the hope that if the cause is tried again a much simpler and shorter record may be made.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

26 Cal. App. 274

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO., Inc., v. JAMES J. STEVINSON. (Sac. 2313.)

(Supreme Court of California. March 10, 1915.)

1. EMINENT DOMAIN ⇐198—PROCEEDINGS—QUESTIONS FOR COURT AND JURY.

In eminent domain cases, the only question for the jury is the question of compensation, and all other issues are for the court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 525, 526, 528, 535-539; Dec. Dig. ⇐198.]

2. EMINENT DOMAIN ⇐198—ACQUISITION OF WATER RIGHTS—WASTE OF WATER—QUESTIONS FOR COURT.

In proceedings to condemn a right to divert water of a stream as against riparian rights, questions whether the water which plaintiff has acquired the right to take is sufficient for its public use, if carried and distributed without unreasonable waste, and whether plaintiff's canal will unreasonably waste the water sought to be condemned, and the quantity necessary for its use, are for the court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 525, 526, 528, 535-539; Dec. Dig. ⇐198.]

3. EMINENT DOMAIN ⇐198—COMPENSATION—OBLIGATIONS IMPOSED ON PLAINTIFF.

No unreasonable expense should be imposed on a public service water company seeking to condemn a right to divert water of a stream as against riparian rights, and whether the company should be required to cement its canals to prevent waste by seepage must be determined by the trial court, in view of all the facts.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 525, 526, 528, 535-539; Dec. Dig. ⇐198.]

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

On petition to transfer cause to the Supreme Court for rehearing. Denied, and opinion and decision of the District Court of Appeals modified.

For opinion of the District Court of Appeals, see 147 Pac. 254.

Frank H. Short, of Fresno, F. G. Ostrand-er, of Merced, and Edward F. Treadwell, of San Francisco, for appellant. J. C. Campbell, of San Francisco, and James F. Peck, of Oakland, for respondent.

PER CURIAM. The petition to transfer this cause to the Supreme Court for a rehearing is denied. The opinion and decision of the District Court of Appeal is, however, modified, in effect, in the following particulars:

[1] In so far as that opinion holds that the issue as to the necessity for the taking of the property sought to be condemned must be submitted to a jury, unless a jury trial thereof is waived, it is erroneous. The rule is that in cases of eminent domain all questions, except those necessary to determine the compensation to be made to the owner for his property taken or damaged, are to be determined by the court. See Vallejo, etc., Co. v. Reed Orchard Co., 147 Pac. 238 (Sac. No. 2077), decided March 5, 1915.

[2] This necessarily includes, among the questions triable by the court without a jury, the question whether the plaintiff's canal will unreasonably waste the water to be condemned and the quantity necessary for the use, after allowing for unavoidable waste; also the question whether the water which the plaintiff already has acquired the right to take would be sufficient for its public use, if carried and distributed without unreasonable waste.

[3] There is considerable discussion in the opinion of the district court with respect to the claim of respondent that the plaintiff should be required to cement its canals to prevent waste by seepage. Its purport on this point is not as clear as could be wished. Inasmuch as the case is remanded for a new trial and these questions are thereupon to be determined by the court below, without a jury, we think all of the discussion on that subject would better have been omitted, and we deem it advisable to declare that nothing said about them in the opinion is to be regarded, on the new trial, as the law of the case, and that the court below be left free to decide the case unhampered in this respect. They are questions of fact to be decided in each case upon all the circumstances. No unreasonable expense should be imposed on the public service company.

169 Cal. 616

HADACHECK v. ALEXANDER, Mayor, et al. (L. A. 3456.)

(Supreme Court of California. March 13, 1915.)

MUNICIPAL CORPORATIONS $\hookrightarrow$ 111 — ORDINANCES—VALIDITY—MOTIVES OF MEMBERS OF CITY COUNCIL.

Motives of members of a city council adopting an ordinance regulating an occupation and prohibiting the pursuit thereof in a residential district will not be inquired into in determining the validity of the ordinance, the propriety of which is solely for the council.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 245-256; Dec. Dig. $\hookrightarrow$ 111.]

In Bank. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by J. C. Hadacheck against George Alexander, Mayor of the City of Los Angeles, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

G. C. De Garmo and J. W. McKinley, both of Los Angeles (W. R. Millar, of Los Angeles, of counsel), for appellant. Albert Lee Stephens, City Atty., John W. Shenk, and Charles H. Hass, all of Los Angeles, for respondents.

PER CURIAM. This is an action in which plaintiff sought a judgment in injunction restraining the defendants from putting into operation a certain ordinance of the city of Los Angeles which, for convenience, may be called the "Brickyard Ordinance." He failed to secure the judgment he sought, and prosecutes this appeal from the adverse judgment entered against him.

Under writ of habeas corpus sued out by this appellant the general question of the validity of the ordinance was considered and decided against him. *Ex parte Hadacheck*, on Habeas Corpus, 165 Cal. 416, 132 Pac. 584. It is contended, however, that the decision on habeas corpus is not conclusive, for the reason that upon this appeal from a civil judgment evidentiary matters may be considered—matters not open for consideration under the writ—and that, giving due consideration to those matters, it will be determined that this ordinance is unreasonable and oppressive, and therefore void. The evidence here referred to is quoted at length in the brief, and consists, for the most part, of the declarations of one of the members of the city council of the city of Los Angeles who voted for the enactment of the ordinance in question. It is contended that the evidence of this councilman shows an ignorance of the actual conditions existing; an ignorance of the very boundaries of the district in which the maintenance of brick making was prohibited; an ignorance of operation of the ordinance upon all those to be affected by its terms and similarly situated to this appellant, sufficient to invalidate the ordinance—the contention herein being that the testimony of this councilman leads to the conviction

that, at the instigation of some individuals, an ill-digested ordinance was hastily prepared and passed, to meet their complaints. It is, however, the general, if not the universal, rule that the motive of the legislator may not be inquired into. His conduct is to be judged by the expression which it takes in the enactment adopted, and, as was said in *Ex parte Hadacheck*, supra, 165 Cal. 420, 132 Pac. 586:

"Whether or not this trade, however strictly the manner of its conduct may be regulated, can be pursued at all in a residential district without causing undue annoyance to persons living in the district, is certainly a question upon which reasonable minds may differ. If this be so, the propriety of entirely prohibiting the occupation within such districts is one for the legislative determination. The courts will not substitute their judgment upon this issue for that of the legislative body."

Wherefore the judgment appealed from is affirmed.

169 Cal. 580

MORRISON v. LAND et al. (Sac. 2259.)

(Supreme Court of California. March 6, 1915.)

1. **WILLS** $\hookrightarrow$ 58—AGREEMENTS TO MAKE.

One may make a valid contract with another to devise or bequeath property by his last will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 164, 165; Dec. Dig. $\hookrightarrow$ 58.]

2. **WILLS** $\hookrightarrow$ 67 — AGREEMENTS TO MAKE — BREACH.

In event of breach of a contract to devise or bequeath, the party damaged has an action at law for the damage, and in special cases may maintain a suit in equity for specific performance.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 175-177; Dec. Dig. $\hookrightarrow$ 67.]

3. **EXECUTORS AND ADMINISTRATORS** $\hookrightarrow$ 224—PRESENTATION OF CLAIMS—NECESSITY.

Where an agreement to give by will is breached, and the party damaged is restricted to an action at law, he is a creditor, having a claim against the estate arising upon contract, within Code Civ. Proc. § 1490 et seq., requiring presentation of such claims to the executor, administrator, and judge, and, in the absence of such presentation, cannot recover.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 768-788; Dec. Dig. $\hookrightarrow$ 224.]

4. **EXECUTORS AND ADMINISTRATORS** $\hookrightarrow$ 443—ACTIONS AGAINST—COMPLAINT.

A complaint in an action for damages for breach of contract to give by will must allege presentation of the claim to the executor or administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1798-1811, 1823-1830, 1842-1845, 1848; Dec. Dig. $\hookrightarrow$ 443.]

5. **SPECIFIC PERFORMANCE** $\hookrightarrow$ 86—RIGHT TO SPECIFIC PERFORMANCE.

As specific performance of a contract will be granted only where the legal remedy is inadequate, specific performance of a contract to make a money bequest by a will in consideration of plaintiff's continuing to act as assistant manager of deceased's hotel cannot be had; for the legal action for damages affords complete relief.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 223, 224; Dec. Dig. $\hookrightarrow$ 86.]

6. SPECIFIC PERFORMANCE 4—RIGHT TO—STATUTE.

Civ. Code, § 3384, which, as originally enacted, declared that, except as otherwise provided in the article, specific performance of a contract might be compelled, and further provided that, when the act to be done was such that pecuniary compensation for nonperformance would not afford adequate relief, specific performance could be had. The section was later amended by striking out the latter provision. *Held*, that the amendment did not change the law so as to allow specific performance of an obligation where an action for damages afforded complete relief.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 4; Dec. Dig. 4.]

7. PLEADING 34 — CONSTRUCTION — PRESUMPTIONS.

It will be presumed that the complaint stated plaintiff's cause of action as favorably as possible.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. 34.]

8. SPECIFIC PERFORMANCE 128 — RELIEF AWARDED—DAMAGES.

While monetary relief will be afforded where, through no fault of plaintiff, specific performance of a contract is impossible, such relief will not be granted where plaintiff sued to specifically enforce a contract for breach of which an action for damages afforded an adequate remedy.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 412-419; Dec. Dig. 128.]

9. APPEAL AND ERROR 195 — PRESENTATION OF GROUNDS IN COURT BELOW—NECESSITY.

Where a demurrer to the complaint was sustained, and the suit dismissed, plaintiff, not having raised the question below, cannot contend on appeal that the trial court abused its discretion in not allowing leave to amend.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1149; Dec. Dig. 195.]

In Bank. Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Suit by Alexander W. Morrison against Frank Land, executor of William Land, deceased, and others. From a judgment sustaining a demurrer without leave to amend, plaintiff appeals. Affirmed.

W. A. Gett, of Sacramento, for appellant. Wm. V. Cowan, Clyde H. Brand, R. T. McKisick, and White, Miller, Needham & Harber, all of Sacramento, for respondents.

ANGELLOTTI, C. J. This is an action against the executors and executrix of the will of William Land, deceased, and the devisees and legatees under such will, to specifically enforce an alleged contract between plaintiff and the deceased, by which deceased obligated himself to bequeath to plaintiff by his will the sum of \$50,000. Demurrers to the complaint on the ground, among others, that the same does not state facts sufficient to constitute a cause of action, were sustained, without leave to amend. We have here an appeal by plaintiff from such judgment.

The case stated by the complaint, so far as material, is substantially as follows: From

the year 1870 to a time not definitely alleged, but, according to a recital, extending over a period of 40 years, deceased was engaged in conducting a large hotel and hotel business in the city of Sacramento, known as the Western Hotel, and during all of said time plaintiff was in the employ of deceased "as the chief clerk, accountant, bookkeeper, and business confidant" of deceased "in the management and operation of said hotel, hotel business, and all and other sundry business connected with the above-mentioned business," and, during the absence of deceased, as his representative and in the capacity of assistant manager of said business. During all of said time the services of plaintiff were in all respects satisfactory to deceased. During all said time plaintiff and deceased resided at said Western Hotel, associated together, and "sustained each toward the other relations of mutual respect, confidence, and trust." The business was prosperous, yielding to deceased a profit approximately of \$30,000 each year. While plaintiff was so in the employ of deceased he received offers of similar employment in and about hotels in Sacramento and San Francisco at a higher compensation "from time to time" from "divers and sundry persons." Nothing more definite is stated as to these offers. Plaintiff communicated the fact of these offers, as made, to deceased. For the purpose of inducing plaintiff to continue in his employ, deceased agreed with plaintiff that:

"If he (said plaintiff) would remain with him, * * * and thereafter attend to, render, and perform at his said Western Hotel, such services as he (plaintiff) was then performing for" said deceased, "so long as he * * * owned or conducted said Western Hotel, that he * * * would by his last will and testament devise and bequeath to plaintiff the sum of \$50,000."

It is impossible to ascertain from the complaint anything about when this agreement was made. Plaintiff relied upon this promise, consented to so remain in the employ of deceased, and did so remain until deceased "retired from the management, conducting, and ownership of said Western Hotel." There is no information in the complaint as to how long after the agreement this retirement occurred. Deceased died testate on or about December 30, 1911, leaving estate of the value of about \$2,000,000, all of which was acquired while plaintiff was in said employ. The debts and expenses of administration will not exceed \$100,000. A paper purporting to be his last will has been admitted to probate as such. All the defendants are named in this paper as devisees or legatees. It nowhere appears in the complaint that plaintiff was not also named as a legatee. It is alleged that by reason of refusing said offers of employment from others at higher compensation, and remaining in the employ of deceased, plaintiff "has suffered great and irreparable injury and damage which can-

not be compensated except" by a decree for the specific performance of the agreement. It is also alleged that each of the defendants denies and repudiates all rights of plaintiff in and to the money mentioned, and threatens to cause to have distributed to themselves as legatees and devisees the entire estate, and that the executors and executrix, unless restrained, will pay over and deliver to the defendants all the residue of the estate. There is no allegation that any claim for this money was ever presented to the executors and executrix of the will for allowance, nor any allegation other than as above stated, tending to show that the consideration of the alleged contract was just, reasonable or adequate.

As is urged by respondents, it is nowhere alleged in the complaint that deceased did not provide for the promised legacy in his will. No breach of the contract is alleged, without which, of course, plaintiff could not be entitled to relief of any kind. However, passing this and other objections made to the complaint, we will consider the main question presented by this appeal.

[1-4] There is no dissent in the authorities from the proposition that one may make a valid contract with another to devise or bequeath property by his last will in a certain specified way. It is clear that in the event of a breach of such a contract the party damaged has an action at law for the damage caused by such breach of the promisor, and in some cases this, by reason of the circumstances, may be his only remedy, for a resort to any equitable remedy can be had only where the circumstances are such as to make the case one within the well-settled principles relative to the proper exercise of equitable jurisdiction.

Where the party damaged is restricted to his remedy at law for the breach, he must necessarily proceed upon the theory that he is a "creditor" of the deceased, having a "claim against the estate" "arising upon contract," within the meaning of those words as used in our probate law, and he is subject to the provisions of our statutes requiring presentation of claims to the executor or administrator and judge. Code Civ. Proc. § 1490 et seq. In the absence of such presentation, such a claim, by express provision of the statute, is forever barred. While, owing to the nature of the contract before us, a final breach cannot be regarded as occurring until the death of the deceased, the breach was committed by the deceased, and the liability on account thereof is his. There is no decision in this state that is contrary to this view. Expressions in some opinions which, when detached from their context and considered alone, might appear to give some support to a contention that such a claim need not be so presented, furnish no such support when considered in connection with the question under discussion. On the other hand, it was substantially stated in *Etchas*

v. Orena, 127 Cal. 588, 60 Pac. 45, that it is essential to an action for breach of contract to compensate one for services by making provision in such person's favor in a will that a claim against the estate be presented, that no claim could exist against the estate in such case except one founded upon the fact that such services were performed and no provision made in the will for compensation, and that the particulars of the claim should be stated. It is well settled that, where presentation of a claim against the estate is essential, a complaint which does not aver that the claim has been presented fails to state a cause of action. *Burke v. Maguire*, 154 Cal. 462, 98 Pac. 21; *Morse v. Steele*, 149 Cal. 305, 86 Pac. 693. The complaint here contains no allegation as to the presentation of a claim by plaintiff to the executors and executrix, and it is not suggested that it could truthfully have been amended to show such a presentation. The claim of counsel is that it was not necessary to present a claim. It has been held that, where services have been performed in pursuance of a contract to leave property by will to the one rendering the service, and the promisor fails to comply with the agreement, a recovery may be had at law against his estate for the reasonable value of the services. See *Cyc.* 1069. Of course, in such a case presentation of the claim would be essential. Manifestly, for this defect, if for no other, the complaint must be held to be fatally defective, unless the facts stated therein entitle plaintiff to equitable relief.

[5] It is settled that courts of equity, to use the language of *Pomeroy*, "will under special circumstances, enforce a contract to make a will, or to make a certain testamentary disposition, * * * not by ordering a will to be made, but by regarding the property in the hands of the heirs, devisees, assignees, or representatives of the deceased promisor, as impressed with a trust in favor of the plaintiff, and by compelling defendant, who must, of course, belong to some one of these classes of persons, to make such a disposition of the property as will carry out the intent of the agreement." *McCabe v. Healy*, 138 Cal. 81, 84, 70 Pac. 1008. (The italics are ours.) What are the "special circumstances" that warrant a resort to equity? We think it may safely be asserted that in the hundreds of cases to be found in the reports in which this doctrine has been considered none can be found to support appellant's claim that the circumstances of this case are such as to entitle him to relief in equity.

Passing without discussion other requisites, it is elementary that where, as here, the primary right of a party is legal in its nature, as distinguished from equitable, and one for which the law affords some remedy, as here damages by way of compensation for breach of contract, a proper exercise of the equitable jurisdiction will not give equitable re-

lief in any case where the legal remedy is full and adequate and does complete justice. No principle of equitable jurisprudence is more firmly established than this. 1 Pom. Eq. Jur. § 221. For instance, the exclusive jurisdiction of equity to grant relief by way of specific performance of a contract will be exercised only in those cases where the legal remedy of compensatory damages is insufficient under the circumstances of the case, in the opinion of the court, to do complete justice between the parties. The fact that in applying this doctrine courts of equity have established the further rule that, in general, the legal remedy of damages is inadequate in all agreements for the sale or letting of land does not interfere with this rule. In so far as cases of the character of the one before us are concerned, the very basis of the granting of equitable relief is the conclusion in view of the circumstances of the particular case that full and adequate compensation cannot be had at law. Certainly no case has been cited to us, and we know of none, in which such relief has been given where it was apparent that full and adequate compensation can be given at law. Everything that has been said by this court is in accord with this view. In *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369, it was said:

"But in such cases the reason for the interposition of equity is quite obvious. Plaintiff has rendered service of extraordinary and exceptional character, such service as, in contemplation of the parties, *was not to be compensated for in money*, and, as in contemplation of law, *cannot be compensated for in money*; therefore by no action at law could a plaintiff be restored to his original position. It would be in the nature of a fraud upon him to deny him any relief, and, the law failing by reason of its universality, equity, to promote justice, makes good its imperfections." (The italics are ours.)

And in *Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148, where such relief was denied because plaintiff's remedy at law was adequate, it was said:

"Equity, it is true, does entertain contracts for specific performance to convey the whole or any portion of the promisor's property by will, but it decrees such performance: First, only upon clear proof of fairness, justness, and adequacy, * * *; and, second, it does so only where the plaintiff cannot be compensated in money. These cases usually arise where the service is of some extraordinary nature which cannot be, and in the contemplation of the parties was never expected to be, paid for in money, as where home ties are broken," etc.

And, quoting from *Owens v. McNally*, supra, the court further said:

"Specific performance * * * will be decreed only when no other adequate relief is available to plaintiff."

And also:

"The jurisdiction of a court of equity to decree specific performance does not * * * depend at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of cannot be adequately compensated in damages. If it can, the action has no place

in a court of equity, and the plaintiff's remedy is strictly in law. * * * So it will be found that in all of the cases in which specific performance of these agreements to leave property by will has been decreed by the courts, there has been present the element of peculiar personal services, fully performed and incapable of compensation in money."

[6] There is no force in plaintiff's contention that the rule in this respect has been changed in this state by an amendment of section 3384 of the Civil Code. That section as originally enacted in 1872, in addition to providing, as it does now, that, "except as otherwise provided in this article, specific performance of an obligation may be compelled," contained four subdivisions stating instances in which such relief would be granted, and the second of these subdivisions read: "When the act to be done is such that pecuniary compensation for its nonperformance would not afford adequate relief." This section was amended in 1874 by striking out all of these four subdivisions. There is no provision in the article in terms precluding the relief of specific performance in the case of such a contract as the one before us, even though pecuniary compensation would afford adequate relief. Neither is there any provision in terms precluding such relief as to any obligation to pay money. If counsel's claim in this behalf be correct, the effect of the amendment is to authorize a decree of specific performance of the obligation of the maker of a promissory note or any other obligation to pay money. Of course, no such intent as that claimed can be attributed to the amendment. The reason for the amendment apparently was that it was deemed unwise to attempt to specify by statute all the particular circumstances under which such relief might be granted, and it was thought best to provide simply that it could always be granted, except as otherwise provided in the article. But this obviously was not intended to dispense with the fundamental requirement that the law does not afford an adequate remedy. That section simply means that specific performance of an obligation may be compelled in any case where the circumstances are such as to authorize such relief under the well-settled doctrines of equity jurisprudence, except as otherwise provided in the article. Over and over again since such amendment was made, this court has said that inadequacy of any remedy at law is absolutely essential to the granting of a decree of specific performance. The only intimation to the contrary that we have been referred to, or have found, is in the opinion in *Shannon v. Cavanaugh*, 12 Cal. App. 434, 107 Pac. 574, decided by the District Court of Appeal of the Second District. No application for a hearing in this court was made in that case. We cannot follow or approve any intimation in the opinion in that case to the effect that, under our Code as it now stands, specific performance may be decreed notwithstanding the plaintiff can be

fully compensated at law. It was held in that case, passing the suggestion we have referred to, that the circumstances were such as to require the conclusion that there was no complete remedy at law.

There is absolutely nothing in *Glock v. Howard, etc., Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, or *Johnston v. Blanchard*, 16 Cal. App. 321, 116 Pac. 973, in conflict with the views we have expressed. These cases simply recognize the rule prescribed in this state by section 3389 of the Civil Code that a contract *otherwise proper to be specifically enforced* will be so enforced, notwithstanding it contains a provision declaring the amount which shall be presumed to be the amount of damage sustained by reason of a breach, or one for a penalty in the event of nonperformance. Where this is the situation, if the circumstances are such as to make the case a proper one for specific performance, the party may waive his stipulated damages and maintain his action in equity. But the rule does not render a contract one as to which specific performance will be decreed *simply because it contains a provision for liquidated damages*, which appears to be the logical effect of plaintiff's contention.

[7] Surely there can be no doubt upon the question whether plaintiff had a full and adequate remedy at law. It is to be presumed that plaintiff has stated his case in his complaint as favorably to himself as he can. As the same is described therein, there was nothing extraordinary or peculiar in the nature of the service to be rendered by plaintiff for deceased. At best, he was the assistant manager of the hotel business of deceased conducted at the Western Hotel in Sacramento, and was a faithful and efficient employé of deceased, having his absolute confidence. The services that he was rendering were services that could be, and in the contemplation of the parties were to be, compensated in money. He was rendering those services at a stipulated rate of compensation in money. Being offered similar employment at various times by others, at a greater compensation, deceased asked him to continue in his employ, performing the same service that he had hitherto performed, at the same compensation, agreeing with him that, if he would so remain as long as he (deceased) continued in such hotel business, he (deceased) would make a bequest to him in his will of \$50,000. He was to receive \$50,000 in money from the estate of deceased if the latter performed his contract. An ordinary action at law for breach of the contract would bring him the very thing to which he is entitled under the allegations of his complaint—afford him full and adequate relief. In such an action the measure of damages would have been the value of the property agreed to be bequeathed, for that was the amount in which he was damaged by the

breach. See 40 Cyc. 1073. Attorneys for respondents pertinently ask:

"Is a decree in equity ordering payment of a sum of money from the estate to plaintiff any more perfect and complete justice to him than a common-law judgment in his favor and against the estate for a like sum?"

A clearer case of adequacy of remedy at law could not be made than that presented here. The situation is such as to absolutely preclude resort to equity.

It thus appears that the complaint does not state facts sufficient to entitle plaintiff to any relief, legal or equitable. It fails to show him entitled to any equitable relief for the reason we have just discussed. It fails to show him entitled to recover at law, in view of the want of an allegation showing presentation of his claim to the executors and judge for allowance.

[8] It is true, as said by counsel for plaintiff, that monetary relief will be given as an alternative for the specific performance to which a plaintiff is really entitled, where, through no fault of his, specific performance cannot be decreed. But manifestly that rule has no application here, where plaintiff has no right to specific performance. It is only where the beneficiary of a promise to make a will has a right to specific performance that the property of the deceased in the hands of the heirs, devisees, and legatees is regarded as impressed with a trust in his favor, and no monetary relief can be awarded here, as suggested, upon the theory of breach of trust.

For the reasons we have stated, the complaint fails to state facts sufficient to constitute a cause of action, and it is unnecessary to discuss other reasons urged by defendants.

[9] In his closing brief, filed in lieu of oral argument, counsel for plaintiff for the first time contends that the lower court was guilty of an abuse of discretion in "refusing leave to amend" the complaint, after demurrer sustained. The transcript shows simply that an order was made July 19, 1913, sustaining the demurrer without leave to plaintiff to amend, and that on December 20, 1913, judgment was given dismissing the action. There is nothing to show or even intimate that plaintiff ever asked leave to amend or that he desired to amend. It appears to be the settled rule in this state that it is too late to make such a point for the first time in this court, when nothing appears in the record to show an abuse of discretion on the part of the lower court. *Buckley v. Howe*, 86 Cal. 596, 600, 25 Pac. 132; *Robertson v. Burrell*, 110 Cal. 568, 579, 42 Pac. 1086; *Durrell v. Dooner*, 119 Cal. 411, 413, 51 Pac. 628; *Prince v. Lamb*, 128 Cal. 130, 60 Pac. 689. Certainly no abuse of discretion is shown or suggested by the record before us. The allegations of the complaint are such as to make it reasonably certain that the pleading could not have been amended truthfully so as to make it state a cause of action. If

plaintiff thought otherwise, he should have applied to the court below for leave to amend. The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

169 Cal. 607

Ex parte STANTON. (Cr. 1870.)

(Supreme Court of California. March 13, 1915.)

1. PRISONS $\hookrightarrow$ 15—GOOD CONDUCT—REDUCTION OF TERM—BOARD OF PRISON DIRECTORS—PROCEDURE.

In determining whether a paroled prisoner, by violation of the conditions of his parole, has forfeited his good conduct credits, the board of prison directors is not required to proceed with the formality required of courts.

[Ed. Note.—For other cases, see Prisons, Cent. Dig. § 26; Dec. Dig. $\hookrightarrow$ 15.]

2. HABEAS CORPUS $\hookrightarrow$ 92—SCOPE OF REVIEW—EVIDENCE.

In reviewing on habeas corpus the action of the board of prison directors in determining whether a prisoner on parole has forfeited his right to good conduct credits on his sentence, the court will not consider the sufficiency of the evidence on which the board acted.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87–96; Dec. Dig. $\hookrightarrow$ 92.]

3. PRISONS $\hookrightarrow$ 15—REDUCTION OF TERM—FORFEITURE OF CREDITS—MISCONDUCT ON PAROLE—PRISON RULES.

Under Pen. Code, § 1588, providing that every convict who shall commit no infraction of the rules, etc., shall be allowed deduction from his term of certain periods according to the length of his sentence, and providing that a convict violating the prison rules shall forfeit such credits as to the board of directors may seem just, and under St. 1901, p. 82, providing that the state board of prison directors may establish rules and regulations under which prisoners may be allowed to go upon parole outside of the prison while remaining in the legal custody, and under the control of the state board of prison directors, a convict on parole was within the custody of the board of prison directors, so that his violation of the rules regarding his conduct was a violation of the prison rules, and justified the board in declaring a forfeiture of his time credits.

[Ed. Note.—For other cases, see Prisons, Cent. Dig. § 26; Dec. Dig. $\hookrightarrow$ 15.]

In Bank. Application for habeas corpus by W. J. Stanton against James A. Johnson, Warden of the State Prison. Discharged.

Arthur L. Shannon, of Sacramento, for petitioner. U. S. Webb, Atty. Gen., and Robert W. Harrison, Deputy Atty. Gen., for respondent.

SHAW, J. The petitioner was committed to the state prison at San Quentin on February 5, 1896, under a sentence of 25 years for murder of the second degree. Under the statute providing for credits to prisoners upon the time of their sentence allowed for good behavior, the petitioner, if allowed the statutory credits, would have been entitled to his release on May 5, 1911. The prison authorities are holding him in custody upon the

claim that by reason of his misconduct he has forfeited his credits, and that such forfeiture has been declared by the order of the board duly and regularly made.

The statute relating to prisoners' credits was first enacted in 1889 (Stats. 1889, p. 410), and has since been incorporated in the Penal Code as section 1588. Its provisions material here are as follows:

"Every convict who shall have no infraction of the rules and regulations of the prison, or laws of the state, recorded against him, and who performs in a faithful, orderly, and peaceable manner the duties assigned to him, shall be allowed from his term, instead and in lieu of the credits heretofore allowed by law, a deduction of" certain periods arranged according to the number of years of sentence.

"Each convict shall be held entitled to these deductions, unless the board of directors shall find that for misconduct or other cause he should not receive them. But if any convict shall commit any assault upon his keeper, or any foreman, officer, convict, or person, or otherwise endanger life, or shall be guilty of any flagrant disregard of the rules of the prison, or commit any misdemeanor, or in any manner violate any of the rules and regulations of the prison, he shall forfeit all deductions of time earned by him for good conduct before the commission of such offense, or that, under this section, he may earn in the future, or shall forfeit such part of such deductions as to the board of directors may seem just; such forfeiture, however, shall be made only by the board of directors after due proof of the offense and notice to the offender; nor shall any forfeiture be imposed when a party has violated any rule or rules without violence or evil intent, of which the directors shall be the sole judges."

The law authorizing the parole of convicts was enacted in 1893 and amended in 1901 (Stats. 1901, 82). This amendment was the law in force when the credits in controversy were forfeited. It empowered the state board of prison directors "to establish rules and regulations" under which the board could allow a prisoner "to go upon parole outside of the buildings and inclosures, but to remain while on parole in the legal custody and under the control of the state board of prison directors, and subject at any time to be taken back within the inclosure of said prison." It also gave said board "full power to make and enforce such rules and regulations and retake and imprison any convict so upon parole."

In November, 1903, the petitioner, by an order of the board, was allowed to go on parole. In October, 1905, he was retaken, brought before the board, and charged with a "violation of the terms of his parole." To this charge he pleaded guilty, and thereupon the board adjudged that all credits earned and to be earned by him were forfeited, and he was retained in the prison. In December, 1910, the warden made a report regarding him, recommending that he be again paroled, in pursuance of which he was allowed to go on parole again on July 1, 1911. Thereafter, on October 22, 1912, he was again charged with a violation of his parole, whereupon, after due hearing, he pleaded guilty, his pa-

role was revoked, and his credits, earned and to be earned, were declared forfeited. The charge against him in this instance was "drinking intoxicating liquors and entering a saloon."

The rules and regulations of the board regarding the parole of prisoners provided that any paroled prisoner should be liable to be "retaken and again confined within the prison for any violation of the conditions of his parole," and that for any such violation, or for any violation of these rules, he should forfeit all or any part of his credits at the sole discretion of the board. One of the conditions of the parole in his case was that he should "under no circumstances enter into a drinking saloon where liquor is either sold or given away."

[1, 2] It must be conceded, of course, that the proceedings and orders of the board of prison directors were very informal, and perhaps not such as would be required in the case of court proceedings. But it is settled that the board is not required to proceed with the formality required of the courts. Its functions are primarily administrative. The essential thing is the existence of the jurisdictional facts; not the recital of their existence in the records of the board. The courts will not, on habeas corpus, consider the sufficiency of the evidence on which the board acted or hold their proceedings invalid, if the offense charged is one which can fairly be considered as embraced within the provisions of the statute applying to the forfeiture of credits. *Ex parte Knowlton*, 136 Cal. 107, 68 Pac. 480. We think the records above referred to are sufficient to show clearly the nature of the charge made against the petitioner and the action of the board thereon, and are sufficient to justify his detention if the offense charged was of a character which was embraced within the statutory provisions.

[3] On this point the petitioner contends that the law does not authorize a forfeiture of credits for offenses committed by convicts while at liberty on parole, but only for those committed by them while actually confined within the prison inclosure. We are satisfied that this contention is without foundation. The parole law expressly declares that a prisoner out on parole is nevertheless "in the legal custody and under the control of the state board of prison directors." In legal contemplation, therefore, he remains a prisoner, although out on parole. He is in the control of the board and subject to its rules, although otherwise at liberty. The rules which the board may make for his conduct while outside are, as we understand the statute, "the rules and regulations of the prison," within the meaning of that phrase as used in the act providing for the forfeiture of credits, for the violation of which the board may declare such forfeiture. The phrases "rules of

the prison" and "rules and regulations of the prison," in the credit law, should be interpreted broadly to include any rule made by the prison board to regulate the conduct of convicts committed to its custody and control, whether for acts done within or without the inclosure. Its language is equivalent to the phrase "rules and regulations of the prison authorities"; i. e., the board of prison directors. We find no reasonable ground for restricting the application of the law to offenses committed by convicts while actually within the prison walls.

There are no other points requiring notice.

The writ is discharged, and the prisoner remanded to the custody of the prison authorities.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; HENSHAW, J.

169 Cal. 592

METROPOLIS TRUST & SAVINGS BANK v. MONNIER (HASSHAGEN, First Intervener, and ANDERSON, State Superintendent of Banks, Second Intervener). (S. F. 6132.)

(Supreme Court of California. March 11, 1915. Rehearing Denied April 8, 1915.)

1. MORTGAGES ⇐256 — NEGOTIABILITY — NOTES.

Where a note and the mortgage securing it are executed as part of the same transaction, the note, though negotiable in form, and not referring to the mortgage, is nonnegotiable in fact if taken with notice of the existence of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 678–681, 688; Dec. Dig. ⇐256.]

2. PLEADING ⇐8—CONCLUSION OF PLEADER—ANSWER.

An allegation, in the answer in an action to foreclose a mortgage securing a note, that the note and mortgage were obtained by menace, duress, and fraud exercised by the mortgagee on defendant, and that the mortgagee was then acting as defendant's attorney and occupied a fiduciary relation to defendant, being a mere conclusion of the pleader, was insufficient to present a defense based on the exercise of menace, fraud, or duress.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12–28½, 68; Dec. Dig. ⇐8.]

3. JUDGMENT ⇐18—PLEADING TO SUSTAIN—FINDINGS OUTSIDE THE ISSUES.

A judgment for defendant, in an action to foreclose a mortgage securing a note, was not authorized by findings that the mortgagee exercised menace, duress, and fraud in procuring the instruments, where the answer failed to state facts sufficient to present a defense based on the exercise of menace, duress or fraud.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 34–37; Dec. Dig. ⇐18.]

4. ATTORNEY AND CLIENT ⇐123—TRANSACTIONS BETWEEN — FAIRNESS — BURDEN OF PROOF.

While Civ. Code, § 2235, providing that all transactions between a trustee and his beneficiary, by which he gains any advantage from his beneficiary, "are presumed to be entered into by the latter without sufficient consideration and under undue influence," does not preclude an attor-

ney from dealing with his client, it places on him, when he does so deal and obtains an advantage thereby, the burden of showing that the transaction was fair.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 239-245, 248, 249; Dec. Dig. ☞123.]

5. TRUSTS ☞283—TRANSACTIONS BETWEEN TRUSTEE AND BENEFICIARY—PRESUMPTION—"SUFFICIENT CONSIDERATION."

The presumption arising under Civ. Code, § 2235, relative to transactions between a trustee and his beneficiary, by which the trustee obtains an advantage, is that they are without "sufficient consideration," and not that there is a total want of consideration.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 403, 404; Dec. Dig. ☞283.]

For other definitions, see Words and Phrases, First and Second Series, Sufficient Consideration.]

6. ATTORNEY AND CLIENT ☞123—CONTRACT PROCURED BY UNDUE INFLUENCE—VALIDITY.

Where an attorney through the exercise of undue influence, but for some consideration, procures from his client a note secured by a mortgage, the transaction is voidable merely, and the instruments cannot be canceled or a recovery on them denied, except on equitable conditions.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 239-245, 248, 249; Dec. Dig. ☞123.]

7. TRIAL ☞377—REFUSAL TO REOPEN CASE—EVIDENCE IN REBUTTAL OF DEFENSE.

Where, in an action to foreclose a mortgage given by the mortgagor to her attorneys for services rendered, the defense was undue influence, and the attorney for the intervener, owning the instruments sued on, was advised after submission of the cause, but before its determination, that the differences between defendant and such attorney as to the value of his services and her execution of the instruments in payment therefor had been wholly adjusted, and where one of the interveners' attorneys made affidavit that, though he had been previously notified that negotiations were pending for such adjustment, he had been told by defendant's attorney that such negotiations had been abandoned, it was error to refuse to permit a reopening of the case to admit evidence of such adjustment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 887-890; Dec. Dig. ☞377.]

In Bank. Appeal from Superior Court, City and County of San Francisco; A. I. McSorley, Judge.

Action by the Metropolis Trust & Savings Bank, a corporation, against Anna Monnier, defendant, Adeline Hasshagen, first intervener, and Alden Anderson, Superintendent of Banks of the State of California, second intervener. From judgment for defendant against all the other parties and denial of new trial, the other parties, with the exception of the Superintendent of Banks, appeal. Reversed and remanded.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for appellant Hasshagen. Gavin McNab, B. M. Aikins and Geo. W. Mordecai, all of San Francisco, for other appellants. Thomas E. Curran and Francis Dunn, both of San Francisco, for respondent. F. A. Cutler, of San Francisco, for Anderson.

PER CURIAM. Plaintiff sued to foreclose a mortgage securing a promissory note executed by the defendant Anna Monnier in favor of Charles L. Patton for the sum of \$20,000, payable in one year from August 1, 1908, the date of the note and mortgage. The mortgagee sold and assigned the note and mortgage to the Union State Bank on October 26, 1908. On April 26, 1909, the note and mortgage were transferred to the plaintiff Metropolis Trust & Savings Bank as collateral security for a promissory note made on that date by the Union State Bank in favor of plaintiff. On June 17, 1909, plaintiff for a valuable consideration transferred the note and mortgage to Adeline Hasshagen, who appears in this suit as first intervener, and also transferred to her the note of the Union State Bank which the note and mortgage of Monnier to Patton were assigned to secure. These were taken as part of the consideration of her note and deed of trust for \$45,000, on the same date and as part of the same transaction delivered by said Adeline Hasshagen to said plaintiff. However, Mrs. Hasshagen allowed the note and mortgage to remain in the possession of the plaintiff as additional security for her note of \$45,000. No part of the note of Monnier to Patton has been paid. More than \$20,000 remains unpaid on the note of \$45,000 from Hasshagen to plaintiff, and she claims the benefit of the foreclosure sought by the banking corporation plaintiff. The superintendent of banks appears as second intervener, representing the insolvent Union State Bank.

The defendant Anna Monnier set up by way of defense want of consideration, fraud, menace, and duress exercised by Charles L. Patton in obtaining the note and mortgage; and that Patton was her attorney occupying a fiduciary relation at the time when the note and mortgage were executed. After trial of all the issues joined by the various parties claiming interest in the note and mortgage of Monnier to Patton, the court found that, when the note and mortgage were executed, Charles L. Patton long had been and for a long time thereafter continued to be attorney at law for Anna Monnier; that the note and mortgage were procured by the exercise of undue influence over said Anna Monnier on the part of said Charles L. Patton; and that there was no consideration for the note and mortgage, and that the note and mortgage had been procured by menace, fraud, and duress, exerted by Patton on defendant. The conclusion of law from the findings was that the note and mortgage were nonnegotiable; that subsequent transferees thereof took with full notice of all equities existing in favor of the defendant; and that the instruments are void as to Patton and all subsequent transferees. Judgment was accordingly entered in favor of defendant against all the other parties, who,

with the exception of the superintendent of banks, have duly appealed from the said judgment and from the order denying their motion for a new trial.

[1] The first contention of appellants is that the note does not come within the rule announced in *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110, and is a negotiable instrument. It is negotiable in form, and contains no reference to the mortgage, and appellants also insist that the mortgage does not contain covenants not permitted in a nonnegotiable instrument. They seek, therefore, to differentiate this case from *Meyer v. Weber*, supra. We see no difference in principle between that case and this. The note and mortgage were made, executed, and delivered simultaneously. All of the transfers involved in this litigation were of the note and mortgage. The plaintiff and first intervener pray for relief based upon a covenant of the mortgage not contained in the note, namely, the stipulation for the payment of attorney's fees in case of a suit. So far as all of the parties to this litigation are concerned, the note and mortgage were known to be coexistent and interdependent. They were nonnegotiable. To make them so it was not necessary that the note should state upon its face that it was coupled with a mortgage. Where a note is secured by a contemporary mortgage on land, both instruments having been executed as a part of one transaction, the said note, whether negotiable in form or not, is nonnegotiable in fact if taken with notice of the existence of the mortgage. *Flood v. Petry*, 165 Cal. 309, 132 Pac. 259, 46 L. R. A. (N. S.) 861; *Meyer v. Weber*, supra; *Briggs v. Crawford*, 162 Cal. 125, 121 Pac. 381; *Helmer v. Parsons*, 18 Cal. App. 451, 123 Pac. 356; *Mentry v. Broadway Bank, etc., Co.*, 20 Cal. App. 389, 129 Pac. 470; *National Hardwood Co. et al. v. Sherwood et al.*, 165 Cal. 1, 130 Pac. 883; *Taylor v. Jones*, 165 Cal. 108, 131 Pac. 114. The finding of nonnegotiability was therefore supported by ample authority applicable to the facts disclosed at the trial.

[2] The allegation that the note and mortgage were given without any consideration presented a material issue in the case, on which the court found in favor of defendant. The allegation touching the menace, duress, and fraud asserted to have been exercised by Patton upon defendant was in the following language, no less and no more:

"That said note and mortgage were obtained by the means of menace, duress, and fraud exercised and exerted by said Charles L. Patton upon this defendant, and that said Charles L. Patton was at all said times acting as the attorney of this defendant and occupied a fiduciary relation to this defendant."

The court, as has been said, found the note and mortgage were procured by means of menace, duress, and fraud. As a pleading charging menace or fraud or duress this answer is wholly insufficient to raise an issue or present a defense. It contains no averment of fact whatsoever, and rests upon the

naked, unsupported, legal conclusion of the pleader. *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Capuro v. Builders Ins. Co.*, 39 Cal. 123; *Albertoli v. Branham*, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200; *People v. McKenna*, 81 Cal. 158, 22 Pac. 488.

[3] Nor, as such an allegation tendered no issue upon the question of menace, fraud or deceit, was it incumbent upon appellants, in availing themselves of this defect, to demur to the answer either upon general or special grounds. A general ground of demurrer would not have availed, since the pleading did state a defense under the allegation of lack of consideration. The issues of fraud, menace, and duress not being in the case, appellants could rest until evidence was sought to be offered concerning them, and then properly make their objection to the introduction of such evidence. For, as is said in *People v. McKenna*, supra, discussing the necessity of averment of facts in such cases:

"It matters not that no objection is made by demurrer (to the absence of them). Objection may be made at any time because it goes to the substance of the complaint or indictment. The question whether a thing has been done fraudulently is a matter of law, and an allegation of fraud in general terms presents no issuable fact."

It follows herefrom that appellants' position is correct in declaring that this judgment cannot derive support from the findings of the exercise of menace, duress, and fraud.

The court also found that Patton exercised undue influence. It is a singular circumstance, however, that undue influence is not directly tendered by defendant as an issue, and at the most it is only inferentially tendered in the allegation above quoted that Patton was her attorney at the time she gave him the note and mortgage.

Perhaps, if no other ground of objection to the judgment appeared, it might well be argued that the trial below proceeded on the theory that this ground of defense was sufficiently pleaded, and that, after such trial and a finding on the issue, the appellant could not question the sufficiency of the pleading for the first time on appeal. As will appear, however, the judgment must be reversed for other reasons, and this proposition need not be considered. Upon a new trial, the course of proceedings, and perhaps the pleadings themselves, will be different, and it is unlikely that the question now under discussion will be presented in the same aspect.

The finding that the note and mortgage were entirely without consideration would support the judgment, regardless of any question of fraud or undue influence, but this finding is manifestly contrary to the evidence. The undisputed testimony is that the note and mortgage were given in exchange for the surrender of existing contracts between Mrs. Monnier and Mr. Patton and another attorney, providing for the employment of said attorneys on certain terms. That some services were rendered and some compensation due is

not to be questioned. The defense must therefore rest entirely on the finding that the note and mortgage had been obtained through the exercise of undue influence.

[4] Assuming that, upon another trial, the defense of undue influence will be within the issues, it is proper to point out that a prima facie case in support of this defense would be made out by proof that Mr. Patton, prior to and at the time he took the note and mortgage, was acting as attorney for Mrs. Monnier. The relation of attorney and client is of a fiduciary character, and the Civil Code (section 2235) clearly provides that all transactions between a trustee and his beneficiary during the existence of the trust, by which he obtains any advantage from his beneficiary, "are presumed to be entered into by the latter without sufficient consideration, and under undue influence." This does not mean that a trustee may not deal with his beneficiary. But, if he does deal with him in such manner as to obtain an advantage, the trustee has the burden of showing by evidence that the transaction was fair. Certainly the obtaining of a note for \$20,000, secured by mortgage, is an advantage, and the attorney, or those claiming under him, cannot safely rest, as they did in this case, without affirmative proof of the facts surrounding the transaction. On the question of the applicability of the presumption declared by section 2235, it is sufficient to refer to *Cooley v. Miller & Lux*, 156 Cal. 510, 523, 105 Pac. 981, and authorities there cited. See, also, *Cooley v. Miller*, 142 Pac. 83, 88.

[5, 6] It will be observed that the presumption is, not only that undue influence was exercised, but that there was no "sufficient consideration." This does not mean that a total want of consideration is presumed. Besides, as we have already pointed out, there was a clear showing that the giving of the note and mortgage was supported by some consideration. In this connection it may be remarked that, even if undue influence had been established, the note and mortgage would not thereby have been rendered void, in the extreme sense of that term. The transaction would have been voidable merely, and the instruments should not have been ordered canceled, or a recovery on them denied, except upon equitable conditions, such as, for example, the payment to Patton or his assignees of the fair value of the contracts surrendered upon the giving of the note and mortgage.

[7] This brings us to the last proposition necessary here for consideration. After the submission of the cause and before its determination, appellant Hasshagen's attorney was advised that the differences between Patton and Mrs. Monnier touching the value of his services and her execution of the note and mortgage in payment therefor had been wholly and completely adjusted and settled, which adjustment and settlement necessarily,

and as matter of course, disposed of all the real and attempted defenses of undue influence, menace, fraud, duress, and lack of consideration. Application to the court was timely made to permit the opening of the case for the taking of this evidence, which, if forthcoming, was a complete defense and bar to the assertion of all of Mrs. Monnier's equitable claims for relief. The court refused permission to open the case and rendered judgment in favor of Mrs. Monnier and against the validity of her note and mortgage. The court found its justification for this refusal in that the attorneys of appellant had failed in proper diligence in securing knowledge of this compromise and adjustment. This notwithstanding the fact that one of the attorneys for appellant made affidavit that he was advised that negotiations for such settlement were in progress between Mr. Patton and Mrs. Monnier, but was further advised by one of Mrs. Monnier's attorneys that the negotiations had fallen through and the attempted settlement had been abandoned. It is manifest that this evidence presented a complete answer to Mrs. Monnier's defense. Moreover, it is equally manifest that to refuse admission of this evidence, which admission was sought before the determination of the case, would result in enabling Mrs. Monnier with gross injustice to reap the benefit of an asserted fraud, for which she had already received full and satisfactory compensation. We can but repeat the language of this court in *Sulloway v. Sulloway*, 160 Cal. 508, 117 Pac. 522:

"He might properly have been required, as a condition precedent to the granting of his application, to reimburse defendant for the expense of bringing back his witnesses, but the absolute denial of his application to be allowed to introduce evidence on the matters referred to, when he was so clearly entitled to prevail on the merits, and where the effect of a judgment against him would be to practically deprive him for all time of any use or enjoyment of the water rights given him by the will, must be held to constitute prejudicial error."

It was therefore a plain abuse of discretion for the court to have refused to hear the offered evidence.

The judgment is reversed, and the cause remanded.

(169 Cal. 600)

In re REYNOLDS' ESTATE. (L. A. 3675.) (Supreme Court of California. March 12, 1915.)
TAXATION — § 79 — TRANSFER TAX — GIFTS — "CONTEMPLATION OF DEATH."

Inheritance Tax Act (St. 1911, p. 713) § 1, subsec. 3, imposes a tax upon the transfer of any property, without adequate consideration, in contemplation of death or intended to take effect in possession at or after his death, and section 27 as amended, declares that the words "contemplation of death" shall include that expectancy of death actuating the mind of a person on the execution of his will, and shall not be limited to that expectancy of death actuating the mind of one making a gift causa mortis, and that the purpose of the

act is to tax all transfers made in lieu of or to avoid the passing of property by testate or intestate laws. The deceased suffered from a tumorous growth, which in 1904, and about once a year thereafter, necessitated an operation, and which in September, 1910, necessitated the amputation of his right leg. Two days before such operation he gave certain hotel property to his wife, and, after the trouble returned, gave certain other property to her and made a will, and on May 26, 1911, he conveyed to his son a department store property worth \$100,000, and assigned to him the goods therein on his assumption of an indebtedness of \$30,000 and his payment of \$600 a month during the grantor's life. *Held*, that the gifts to the wife and to the son were made in "contemplation of death," and as substitutes for gifts by will, and were subject to the transfer tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. ¶ 879.]

For other definitions, see Words and Phrases, First and Second Series, Contemplation of Death.]

Department 2. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

In the matter of the Estate of George N. Reynolds, deceased. From decree of the court in probate imposing an inheritance tax upon property disposed of by deceased in his lifetime, Laura T. Reynolds and another appeal. Affirmed.

W. J. McIntyre, of Riverside, for appellants. Lyman Evans, Dist. Atty., of Riverside, and Robert A. Waring, State Inheritance Tax Atty., of Sacramento, for respondent.

HENSHAW, J. This appeal is from the decree of the court in probate imposing an inheritance tax upon property disposed of by the deceased during his lifetime.

By the inheritance tax act (Stats. 1911, p. 713) a tax is imposed upon the transfer of any property, real, personal, or mixed (subsection 3, § 1)—

"when the transfer is of property made by a resident, or by a non-resident when such non-resident's property is within this state, by deed, grant, bargain, sale, assignment or gift, *made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor or donor, or intended to take effect in possession or enjoyment at or after such death.*"

The words italicized were added to the act by the amendment of 1911. Otherwise the act is in language identical with the earlier inheritance tax act of 1905. Stats. 1905, p. 341. However, it had long and uniformly been held that transfers made upon valuable and adequate consideration were not within the purview of the inheritance tax act, and therefore the amendment served but to clarify and not to change the pre-existing law. Section 27 of the same act, as amended in 1911, declares as follows:

"The words 'contemplation of death,' as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in no wise shall said words be limited and restricted to that expectancy of death which actuates the

mind of a person in making a gift causa mortis; and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws."

This amendment also served the purpose of elucidating without changing the law, by giving fuller expression to the legislative intent and meaning.

With the law thus before us, we may come to the facts of the case. George N. Reynolds in his lifetime was a resident of the city of Riverside and was possessed of much wealth. He died testate in September, 1911. The cause of his death was sarcoma—a malignant tumorous growth which first made its appearance upon one of his hips. The excision of a sarcoma by surgical operation sometimes results in an eradication of the trouble. At other times it is recurrent. In the case of Mr. Reynolds the first surgical operation became necessary in 1904. Thereafter the tumor returned, and he was obliged to submit to an operation about once a year. In the later stages of the affliction more frequent operations became necessary; the last three occurring three months apart. Mr. Reynolds was well advised of the character of sarcoma, knew from experience the danger of its recurrence, and that if not successfully eradicated it meant death. On the 3d of September, 1910, about one year before his death, it was deemed necessary to perform one last drastic operation. That was the amputation of his right leg at the hip. This operation held out the only hope of checking his mortal disease. Two days before the operation was performed he made a gift of the Reynolds Hotel property to his wife, Laura T. Reynolds. He recovered from the effects of the operation, but in the spring of 1911 began to fail. The sarcoma returned and, as has been said, occasioned his death in September. On April 14, 1911, he made another gift of the Nevada Block in Riverside to his wife. One day thereafter he made his will, leaving \$10,000 to his wife, and the remainder of his estate, appraised in the probate proceedings at about \$110,000, to his son Charles; the wife and son constituting his sole heirs at law. The inheritance tax appraiser valued the property thus deceded to the wife at \$125,000. It was about six months after the last operation when Mr. Reynolds began to fail. He was confined to his home from June until his death. On May 26th he conveyed to his son Charles the property known as the Reynolds Department Store, valued by the inheritance tax appraiser at \$100,000, and on the same day assigned and transferred to him the merchandise in the store. Under the transfer the son Charles assumed all the indebtedness of the business, amounting to about \$30,000, and agreed to pay his father \$600 per month during his life. The court in probate, after the taking of evidence, held that these transfers

were subject to the inheritance tax and decreed accordingly. Whether or no the court's findings in this regard are supported by the evidence is the essential question upon this appeal. In passing upon such transfers the law which will direct trial courts and this court has been sufficiently indicated in the quotations already made. Little or no aid upon the question will be found in the adjudications of other states under their varying laws, and least of all from the courts of New York, which first gave an extremely narrow construction to a gift or transfer "in contemplation of death," holding their statute to mean a gift causa mortis, and to be applicable to no other kinds or characters of transfers. In *re Price's Estate*, 62 Misc. Rep. 149, 116 N. Y. Supp. 283, reviews the history of the decisions of that state. Nothing in our law compels us to adopt the restricted construction put by the courts of New York upon their own statute, and everything in our law directs that a liberal construction should be placed upon it to the end that its provisions be not evaded.

Coming then to the testimony in the case, we have already spoken of the physical condition of the deceased and of his knowledge of the character of his ailment. The transfers to his wife were admittedly gifts, pure and simple. They were made prior to and following an operation "considered absolutely necessary to save his life." Mrs. Reynolds speaks of the transfers to her as gifts and says that they were made under Mr. Reynolds' promise to make provision for her. After his death she filed her election to take these gifts instead of the benefits under the will. All this was done under the agreement that she had had with Mr. Reynolds, that the property given to her was in lieu of all rights and claims which she might have against his estate. It would seem to be clear beyond peradventure that, as to these transfers, they were made in that contemplation of death which the law designates, and that they were gifts in life substituted for gifts by will. The transfers to the son stand upon a slightly but not an essentially different plane. If it can be said that there was any element of valuable consideration received back by the father for his transfer to the son, it was certainly not adequate from any commercial point of view. He was in failing health at the time the gift was made. It was known, and he knew, that his tumor had returned and that the days of his life were numbered, and the agreement to assume an indebtedness of \$30,000 in consideration of a gift in value exceeding \$100,000 and the further agreement to pay \$600 a month during the donor's life (which agreement itself does not seem to have been observed), certainly do not measure up to the requirements of the law of a valuable and adequate consideration. Indeed, it seems to be quite plain that, as in the case of the widow, so in the case of the son, the fa-

ther in contemplation of death was transferring by gift instead of devise the valuable business which he owned and had theretofore conducted.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

169 Cal. 604

In re BROOME'S ESTATE. (L. A. 3851.)
(Supreme Court of California. March 12, 1915.)

1. APPEAL AND ERROR ⇨616—RECORD—AUTHENTICATION—"JUDGMENT ROLL."

Papers not properly authenticated by the judge as having been used on the hearing resulting in an order or decree cannot be considered on appeal, except those constituting the judgment roll, which, on appeal from a decree of final distribution in an estate, includes the petition for distribution, the opposition thereto, if any, the counter petitions, or any pleadings filed at or before the hearing by parties who appeared and claimed distribution, with the answers thereto and the findings and decree of distribution, and any order similar to those mentioned in Code Civ. Proc. § 670, defining the contents of the "judgment roll."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2714-2718; Dec. Dig. ⇨616.]

For other definitions, see Words and Phrases, First and Second Series, Judgment Roll.]

2. APPEAL AND ERROR ⇨612 — RECORD — QUESTIONS PRESENTED — DISTRIBUTION OF ESTATE.

Where the petition for a decree of distribution merely alleges that petitioner is the administrator with the will annexed, and asks that distribution be ordered in proportions specified, and the decree thereon follows the exact terms of the petition, and none of the pleadings set out the will or refer to it in such manner as to make it part of the judgment roll, and on appeal under Code Civ. Proc. § 953a, the certificate made by the clerk to the transcript states only that the copies included in the transcript are true and correct copies of the originals as they appear on file and of record in his office, and there is no showing that they were used on the hearing, the will is not before the appellate court for construction, and whether the distribution ordered is in accordance therewith cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694-2701; Dec. Dig. ⇨612.]

Department 2. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

In the matter of the estate of William Richard Broome, deceased. From a decree of final distribution, Frances Broome, widow of deceased, appeals. Affirmed.

See, also, 162 Cal. 258, 122 Pac. 470.

Houghton & Houghton, of San Francisco, for appellant. Canfield & Starbuck, of Santa Barbara, for respondent.

HENSHAW, J. This is an attempted appeal by Frances Broome, widow of William Richard Broome, deceased, from a decree of final distribution given in the latter's estate.

[1] It would appear that on this appeal a different construction of the will of William Richard Broome is sought from that put upon it by the decree, but the record presented to us forbids an examination of the question. It is axiomatic that papers not properly authenticated as having been used on a hearing resulting in a judgment or order or decree cannot be considered on appeal. Saving those papers, and those alone, which may be regarded as constituting the judgment roll, all others require authentication by the judge. What may be regarded as constituting the judgment roll in an appeal such as this is set forth in *Estate of Gamble*, 166 Cal. 253, 135 Pac. 970. There it is said:

"These would be the petition for distribution, the opposition thereto, if any written opposition was filed, the counter petitions filed, if any there were, or any other papers in the nature of pleadings filed at or before the hearing purporting to set forth the claim of parties who appeared and claimed distribution, with the answers thereto, also the findings of the court, if any, upon the issues formed, any orders or other papers of like character to those mentioned in section 670 of the Code of Civil Procedure, and the decree of distribution itself."

These papers, and these alone, are we permitted to consider upon this appeal.

[2] But the transcript brought upon support of this appeal, apparently prepared under the new method (C. C. P. § 953a), consists of a number of papers, records, and documents, including the order admitting the will to probate, petition for letters of administration with the will annexed, order appointing administrator with the will annexed, and stipulation of the parties, bearing for certification nothing further than the declaration of the clerk that the copies contained in the transcript are true and correct copies of the same "as they appear on file and of record in my office." Therefore the will of William Richard Broome, deceased, upon which the decree of distribution is based, is not before this court for consideration. We do not mean by this to be understood as saying that, if any of the papers and files which we are authorized to consider contained either an exposition of the will or such reference to it as to make it a part of the judgment roll, it might not here be considered. But such is not the condition of affairs presented by this appeal. The petition for distribution declares merely that the petitioner is the administrator with the will annexed, and asks that distribution be decreed, to this appellant one-third of the estate, and to the three named children of the deceased each two-ninths of the estate. The decree of distribution in precise terms follows the petition. The will is thus merged in the decree of distribution. It is merely a part of the evidence upon which the decree of distribution is based. *Wills v. Wills*, 166 Cal. 529, 532, 137 Pac. 249. "On appeal the presumptions of law are all in favor of the action of the court below.

If error is claimed, the record on appeal must contain sufficient legal evidence of it or the claim must be disregarded." *Estate of Gamble*, supra.

Such is the precise situation here presented, and for this reason the decree appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

169 Cal. 611

NICHOLS et al. v. McCULLOM et al.

(L. A. 3333.)

(Supreme Court of California. March 13, 1915.)

1. EJECTMENT $\Leftrightarrow$ 94—TITLE—SUFFICIENCY OF EVIDENCE.

Evidence in ejectment held sufficient to show the identity of the land occupied by defendants with the section to which plaintiffs had title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 279; Dec. Dig. $\Leftrightarrow$ 94.]

2. PUBLIC LANDS $\Leftrightarrow$ 28—RESURVEY—CONSTITUTIONALITY.

Where the original federal survey of public lands became useless through disappearance of monuments, and Congress ordered a resurvey to be made, which was done, defendants, who subsequently entered upon a school section not open to entry established by such resurvey, could not object to the abandonment of the previous survey when they had claimed no rights in the lands previous to the act authorizing the resurvey; the public lands being under the exclusive control of Congress until title or right to acquire it has vested in some person other than the United States.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 40; Dec. Dig. $\Leftrightarrow$ 28.]

3. PUBLIC LANDS $\Leftrightarrow$ 54—SURVEYS—TITLE OF STATE PATENTEES.

Where defendants entered upon a school section established by a previous resurvey of public lands pursuant to act of Congress, and where such lands were claimed by the plaintiffs as state patentees, if the land in controversy was made a school section by the original government survey, the defendants could not defeat plaintiffs' title, since plaintiffs held by state patent of a certain tract delimited by such original survey; while, if the first survey was not efficient to render the tract school land so as to be subject to the grant of the state, it remained public land of the United States subject to the jurisdiction of Congress as to which the resurvey was authorized, and which resurvey identified the tract as school land belonging to the state or its grantees, and accordingly not open to entry by defendants.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 152-164, 166-169; Dec. Dig. $\Leftrightarrow$ 54.]

In Bank. Appeal from Superior Court, Imperial County; F. J. Cole, Judge.

Action by Augusta Z. Nichols and others against W. F. McCullom and another. Judgment for defendants, and plaintiffs appeal. Reversed.

Leroy A. Wright, of San Diego, W. H. Larew, of Madera, J. S. Larew, of El Centro, Powers & Holland, of Los Angeles, and Wright & Winnick, of San Diego, for appellants. Eshleman & Swing and Conkling & Brown, all of El Centro, for respondents.

SLOSS, J. This action was brought to recover possession of a tract of land in Imperial county, with damages for the withholding. There was a jury trial, which resulted in a verdict in favor of defendants. From the judgment entered pursuant to the verdict, the plaintiffs appeal, bringing up the evidence by means of a bill of exceptions.

The land in controversy is described as fractional section 16 of fractional township 17 south, range 15 east, San Bernardino base and meridian, containing 441.96 acres more or less. The land thus described was originally public land of the United States, and, being a sixteenth section, it passed from the United States to the state of California as a part of the school land grant. It is not disputed that the plaintiffs have acquired the state title as successors to the holders of a patent from the state, dated January 12, 1903. Nor is it questioned that the defendants are in possession of land which, according to the claim of plaintiffs, forms a part of the section granted by the state patent. The real point of contention is whether the plaintiffs have succeeded in establishing the identity of the land occupied by defendants with fractional section 16 of township 17 south, range 15 east, San Bernardino base and meridian. In other words, the defendants took at the trial, and now take, the position that, while the plaintiffs are unquestionably the owners of that section, the proof fails to show that the land claimed and withheld by the defendants is within the section thus described. The jury, by returning a verdict for the defendants, determined this issue in their favor. The appellants attack the sufficiency of the evidence to support the verdict, and assign as error certain instructions of the court.

The tract in controversy, with neighboring land, located in what is known as Imperial valley, was originally surveyed under the authority of the government of the United States in 1856. The survey was approved, and the approved plat filed in the Department of the Interior and in the local land office in 1857. It is a matter of common knowledge, and is, in fact, sufficiently shown by the record in this case, that the land embraced in this survey, or the greater part thereof, remained unoccupied for many years. When it was discovered that the apparently barren lands in Imperial valley could be rendered exceedingly productive by means of irrigation, an extensive settlement of the valley began. By that time the monuments referred to in the field notes of the survey of 1856 had, to a great extent, been obliterated, and it was difficult, and in many cases impossible, to trace upon the ground the boundaries of the governmental subdivisions as established by the survey. Moved, no doubt, by the knowledge of these conditions, the Congress of the United States passed an act, entitled "An act providing for the resurvey of certain townships in San Diego

county, California." (The land is within the territory which has, since the passage of the act, been taken from San Diego county to form the new county of Imperial.) By this act, which was approved July 1, 1902, it was enacted:

"That the Secretary of the Interior be, and he is hereby authorized to cause to be made a resurvey of the lands of San Diego county, in the state of California, embraced in and consisting of the tier of townships 13, 14, 15 and 16 south, of range 11, 12, 13, 14, 15 and 16 east, and the fractional township 17 south, of range 15 and 16 east, all of San Bernardino base and meridian; * * * provided, that nothing herein contained shall be so construed as to impair the present bona fide claim of any actual occupant of any of said lands to the lands so occupied."

Pursuant to this law resurveys of the townships described were ordered. Among others, instructions for surveying township 17 south, range 15 east, were issued to Legrand Friel, United States deputy surveyor. Mr. Friel made his survey, and filed his returns with the surveyor general. They were transmitted to the General Land Office for its approval. Such approval was refused for reasons stated in a decision of the Commissioner of the General Land Office, who returned the papers to the surveyor general for California with directions to except from approval the establishment of the alleged school sections; the Commissioner stating that the sixteenth and thirty-sixth sections in each of the townships involved would be "platted and located in conformity with the claim lines of adjacent sections as shown by the resurvey." A corrected survey and plat were made, and were duly approved. The record contains a decision of the Commissioner, under date of November 4, 1910, adjudging that "tract 159" is a school section represented upon the plat of resurvey; i. e., section 16 of township 17. At the trial the defendants admitted that they were occupying "the tract of land on that map as section 16 by the new survey"—the land "marked as tract 159 on the plat."

It should be added that at the date of the approval of the act providing for a resurvey (July 1, 1902) the defendants had not gone into possession of the land, and had taken no steps toward acquiring any title thereto. They were not, therefore, within the scope of the proviso with which the enactment ends.

[1, 2] On the foregoing evidence, none of which is disputed, it seems clear that the plaintiffs made out a complete case of ownership and right of possession of the land in controversy, and that the verdict of the jury against their claim is unsupported.

The act of July 1, 1902, authorized the Secretary of the Interior to cause to be made a resurvey of certain townships. As we have already pointed out, the lines of the original survey could not with certainty be traced upon the ground. The purpose of the congressional enactment undoubtedly was that the

new survey directed to be made should supersede the old one, which had become unavailable. It was intended that the dispositions of the public lands within the area affected should be regulated by the new survey, which, in theory at least, would reproduce the exact corners and lines of the old one. The Congress recognized, however, that some of these lands were held by occupants who claimed or might claim vested rights. Such claims were expressly saved from the effect of the act by the proviso at the end. But the very fact that this proviso was inserted lends added force to the view that, as to all persons not then in occupancy of any of the lands, the resurvey was intended to be binding. We see no constitutional objection to such an enactment. The public lands are under the exclusive control of Congress until title or a right to acquire title has, pursuant to some law, vested in some person or body corporate other than the United States. A person who claims no right in such public lands certainly cannot object to the act of Congress in abandoning a survey already made, and substituting another in its place. This would be true even if the monuments of the original survey were readily discoverable. The power of Congress to provide for a resurvey is much clearer where, as here, it has become impossible or exceedingly difficult to make a correct application of the original survey.

[3] But, say the respondents, the sixteenth and thirty-sixth sections were identified by the survey of 1856, and, upon the approval of that survey, they at once passed to the state of California. *Higgins v. Houghton*, 25 Cal. 252; *Sherman v. Buick*, 45 Cal. 656. They then, it is argued, ceased to be public lands, and the power of the federal government to exercise any control over them, by survey or otherwise, ceased. But the location of these sections was necessarily dependent upon the location of the adjoining sections of public land still undisposed of. In delimiting the boundaries of the adjoining sections, it was necessary that the boundaries of the school sections should be marked out and determined. Furthermore, this contention, it seems to us, can hardly be urged against the appellants, who are accepting the resurvey as accurately describing the land owned by them. Such appellants might, perhaps, be in a position to attack the resurvey on the ground that its effect was to take from them land to which they already had title. But they are the only parties entitled to make this point. When they rely upon the resurvey as an accurate designation of the school section owned by them, the respondents, who do not claim under the state, and who were not making a claim of any

kind when the statute authorizing the survey was passed, cannot object. If, according to the survey of 1856, the land in controversy was the sixteenth section, the appellants have a perfect title to it, and the respondents clearly have neither title nor right of possession. If it was not school land, it remained public land of the United States, and subject to the jurisdiction of Congress. In that aspect, the resurvey was unquestionably authorized, and the respondents can have no valid claim to land which was identified by the resurvey as school land which belonged to the state or its grantees, and was accordingly not open to entry.

The authorities cited by respondents to the effect that the Land Department has no authority by means of a resurvey or otherwise to affect the title to land after such title has passed from the government to its grantees (*Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Kean v. Roby*, 145 Ind. 221, 42 N. E. 1012; *Murphy v. Kirwan* [C. C.] 103 Fed. 104) have no application to the facts of this case. In none of these cases had there been congressional authorization to make a resurvey which should take the place (so far as claims to be thereafter initiated were concerned) of an existing survey.

If the act of 1902 has been rightly interpreted by us, there is no occasion to consider the argument of respondents to the effect that the decision of the Land Department of the government fixing the location of section 16 was erroneous, and that said section was placed by the new survey at a different place from that occupied by section 16 under the survey of 1856. The new survey superseded the old one. Parties going upon the land after the passage of the act, and with constructive knowledge of the fact that such survey was to be made, took the chance that such survey might establish that the land occupied by them was a school section, and not subject to entry as vacant lands of the United States.

The foregoing views make it unnecessary to consider specifically the various points made by appellants in attacking rulings on evidence and instructions to the jury. These questions can readily be solved by the application of the principles outlined in this opinion. Nor need we discuss the claim that the court erred in overruling plaintiffs' challenge to a juror. The same situation will not, in all likelihood, be presented on a new trial.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

169 Cal. 542

PEOPLE v. BANNING et al. (L. A. 3290.)
(Supreme Court of California. March 5, 1915.)

1. NAVIGABLE WATERS $\hookrightarrow$ 37—TIDELANDS—SALE.

Sale by the state of tidelands within two miles of an incorporated town, and so reserved from sale by the law then in force, was void.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. $\hookrightarrow$ 37.]

2. ADVERSE POSSESSION $\hookrightarrow$ 7—TIDELANDS.

No title to tidelands can be acquired by adverse possession against the state.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24-42; Dec. Dig. $\hookrightarrow$ 7.]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the People against Hancock Banning and others. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 166 Cal. 630, 138 Pac. 100.

Smith, Miller & Phelps, of Los Angeles, for appellants. U. S. Webb, Atty. Gen., and Anderson & Anderson, Leslie R. Hewitt, John W. Sherk, City Atty., and A. P. Fleming, all of Los Angeles, for the People.

SHAW, J. The defendants appeal from the judgment.

This case is similar to the series of nine cases begun by the State of California to determine the state's right and title to certain lands in the bay of San Pedro and mentioned in the opinion in *People v. California Fish Co.*, 166 Cal. 576, 138 Pac. 79. The complaint, in form, states a cause of action to quiet title to a tract of land containing about seven acres. The judgment is that the state of California is the owner of all that portion of the tract which lies south of the boundary line of the San Pedro grant to Manuel Dominguez of December 18, 1858, the same being tidelands, and that the defendants, other than William Banning, own all that part of the tract lying north of said boundary line, and that no adjudication is made as to the littoral rights, if any, of the defendants in or over the land adjudged to the plaintiff.

[1] The defendants claim as purchasers of tidelands from the state, under the provisions of the Political Code, §§ 3440 to 3493½, inclusive. The land lies within two miles of the town of Wilmington. A part of it is included in Tideland Location No. 57, being the location of that number referred to in the opinions in *People v. California Fish Co.*, supra, and *People v. Banning Co.*, 166 Cal. at page 632, 138 Pac. 100. The remainder is included in Tideland Location No. 53, application for the purchase of which was made in 1877, and a certificate of purchase therefor issued in 1880 to James McFadden, to whose rights the defendants have succeeded. Under the decisions above mentioned, all this land was withheld from sale by state officers by the law in force at the time the purchases were

made, because of the fact that it was within two miles of the town of Wilmington. Upon the principle stated in those cases the sales and patents under which the defendants claim are void. The reasons were fully stated in the opinions in those cases, and it is unnecessary to consider them here.

[2] The defendants also claim that they established title to the tideland by prescription. The land here involved, so far as the tideland is concerned, is the same tract that was under consideration in the case of *Patton v. Wilmington*, 147 Pac. 141, this day decided. In the opinion in that case we have treated the subject at length. For like reasons we here hold that defendants did not obtain title by their adverse possession. No other questions are presented.

The judgment is affirmed.

I concur: SLOSS, J.

ANGELLOTTI, C. J. I concur in the judgment for the reasons stated in my concurring opinion in *Patton et al. v. Wilmington*, 147 Pac. 141, L. A. No. 3485.

HENSHAW, J. I concur for the reasons given in my concurring opinion in *Patton et al. v. Wilmington*, 147 Pac. 141, L. A. No. 3485.

We concur: MELVIN, J.; LORIGAN, J.

169 Cal. 537

PEOPLE v. SOUTHERN PAC. RY. CO. et al
(L. A. 3059.)

(Supreme Court of California. March 5, 1915.)

1. ADVERSE POSSESSION $\hookrightarrow$ 7—TIDELANDS.

No title to tidelands withheld from sale can be acquired by adverse possession against the state.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24-42; Dec. Dig. $\hookrightarrow$ 7.]

2. NAVIGABLE WATERS $\hookrightarrow$ 39—LITTORAL OWNERS—TIDELANDS.

Owners of upland bordering on navigable waters can assert no interest in intervening tidelands, against right of the state, or its authorized agents, to hold and control them in furtherance of the public uses of navigation and fishery.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. $\hookrightarrow$ 39.]

3. PUBLIC LANDS $\hookrightarrow$ 144—TIDELANDS—SALE.

Patents for tidelands, within two miles of an incorporated town, and so reserved from sale, are void.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391-399; Dec. Dig. $\hookrightarrow$ 144.]

4. NAVIGABLE WATERS $\hookrightarrow$ 37—TIDELANDS—USE BY RAILROAD.

No right to tidelands is gained by building and operating, without permit from the state or municipal authorities, a railroad across them.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. $\hookrightarrow$ 37.]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the People against the Southern Pacific Railway Company and others. From an adverse judgment and order, defendants appeal. Modified and affirmed.

O'Melveny, Stevens & Millikin, of Los Angeles (Gibson, Dunn & Crutcher, J. W. McKinley, Frank Karr, Ward Chapman, Sheldon Borden, W. R. Millar, and E. E. Bacon, all of Los Angeles, of counsel), for appellants. U. S. Webb, Atty. Gen., and Leslie R. Hewitt, John W. Shenk, A. P. Fleming, and Anderson & Anderson, all of Los Angeles, for the People.

PER CURIAM. This is one of the "tideland cases," so called, decided by this court in a number of opinions filed at the same time; the first of the series being *People v. California Fish Co.*, 166 Cal. 576, 138 Pac. 79. In the present case a rehearing was ordered.

The opinion originally filed was prepared by Shaw, J., and read as follows:

"In this case separate appeals from the order denying a new trial and from the judgment are presented, one by the San Pedro Lumber Company and the other by the other defendants. The action is in all respects similar to the action in *People v. California Fish Co.*, 166 Cal. 576, 138 Pac. 79 (L. A. No. 3060), in which we have fully discussed all of the questions involved in this action, except those hereinafter mentioned. The case involves the land embraced in tideland locations Nos. 63 and 64. Applications and surveys for these locations were approved on April 11, 1881, first payments were made on April 15, 1881, certificates of purchase were issued on April 23, 1881, to P. C. Learned, and a single patent was issued for both locations to said Learned on May 16, 1882. Certain wharf franchises and permits for railroad and wharf purposes, being those mentioned in L. A. No. 3056, *People v. Southern Pacific Railroad Co. et al.*, 166 Cal. 614, 138 Pac. 94, and also a wharf franchise granted by the city of San Pedro, were excluded from consideration by the court below, and all rights claimed thereunder were excepted from the judgment in favor of the plaintiff. A large part of the lands are, and always have been, above the high tide line. The court below found that this upland was the property of the defendant San Pedro Lumber Company, and gave judgment to that effect. That company, in its brief, does not claim by prescription. The remaining portion was found to be a part of the state tide and submerged lands and was adjudicated to be the property of the plaintiff. All of the land lies within two miles of the town of Wilmington as incorporated in 1872. The question of the validity of the patents under which the defendants claim the tidelands was fully discussed in the opinion in L. A. No. 3060 aforesaid; this case being one of the series of cases therein mentioned. Upon the principles there stated, the patent conveyed no title to tidelands or submerged lands.

"The Los Angeles Interurban Railway Company constructed an electric railroad over a part of the land, being a part of its line from Los Angeles to San Pedro, and operated the same for some time and then leased it to the appellant Pacific Electric Railway Company, which has ever since operated it. The railway was constructed less than five years before these actions were begun. It does not appear that either company ever obtained a permit to build and maintain the railroad, either from the state or the municipal authorities. The court below correctly decided that no right to the tideland was gained by this use for railroad purposes.

"An error was made in the judgment respecting the upland awarded to the San Pedro Lumber Company. The Southern Pacific Railroad Company and the Los Angeles Interurban Railway Company have certain titles and rights therein which are not mentioned in the judgment. The parties have stipulated that this error may be corrected by this court by a specified modification of the judgment. This modification will be made in accordance with the stipulation, but without costs. In other respects the judgment is correct. The order denying a new trial is affirmed.

"The following clause in the judgment appealed from, to wit, 'And as to said excepted portion above described it is ordered, adjudged, and decreed that the San Pedro Lumber Company is the owner thereof,' is changed and modified so as to read as follows: 'And as to said excepted portion above described it is ordered, adjudged, and decreed that the San Pedro Lumber Company is the owner thereof, except all that portion thereof described as follows: Commencing at a point on the center line of the Southern Pacific Railroad Company, where said center line intersects United States bulkhead line between stations 52 and * * * of the survey of bulkhead lines which was established by the United States in July, 1908, in San Pedro harbor, and running thence southerly along said railroad following the curvature thereof and embracing a strip of land twenty (20) feet on each side of said center line to the southerly boundary of said last above-described land, and it is ordered, adjudged, and decreed that the Southern Pacific Railroad Company is the owner thereof, also except an easement for right of way conveyed prior to the commencement of this action by the San Pedro Lumber Company to the Los Angeles Interurban Railway Company by deed dated February 25, 1905, and recorded in Book 4001, p. 13, of deeds, records of Los Angeles county, Cal.; and it is ordered, adjudged, and decreed that the Los Angeles Interurban Railway Company is the owner of said easement of right of way last described. And as so modified the judgment is affirmed, with costs to respondent.'"

The rehearing was ordered on the petition of San Pedro Lumber Company, which asked this court to pass specifically on its claim of prescriptive title, and on the question of its littoral rights. Although the first contention had not been advanced in the briefs, and the second was, as we thought, settled by the contemporaneous decision in *People v. S. P. R. Co.*, 166 Cal. 627, 138 Pac. 103, the rehearing was ordered, for the reason, principally, that further consideration of the question of prescriptive title was deemed desirable.

[1] Decisions rendered by this court since the rehearing was ordered dispense with the necessity of extended discussion of either of the questions thus presented. In *Patton v. City of Wilmington*, 147 Pac. 141 (L. A. No. 3485), filed March 4, 1915, it was held that a title to tidelands, which have been withheld from sale by the state, cannot be acquired by adverse possession. It is true that the justices joining in the decision differed widely in their reasons for this conclusion, but five of them united in declaring that, on one ground or another, a prescriptive title to such lands could not be acquired against the state. The court has thus finally repudiated the doctrine that a qualified title (viz., a title to the fee, subject to the public easements) may

thus be acquired. This view had been declared in *People v. Banning*, 140 Pac. 587 (L. A. No. 3077), and *People v. Banning*, 140 Pac. 591 (L. A. No. 3061), decided at the same time as the California Fish Company Case, but in each of these cases the judgment was vacated and a rehearing ordered. The two cases were subsequently disposed of upon stipulation of the parties; there being no decision upon the point now under discussion.

[2] The claim of littoral rights is met by a reference to *Henry Dalton & Sons Co. v. Oakland*, 143 Pac. 721, where it is held, on the authority of *People v. S. P. R. R. Co.*, 166 Cal. 627, 138 Pac. 103, that the owner of upland bordering upon navigable waters cannot assert an interest in the intervening tidelands, as against the right of the state or its authorized agencies to hold and control such tidelands in furtherance of the public uses of navigation and fishery. The decree here appealed from adjudged merely that the plaintiff is the owner of the tidelands in question, and that the defendants have no interest therein. This is a correct determination of the respective rights of the parties in such lands. Whether the owner of the upland may occupy the tidelands until the state, or its agency, sees fit to take possession of them in furtherance of some plan to aid navigation, or whether, when that time comes, the San Pedro Lumber Company will be entitled to compensation on account of structures erected by it on these lands, are questions that are not presented by the record before us, and that may well be left to be decided when they arise. See *People v. Cal. Fish. Co.*, *supra*.

[3, 4] The opinion heretofore filed is approved as a correct determination of the points therein decided.

The order denying a new trial is affirmed. The judgment is modified as provided in said former opinion, and as so modified is affirmed, with costs to respondent.

169 Cal. 625

IN RE CHASE'S ESTATE.

STEWART'v. CHASE et al. (L. A. 3249.)
(Supreme Court of California. March 16, 1915.
Rehearing Denied April 15, 1915.)

1. PLEADING ⚡214 — DEMURRER — ADMISSIONS.

Petitioner for the probate of a will by standing upon his demurrer without answer to the pleadings of contestants, in legal effect admitted the truth of all the allegations well pleaded in the contest.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. ⚡214.]

2. JUDGMENT ⚡713—RES JUDICATA — WILL CONTEST.

Where petitioner contested the will of deceased, admitted to probate in the state, and unsuccessfully sought a revocation of its probate, and offered therein for probate a foreign will of the deceased, an injunction restraining him from presenting the alleged foreign will for probate and from any contest of the will previously admitted to probate, which, after denial of a motion to vacate, became final and was not appealed from, was res judicata and estopped petitioner, claiming a subsequently acquired interest under the foreign will, from offering such will for probate.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. ⚡713.]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Petition by Paul Stewart for probate of a foreign will of Florence E. Chase, deceased, contested by Ernest W. Chase and others. Petition denied, and petitioner appeals. Affirmed.

T. M. Stewart, of Los Angeles, for appellant. Waldo M. York and Enyeart & Holton, all of Los Angeles, for respondents.

HENSHAW, J. There was offered for probate in the superior court of the county of Los Angeles a foreign will of Florence E. Chase, deceased, which will, it was averred, had been duly admitted to probate in the

probate court of the county of Penobscot, state of Maine, of which state it was also alleged Florence E. Chase was a resident at the time of her death. Elinor A. Chase Stevens was the sole devisee and beneficiary under this will. The petitioner for the probate thereof, Paul Stewart, asserts an interest in the will through assignment from Elinor A. Chase Stevens. This offer was met by a contest instituted by the beneficiaries under the will of Horace W. Chase, deceased, who in his lifetime had been a brother of Florence E. Chase, deceased. In their contest they alleged that another will of Florence E. Chase, deceased, had been duly admitted to probate in the superior court of Los Angeles county; that by this will the property left by Florence E. Chase was to be disposed of precisely as was the property of her brother Horace W. Chase; that they were beneficiaries under the will of Horace W. Chase, deceased, and thus interested in the will of Florence E. Chase; that to this will a contest had been instituted by Elinor A. Chase Stevens and Paul Stewart, and that their contest had been dismissed. In this contest Elinor A. Chase Stevens and Paul Stewart offered for probate this foreign will of Florence E. Chase. Further, the contestants pleaded an injunctive judgment obtained by them in an action prosecuted against Elinor A. Chase Stevens and Paul Stewart by which judgment Elinor A. Chase Stevens—

“and all her counselors, attorneys, solicitors, and agents and all others acting in aid or assistance of her, were required to absolutely desist and refrain from presenting for probate in this superior court the said alleged will of Florence E. Chase, deceased, purporting to be dated February 17, 1912, and alleged to have been admitted to probate in the probate court of the county of Penobscot, state of Maine, on the 29th day of May, 1912, and also were required to absolutely desist and refrain from in any way contesting the will of said Florence E. Chase, deceased, heretofore admitted to probate in this superior court on the 24th day of May, 1912; that the said judgment of said court was duly entered in said court in March, 1913; that thereafter, after the entry of said judgment against said Elinor A. Chase Stevens, she moved said court to vacate and set aside the said judgment, which said motion was denied by said court, and the said judgment against the said Elinor A. Chase Stevens, and the said order denying the same have become final, and no appeal has been taken therefrom.”

The order of the court in probate dismissing the contest of Elinor A. Chase Stevens and Paul Stewart, seeking a revocation of the probate of the will of Florence E. Chase, was made after and in pursuance of this judgment. To all of these matters so pleaded as grounds of contest to the probate of the foreign will of Florence E. Chase, so proffered for probate in California by Paul Stewart, Paul Stewart demurred, and, his demurrer having been overruled, he declined to answer. Upon this state of the record, after the making of voluminous findings in accordance with the allegations above set

forth, the trial court decreed the probate of the will of Florence E. Chase, deceased, to be irrevocable and conclusive, and denied the application of Paul Stewart for the probate of the foreign will.

[1] The attitude of appellant in standing upon his demurrer without answer is, of course, in legal effect, an admission of the truth of all the allegations well pleaded in the contest. Thus, it stands admitted that he has acquired his interest in the estate of Florence E. Chase, deceased, through assignment from Elinor A. Chase Stevens, sole beneficiary under the foreign will, and that he took this assignment subject to the injunction above set forth. Indeed, appellant does not question this, but founds his right to a probate of the will upon the proposition that the so-called contest is not a contest at all; that the injunctive judgment does not raise an estoppel against him, and that the sole question with which the court will deal under his offer of probate is whether the instrument under investigation is the legally valid, free act of a competent testatrix, and upon this he argues, that, as it has been so decreed by virtue of its admission to probate in the courts of Maine, it must be so held here, under the provisions of article 4, section 1, Constitution of the United States, requiring that full faith and credit shall be given in each state to the judicial proceedings of every other state.

[2] Appellant's position, however, is a mistaken one. True it is that in terms our Code does not say that an estoppel by judgment may be pleaded as a ground of contest against the offer of probate of a foreign will, and true it is, also, that it specifies the general grounds of contest. But it would be beyond reason to hold that in the enumeration of these specific grounds of contest the law meant to declare that the principles of res judicata and estoppel by judgment were inapplicable in such a contest. By solemn and final decree equity has forbidden this appellant from doing the precise thing which he undertakes to do. It would verge upon the absurd to hold that the court, before which he seeks to do this thing, must disregard that decree when formally presented for its consideration. *Marco v. Low*, 55 Me. 553; *Moors v. Ladenburg*, 178 Mass. 272, 59 N. E. 676. Whatever informalities or irregularities may have attached to the original judgment for lack of due service upon Elinor A. Chase Stevens, it appears and is found that she subsequently came into the courts of California to cause that judgment to be reviewed and set aside. Her application was denied, her right to appeal is gone, and unquestionably that judgment is now final and binding. *Lake v. Bonyng*, 161 Cal. 120, 118 Pac. 535.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

169 Cal. 632

BLACK et al. v. HUNTER et al. (L. A. 3457.)

(Supreme Court of California, March 19, 1915.

Rehearing Denied April 17, 1915.)

1. BROKERS — 66—DIVISION OF COMMISSIONS — CONTRACT—SUBSTITUTION.

Plaintiffs and another real estate broker entered into a contract to divide any commissions obtained from the sale of specified realty. The property was intended to be sold to the county, and, as another broker was urging the county to purchase a different parcel, the three entered into a second contract reciting that, plaintiffs having obtained from their associate the sole agency for the property, and the two having agreed to divide the net commissions, all agreed that, in consideration of the third broker abandoning his project to sell the county a different parcel, the commissions should be divided equally among the three. *Held*, that the second contract superseded the original agreement.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 51; Dec. Dig. 66.]

2. BROKERS — 66—DIVIDING COMMISSIONS—CONTRACTS—ABROGATION.

A partnership or combination agreement between brokers to assist in selling land and divide the commissions *held* abandoned.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 51; Dec. Dig. 66.]

3. PARTNERSHIP — 262 — AGREEMENTS — ABANDONMENT.

Under Civ. Code, § 2450, subd. 2, a partnership may be dissolved by the express will of the partners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 602, 605, 606; Dec. Dig. 262.]

4. BROKERS — 66—DIVIDING COMMISSIONS—ABANDONMENT OF AGREEMENT.

Where brokers who had agreed to combine in an attempt to sell land and to divide the commissions abandoned their agreement, it was not a breach of faith for defendants, who were parties to the contract, to effect a sale without informing one of their associates, where the abandonment was made in good faith, and nothing was concealed from any of the parties.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 51; Dec. Dig. 66.]

In Bank. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by George N. Black and Julius R. Black, copartners doing business as Black Bros., against Cal F. Hunter and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Denis & Loewenthal and E. E. Mellette, all of Los Angeles, for appellants. O'Melveny, Stevens & Milliken and Haas & Dunnigan, all of Los Angeles, for respondents.

MELVIN, J. Plaintiffs sued to recover a portion of a fee received by the defendants for negotiating the sale of certain real estate situated in the city of Los Angeles. Defendants answered, denying liability. A trial was had upon the issues joined, and judgment was given in favor of defendants. From this judgment, plaintiffs appeal.

The court found that on the 26th day of January, 1909, the plaintiff copartnership and the defendant Cal F. Hunter entered in-

to a contract which was in the following words and figures:

"This agreement by and between Cal F. Hunter and Black Bros., both of the city of Los Angeles, recites that, whereas said parties have combined to effect the sale for Frank P. Flint, G. Rupert Johnson, and Adloff & Hauerwass, respectively, of the properties in said city known as lots Nos. 1, 2, 3, 4, 8, and 9, respectively of the D. G. Stephens tract, and have secured or are securing for that purpose from the said owners of said properties certain contracts appointing said Cal F. Hunter as sole and exclusive agent for the sale of said properties, it is hereby agreed by and between said parties that whatever commission shall be received by said Hunter for effecting the sale of any or all of said lots shall be divided by said Hunter and said Black Bros. share and share alike, after deducting any necessary expenses accrued in effecting said sale.

"Dated at Los Angeles, California, this 26th day of January, 1909.

"Cal F. Hunter.
"Black Bros."

It was further found that at the time of the execution of this contract Hunter and Black Bros. were engaged in securing certain exclusive options or agencies for the property described in the agreement from the owners of said land, and that none of said owners contemplated a sale to any other than the county of Los Angeles; that prior to May 12, 1909, Hunter and Black Bros. obtained from the owners of the said property certain agencies and authorities empowering the said Cal F. Hunter to offer the entire tract, which was made up of the holdings of several different owners, to the county of Los Angeles; and that Hunter did make such offer to the county, but that the said county of Los Angeles did not accept it. The court further found that all of the written authorizations empowering Hunter or Black Bros. to sell the properties to the county contained conditions limiting the agencies to definite periods of time, in no case extending beyond the 10th day of June, 1909. There was a further finding that on May 12, 1909, Black Bros., Cal F. Hunter, and R. A. Rowan & Co. entered into the following agreement:

"May 12, 1909.

"This memorandum is to witness:

"That whereas Cal F. Hunter holds certain sole agencies for the sale of the following real property, situate in the city of and county of Los Angeles, state of California, described as follows: Lots 1, 2, 3, 4, 8, and 9, D. G. Stevens tract; and

"Whereas, Geo. N. Black obtained for said Hunter the sole agency for a part of the above-described property; and

"Whereas, said Cal F. Hunter and Geo. N. Black have entered into an agreement to divide the net commissions received after deducting all expenses from the sale of the above described property; and

"Whereas, Cal F. Hunter has offered to sell to the county of Los Angeles the property hereinabove described, for the sum of \$220,000; and

"Whereas, R. A. Rowan & Co. have submitted and offered to the county of Los Angeles the following described property: Lots 1, 2, 3, 4, and 5 in block A of the Ft. Hill tract, in the city and county of Los Angeles, state of California, for the sum of \$341,500:

"Now, therefore, in consideration of the said R. A. Rowan & Co. dropping their proposition above mentioned, and getting back of and assisting the said Hunter and Black to sell the property first above mentioned, to the county of Los Angeles, as submitted by said Hunter, it is mutually agreed between the said Hunter, Black, and Rowan that the net commissions so received from the sale of the property offered by said Hunter, shall be divided as follows: To the said Rowan, one-third of the net commission; to the said Black, one-third of the net commission; and to the said Hunter, one-third of the net commission.

"The said Hunter, holding said agencies for the sale of the property first above described, is hereby authorized to collect all of the said commissions, when said sale has been completed, and shall divide the same immediately upon the receipt of the same, after deducting such expenses as are incurred in making said sale.

"Cal F. Hunter,

"Geo. N. Black,

"R. A. Rowan & Co.

"By J. Hellonbar."

The consideration for this contract was found by the court to be the securing of the services of R. A. Rowan & Co. in carrying out the sale, the revocation of the contract theretofore made by Black Bros. and Hunter, and that the second contract was entered into as a substitute for the one between plaintiffs and Hunter. It was further found that, in spite of the efforts of the contracting parties, the sale to the county was not made under their agreement; that the county refused to purchase the land; that the agencies from the owners expired, and that they refused to renew said authorizations; that on or about September 28, 1909, the parties to the contract of May 12, 1909, with full knowledge of all of the facts and circumstances, agreed to abandon, and did abandon, that contract. The court found that in January, 1911, the owners of the property mentioned in the complaint and the owners of other adjoining land employed Cal F. Hunter and R. A. Rowan to sell the whole parcel to the county; that in April, 1911, they succeeded in making a sale; and that their commission amounted to \$5,200, to no part of which plaintiffs were entitled, because the said sale was not made pursuant to any contract to which they were parties.

The position of appellants, in brief, is this: The first contract was one of copartnership; the second was not a substitute for it, but merely took Rowan & Co. into the transaction as an agent of the copartnership; and therefore the cancellation of the second contract (and appellants admit that it is no longer in existence) did not abrogate the original agreement of copartnership. Appellants also insist that Rowan (who was the efficient representative of his corporation, having full knowledge of the relations existing between Black Bros. and Hunter) was bound not to take advantage of the knowledge gained as their agent or employé in making a new contract detrimental to the interests of Black Bros., citing in this behalf *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242.

[1] The first and most important question

for us to determine relates to the attack made by appellant upon the finding that the contract of May 12, 1909, was a substitute for that of January 26th of the same year. All of the parties to these contracts were men engaged in the business of buying and selling real estate. The evidence shows that G. Rupert Johnson, who owned some land near the corner of Temple and New High streets, in the city of Los Angeles, made some attempt to sell the property to the county of Los Angeles as the site for a hall of records. Being unsuccessful, he sought the professional services of Mr. George Black, one of the plaintiffs. After some investigation and effort, Mr. Black decided that the proper way to dispose of the property was to sell it to the county with two adjoining parcels owned, respectively, by Adloff & Hauerwass and by the State Loan & Investment Company, a corporation controlled by Senator Flint. Mr. Black broached to Senator Flint the matter of combining the properties for sale, and met with encouragement, but, on application to Adloff & Hauerwass, he learned that Mr. Cal F. Hunter had general charge of their properties. Mr. Black then talked to Mr. Hunter, submitted his plan, suggested that they work together, and the negotiations between them resulted in the contract of January 26, 1909, which we have quoted. Appellants insist that, since this contract was not, by its terms, limited to any particular period of time, it could only be abrogated by the solemn dissolution of the copartnership. Part of the consideration, they say, was Mr. Black's "idea" for the consolidation and sale of the properties. This was part of the capital, they affirm, and for such investment, as well as for Mr. Black's efforts to accomplish the sale, he acquired an interest in the adventure of which he has never been lawfully deprived. The contract itself does not reveal anything with reference to the authorship of the scheme of sale. It merely recites that the signers have combined to effect such sale, that they have secured or are securing certain authorizations looking to such desired consummation, and that such commissions as might be received for a sale of the premises would be equally divided between the parties. This copartnership, if we may so name it, was to have for its capital, so far as the terms of the agreement reveal its scope, the joint efforts of the copartners and the agencies from the owners.

Mr. Black and Mr. Hunter made an offer of the property to the supervisors, but they then learned that R. A. Rowan & Co. were agents for a rival tract. After consultation the Blacks and Mr. Hunter concluded that it would be good policy to take Mr. Rowan into the compact, and negotiations were opened with that end in view, culminating in the agreement of May 12, 1909. An examination of that agreement fully justifies the court's finding that it entirely superseded the con-

tract between Hunter and the Blacks. It recites the fact that Mr. Black has obtained for Hunter the sole agency for a part of the property; that Hunter and Black have agreed to divide the commissions from the sale of the property; that Hunter has made a definite offer of the property at a certain figure to the county; that Rowan & Co. have submitted certain other property for sale to the county; and then names the consideration moving from Rowan & Co.—namely, the abandonment of the rival offer and the assisting of Hunter and Black in making the sale of the property “as submitted by said Hunter” to the county of Los Angeles. On their part Hunter and Black concede a part of their prospective commissions to Rowan & Co. This plainly shows the intent that the latter should be in lieu of the earlier contract. Black and Hunter took the Rowans into their venture on an equal footing to consummate that particular sale under the very options or authorizations that were being sought when the original agreement was made in January. By the terms of both contracts, reasonably construed, the copartnerships, or combined efforts, or whatever we may call the arrangements, were to be circumscribed by the authorizations then made or to be made, not to others which might be given under a different employment in the future. We conclude, therefore, that the second of these contracts was a complete substitute for the first.

[2, 3] Without reviewing it in detail, we may say that there was evidence justifying the court in the finding that the options or agencies from the owners of the property expired, but, even if this were not shown, there was abundant and uncontradicted evidence that the tripartite contract was wholly abandoned. It is not in dispute between Rowan, Hunter, and George Black that they met in the fall of 1909 and agreed to terminate the relationship evidenced by the contract of May 12th. They differ only regarding the method adopted. Mr. Black testified that they destroyed the written agreements themselves. (The contract had been drawn in triplicate.) The others denied this physical destruction, but agreed that nothing further was done looking to the sale of the properties until January, 1911, when the new contracts of agency were secured. Both Rowan and Hunter agreed that it was well understood between the three that the deal for which they had become associated had failed. The testimony of all of the participants justified the court in holding that the transaction was abandoned by common consent about September, 1909. Styling the relationship as one of partnership, as plaintiffs insist that it was, it could be, and was, dissolved by the expressed will of the partners. Section 2450, subd. 2, Civ. Code.

[4] There was no claim on behalf of plain-

tiffs that the defendants were guilty of fraud in the transactions of September, 1909. All of the parties knew that the supervisors of the county had refused to consider the purchase of the land at that time. The agreement to abandon the enterprise was made, therefore, in full view of all of the circumstances, and none of the parties to the original contract or to the one substituted for it was bound to consult or consider his former associates in making future business arrangements. When the contracting parties had agreed to dissolve their relations the obligation to confide the private affairs of one to another had ceased to exist. For this reason the cases cited by appellants in support of the contention that defendants owed the highest good faith to plaintiffs, are not in point. For example, *King v. Wise*, 43 Cal. 633, involved the misconduct of a person who, having been commissioned by his associates to acquire property, fraudulently took a profit from their funds. *Humburg v. Lotz*, 4 Cal. App. 438, 88 Pac. 510, was an action between persons who were admittedly partners, one of whom had made a secret gain from the funds of his associates. *Berry v. Colborn*, 65 W. Va. 493, 64 S. E. 636, 17 Ann. Cas. 1018, is based upon entirely different facts. That decision held that the person who consummated the sale and received the commission had assented to a cancellation of written authority to sell, hoping thereby to eliminate his associates. Then, under a verbal authority to dispose of the property, he immediately proceeded on his own account to carry through the transaction. In the case at bar there had been an abandonment of the enterprise for many months, and there was no showing of bad faith in such abandonment. There is nothing to prevent a party to an abrogated agreement which has been abandoned in good faith from negotiating independently for the property contemplated by the original contract. *Commercial Bank v. Weldon*, 148 Cal. 602, 84 Pac. 171.

No other points made in the briefs require consideration.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LORIGAN, J.; HENSHAW, J.; SLOSS, J.; SHAW, J.

169 Cal. 618

BOND v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 7224.)

(Supreme Court of California. March 15, 1915.)

APPEAL AND ERROR — 1217 — REMAND — STAY OF EXECUTION — JURISDICTION.

Where the court, on appeal from an order striking from the files a notice of intention to move for new trial, reverses the order and thereby remands the case to the superior court, an application for a writ of supersedeas to stay enforcement of the judgment cannot be made to

the Supreme Court, but any relief must be sought in the superior court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4717, 4718; Dec. Dig. ☞ 1217.]

In Bank. Action by Annie Bond against the United Railroads of San Francisco. Application for a writ of supersedeas prayed to be directed against the superior court. Dismissed.

See, also, 146 Pac. 688.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco, for appellant.

PER CURIAM. This is an application for a writ of supersedeas to stay the enforcement of a judgment against the defendant pending the determination of an appeal from an order striking from the files defendant's notice of intention to move for a new trial. When this application was made, the judgment itself had become final. *Bond v. United Railroads* (App.) 140 Pac. 982. In the meanwhile, the then pending appeal has been disposed of; this court having, on February 11, 1915, reversed the order striking out defendant's notice of intention. *Bond v. United Railroads*, 146 Pac. 688. No appeal in the case is therefore now pending in this court, and there remains no power to grant a supersedeas. The writ is asked as one "necessary or proper to the complete exercise of their appellate jurisdiction" (Const. art. 6, § 4), and that jurisdiction has been completely exercised. The reversal of the order last under review remands the proceeding for a new trial to the jurisdiction of the superior court, and any steps looking to a stay of execution on the judgment must now be sought in that court.

The proceeding is dismissed.

169 Cal. 268

OVERAA v. KEENEY. (L. A. 3444.)

(Supreme Court of California. March 18, 1915.)

APPEAL AND ERROR ☞ 962—DISCRETION OF TRIAL COURT—DISMISSAL—WANT OF PROSECUTION.

Where the complaint in an action for personal injuries was filed 11 days before the running of limitations, and summons was taken out almost a year later, or about 3 weeks before running of limitations, and the summons was served when all but 7 months of the time for service had expired, there was no such abuse of discretion as would warrant interference on appeal in dismissing the action for want of prosecution, though plaintiff, in opposition to the motion to dismiss, presented an affidavit giving, as his reason for failing to prosecute, his crippled condition, due to the injuries received as alleged in the complaint, and his consequent inability to earn money to enable him to proceed with the litigation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3838; Dec. Dig. ☞ 962.]

Department 2. Appeal from Superior Court, Santa Barbara County; Robert M. Clarke, Judge.

Action by Ole Overaa against Seth A.

Keeney. From a judgment of dismissal for want of prosecution, plaintiff appeals. Affirmed.

B. F. Thomas, of Santa Barbara, for appellant. Canfield & Starbuck, of Santa Barbara, for respondent.

MELVIN, J. Plaintiff appeals from a judgment of dismissal of the action based upon his failure to proceed therein and want of prosecution thereof.

The action was one brought to recover damages for personal injuries which plaintiff alleged that he had received while in the employ of the defendant and acting under his orders. The date of the accident as pleaded was January 21, 1909. The complaint was filed January 10, 1910, 11 days before the expiration of the period of limitation prescribed by subdivision 3 of section 340 of the Code of Civil Procedure. Summons was taken out December 30, 1910, almost a year later, or about 3 weeks before the end of the period limited by section 406 of the Code of Civil Procedure. Summons was served on June 19, 1912, when all but 7 months of the time within which it would have been possible, under the law, to serve said summons, had expired. On the following day, and without answering, defendant moved the court for an order and judgment of dismissal, accompanying his notice of motion with an affidavit showing the great delay, the fact that he had been present in Santa Barbara county practically all of the time following the filing of the complaint, the circumstances that during that time he had frequently met plaintiff and his counsel, and the additional fact that one of defendant's important witnesses, without whom he could not safely go to trial, had departed from the United States and was residing in a foreign country. At the hearing of the motion plaintiff introduced an affidavit giving, at his reason for failing to prosecute the action with greater diligence, his crippled condition, due to the injuries received in the manner alleged in the complaint, and his consequent inability to earn enough money to enable him to proceed with the litigation. After a hearing upon the issues thus presented, the court granted the motion and entered the judgment of dismissal.

Appellant insists that the court was without discretion to dismiss the case, citing as authority which he believes to be conclusive *Johnston v. Baker*, 167 Cal. 261, 139 Pac. 86. It will be noticed that the decision of the District Court of Appeal in that case, affirmed by this court, was based upon the authority of *Romero v. Snyder*, in the same volume of the California Reports, the opinion beginning on page 217 of 167 Cal., on page 1003 of 138 Pac., and on the authority of the latter case we feel constrained to hold that the court did have jurisdiction to dismiss the case for want of prosecution. Both cases related to dis-

missals after the filing of answers, and involved the construction of section 583, Code of Civil Procedure. It was held in each case that, by permitting the court, "in its discretion," to dismiss any action when plaintiff has failed for 2 years after answer filed to bring such action to trial, but making it mandatory upon the court to dismiss such cause after 5 years, the Legislature by section 583, Code of Civil Procedure, intended to deprive the court of all discretion to dismiss such an action before the expiration of 2 years from the filing of the answer. But Mr. Justice Shaw, the author of the opinion in *Romero v. Snyder*, was careful to limit the application of the rule to the case before him—one in which an answer had been filed. In the course of the opinion, among other things, he said:

"We think the language of section 583 supports the theory of the plaintiff that *in cases where an answer has been filed* the court should not dismiss the action for want of prosecution unless the plaintiff has delayed for two years thereafter to bring the action on to trial." (The italics are in the original opinion.)

Discussing the cited decisions regarding the discretion of the trial court, he used the following language:

"It is true that in several of the decisions above cited it is held that the provision of subdivision 7 of section 681, now separately sectionized as 681a, to the effect that an action must be dismissed if the summons is not issued, served, and a return made thereon within three years after its commencement, does not divest the court of discretionary power to dismiss an action for failure to serve the summons or to prosecute the action diligently, although the time is less than three years after the action is begun. *Witter v. Phelps*, 163 Cal. 655, 126 Pac. 593; *People v. Jeffers*, 126 Cal. 296, 58 Pac. 704; *San Jose, etc., W. Co. v. Allen*, 129 Cal. 250, 61 Pac. 1083; *Marks v. Keenan*, 148 Cal. 161, 82 Pac. 772; *Stanley v. Gillen*, 119 Cal. 178, 51 Pac. 183; *Kreiss v. Hotaling*, 99 Cal. 384, 33 Pac. 1125. These decisions declare that the provision in question merely fixes a limit beyond which the court's discretion ceases and a dismissal becomes mandatory upon motion of the opposite party, and, further, that it gives the court the additional power to dismiss an action in such a case of its own motion. No minimum time is specified in that section, or anything to indicate that a period of delay less than that which makes a dismissal mandatory would be sufficient, if the court, in its sound discretion, thinks otherwise. There is no apparent purpose therein to regulate the exercise of the court's power, except to make it imperative that in the specified contingency the action shall be dismissed. Short of the mandatory period, the court's power to dismiss was left unaffected. Those decisions are inapplicable to the language of section 583. [In the printed decision from which the above language is quoted sections 681 and 681a are erroneously cited for 581 and 581a.] * * *

"The other defendants had not filed an answer. Section 583 applies only to the particular instance of delay in bringing the case to trial after answer filed. The court, as we have seen, has general discretionary power, without the aid of legislation, to dismiss an action for want of prosecution. This power remains in full force, affected only by the implied legislative determination of section 583 that two years' delay is not unreasonable in cases where an

answer has been filed. Where an answer has not been filed, the court's power remains, as it was before, limited only by a sound discretion. There is no force in the argument of plaintiff that for the purposes of this section a demurrer is deemed to have the same effect as an answer. We must suppose that the Legislature meant exactly what the words express. The remaining question for consideration, therefore, is whether or not the court abused its discretion in making the order dismissing the case as to the defendants *Snyder* and *Leonardt*. We do not think it can be said that there was an abuse of discretion."

This is conclusive of the whole matter, unless we can say that the facts disclosed by the record in the case now before us show an abuse of discretion by the court. We cannot say that, under all of the circumstances disclosed, there was such abuse. While the allegations in the affidavit of plaintiff must have appealed powerfully to the sympathies of the judge, who, of course, would be affected by the maimed condition of a fellow creature, nevertheless the court was bound to consider the fact that both parties lived in the same county and the further circumstances of their frequent meetings. But trivial cost would have attended the service of summons. If after such service and an answer by defendant the plaintiff's poverty and physical disability should have stood in the way of an early hearing, the court doubtless would have considered those matters in the event of application for postponement of the trial. But we cannot say that, because the court refused to act upon plaintiff's excuse for failure to serve summons, there was an abuse of discretion.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

26 Cal. App. 472

YOUNT v. ARAKALIAN BROS. CO.
(Civ. 1579.)

(District Court of Appeal, Second District, California. Feb. 4, 1915.)

APPEAL AND ERROR — 569 — STATEMENT — REQUISITES — SETTLEMENT BY JUDGE.

A purported statement of the case containing the evidence, which was not settled by the trial judge, and is not accompanied by a stipulation that the appellate court can consider it, does not authorize a review of questions presented by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2530-2545; Dec. Dig. — 569.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by G. W. Yount against the Arakalian Bros. Company, a corporation. Judgment for the plaintiffs, and defendant appeals. Affirmed.

Dan V. Noland, of El Centro, for appellant. Frank Birkhauser, of Calexia, for respondent.

JAMES, J. Respondent brought this action to recover for services performed under a written contract alleged to have been executed by defendant. He had judgment in the lower court, from which this appeal has been prosecuted by the defendant. In addition to the usual papers constituting the judgment roll, there is printed what purports to be a statement of the case presenting the evidence heard at the trial. It does not appear that this statement was ever settled by the trial judge; nor is there any stipulation attached thereto by reason of which this court would be authorized to take notice of the contents of that statement. It would seem from a note printed on the concluding page of the transcript that the motion for settlement of the statement was by the trial court denied. There is, therefore, nothing presented from which a review of the evidence can be made. Examining the judgment roll, we find no error which will warrant a reversal being ordered. The findings of the court seem to support the judgment, and to have been within the issues made by the pleadings.

The judgment is, therefore, affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 507

PEOPLE v. ROBERTSON. (Cr. 364.)

(District Court of Appeal, Second District, California. Feb. 6, 1915. Rehearing Denied by Supreme Court April 5, 1915.)

LARCENY —55—EVIDENCE—SUFFICIENCY.

Where prosecutrix paid money to accused relying on his representation that it was necessary for her to pay the money, which should be paid over to third persons to induce them not to prosecute prosecutrix and accused, and accused admitted receiving the money, and denied that he received it as a loan, but converted it to his own use, the jury could find accused guilty of larceny of the money on the theory that title did not pass to accused, though prosecutrix in referring to the transaction referred to it as a loan.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. —55.]

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge presiding.

W. L. A. Robertson was convicted of grand larceny, and he appeals. Affirmed.

Chauncey Gardner, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe and Robert M. Clarke, Deputies Atty. Gen., for the People.

CONREY, P. J. The defendant appeals from a judgment entered pursuant to a verdict finding him guilty of the crime of grand larceny, and from an order denying his motion for a new trial.

According to the evidence, the defendant obtained from the prosecuting witness, Minnie Benner, the sum of \$100 upon a representa-

tion made to her by the defendant that the money was to be paid over by him to black-mailers who, he told her, were threatening a criminal prosecution against the defendant and said prosecuting witness. The evidence tended to show, and the jury evidently believed, that there were no such persons threatening any prosecution and that the representations were falsely made by the defendant in order to impress fear upon the mind of Miss Benner and thereby induce her to give up possession of the money.

Although some assignments of misconduct on the part of the trial judge are contained in appellant's brief, it appears that no objections were made at the trial to the language used by the court, except in one instance. At that time the judge disavowed any intention to make any comment upon the testimony of the defendant, and instructed the jury that he was not to be understood as having made any suggestion, comment, or intimation whatsoever as to the truth or falsity of the testimony. Thereupon defendant's counsel expressed himself as satisfied. We also are satisfied that the defendant suffered no prejudice by the conduct complained of.

At the oral argument the defendant's counsel admitted that the only point that is really worthy of the serious consideration of this court is based upon defendant's contention that the money was paid over to him by the prosecuting witness as a loan whereby the relation of debtor and creditor was established, that the title to the money passed to the defendant, and that therefore there could be no larceny. Our examination of the record convinces us that there is no other question requiring our attention. There is ample evidence to sustain the jury's implied finding that the transaction was not a loan and that the prosecuting witness parted merely with the possession of her money and that the title did not pass. Although Miss Benner referred to the transaction as a loan, her testimony further shows clearly that she gave the money to the defendant under the influence of said representations, in order to prevent the making of public charges by the supposed detectives, and for the specific purpose of having it given to the detectives in order to keep herself and the defendant from being arrested. The defendant himself admitted receiving the money and denied that he received it as a loan. His testimony is that not one single word was said about a loan, and that "all she said was to give it to those men to keep their mouths quiet." Having so testified, the defendant is in the poorest possible position to contend now that the evidence necessarily proved the transaction to be in the nature of a loan.

The case is clearly within the principle of such decisions as *People v. Rial*, 23 Cal. App. 713, 139 Pac. 661, *People v. Schenone*, 19 Cal. App. 280, 125 Pac. 758, and *People v. Arnold*, 17 Cal. App. 68, 118 Pac. 729. By

means of persistent misrepresentations the defendant took advantage of the ignorance and fears of the prosecuting witness and thereby secured possession of her money with the fraudulent intent of appropriating it to his own use. She consented to the change in its possession for a certain purpose that was never consummated and was never intended by the defendant to be consummated. Under these circumstances, it must be held that the jury was justified in finding that the title did not pass and that the defendant was guilty of the crime of grand larceny.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

26 Cal. App. 523

PEOPLE v. CLAPP. (Cr. 283.)

(District Court of Appeal, Third District, California. Feb. 10, 1915. Rehearing Denied by Supreme Court April 8, 1915.)

1. HOMICIDE — 250 — MANSLAUGHTER — SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. — 250.]

2. CRIMINAL LAW — 1159 — VERDICT — CONFLICTING EVIDENCE.

A verdict of guilty will not be disturbed on appeal where the evidence against defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. — 1159.]

3. CRIMINAL LAW — 438 — EVIDENCE — PHOTOGRAPHS.

A photograph of the scene of the homicide showing the body of a person posed in the position which the evidence tended to show was the position of deceased after he fell was properly admitted for the limited purpose of illustration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 893; Dec. Dig. — 438.]

4. HOMICIDE — 340 — HARMLESS ERROR — INSTRUCTION.

The giving of an instruction that, if the jury entertained a reasonable doubt whether the killing was willful, deliberate, or premeditated, or done with deliberate intent, they should find defendant guilty of murder in the second degree, if error, was harmless, where defendant was found guilty of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. — 340.]

5. HOMICIDE — 187 — EVIDENCE — MATERIALITY — RULE OF RAILROAD COMPANY.

Where, in a prosecution for homicide, it appeared that deceased boarded the engine, which was in defendant's charge, with intent to continue a quarrel, and not under any claim of right, evidence of a rule of the railroad company prohibiting persons from riding on engines was properly excluded as immaterial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 390, 390½; Dec. Dig. — 187.]

6. CRIMINAL LAW — 730 — ARGUMENT OF COUNSEL — CURE OF ERROR.

In a homicide case, the prejudicial effect of a statement of the district attorney in argument, referring to proof of decedent's reputation, which proof was offered by him and ex-

cluded by the court, was cured by an admonition of the court to the jury not to consider such statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. — 730.]

Appeal from Superior Court, Nevada County; Geo. L. Jones, Judge.

Roger Clapp was convicted of manslaughter, and appeals. Affirmed.

C. F. McGlashan, of Truckee, and L. P. La Rue, of Grass Valley, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, J. Defendant was charged with the murder of Albert A. Taylor, committed in the town of Truckee, on June 9, 1914. He was convicted of manslaughter. His motion for a new trial was denied, and he was thereupon sentenced to imprisonment at San Quentin for the term of seven years. He appeals from the judgment and from the order denying his motion for a new trial.

Defendant was an engineer in charge of a switch engine at the railroad yard of the Southern Pacific Company at Truckee. Deceased was yardmaster at the same place, and both were in the employ of the Southern Pacific Company.

[1] 1. The evidence was that defendant was a roomer at deceased's house, and that, prior to the day of the homicide, their relations had been friendly. They had some disagreement arising out of the switching of cars on the morning of June 9th, which culminated in an altercation on defendant's engine, deceased having gone aboard the engine in anger, where a somewhat violent quarrel ensued, deceased apparently the aggressor. He left the engine, however, and the parties did not come to blows. This was about 7 o'clock in the morning. Later, about 9 o'clock, a controversy arose between them which grew out of a collision of cars caused by defendant backing his engine too rapidly. He claimed that he was obeying the signals of the yardmaster, and the latter claimed that defendant was violating them. High and angry words and irritating epithets passed between them, and deceased jumped into the cab of the engine, going towards defendant in a threatening manner, but, before he reached defendant, the latter shot deceased, the bullet entering the head just below the left eye, passing through the brain—a mortal wound, from the effect of which he fell back out of the cab to the ground. Three separate wounds were disclosed by the autopsy.

Witness Thorp testified that he was standing near the lower end of the engine tender, and saw and heard what took place; that, from where he stood, his view of defendant was obstructed by the framework of the cab after deceased entered it, but he saw deceased get onto the engine, and heard the shot

immediately after he had entered the cab. He testified:

"I was standing right here, and I heard the crack of the gun, and he fell out backwards. Q. As I understand you, the moment that he passed out of your view, you heard the shot of the gun, and he fell out? A. Yes. Q. Then what occurred? A. There was three or four shots fired into the body; that is, at the body as it lay on the ground. Q. Where were those shots fired from? A. Right from the engineer's cab window. Q. From the side window? A. Yes, sir; out this way and down towards the body on the ground. Q. Did you see any shots fired? A. I could see the gun in the man's hand, yes, sir, and the fire from the gun—the smoke. Q. The first shot, did you see that? A. No, sir; I didn't see that; that was shot around the cab. Q. What about the other shots? A. The other shots were fired out of the cab and from the outside, and I could see the gun then. Q. Could you tell who did the shooting? A. Yes, sir. Q. Who was it? A. Mr. Clapp, the engineer."

There was testimony that deceased had gloves or mitts on his hands at the time, and, so far as appears, he was not armed. There was evidence that deceased had been in some trouble with the men at other yards of the company, and defendant had been told of it, and cautioned "to look out for him," that he was "a dangerous man," and defendant testified that he believed his life was in danger when deceased came towards him, and that he shot him to save his own life. Defendant admitted that he fired three times, but testified that none of the shots was fired after deceased fell from the cab. The evidence on this point was conflicting, and an effort was made to discredit Thorp's account of the tragedy. The jury, by their verdict, acquitted defendant of murder, but they found from the evidence that he was not justified in killing deceased. Indeed, whether the killing was justified was the vital question for their consideration.

[2] The office of a reviewing court in a case such as this is very clearly stated in *People v. Emerson*, 130 Cal. 562, 563, 62 Pac. 1069:

"The principal ground of the appeal is that the verdict is contrary to law and the evidence, and upon this point counsel contend that all the evidence—that introduced by the prosecution no less than the evidence of the defendant himself—shows clearly and without conflict that the killing (which is admitted) was done in necessary self-defense, or at least under circumstances which negative the existence of any deliberate purpose on the part of the defendant to take the life of the person slain. Necessarily, this contention as to the absence of any conflict in the evidence must be made good in order to sustain the appeal upon the ground stated; for, if the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact, upon which the decision of the jury and the trial court is final and conclusive."

As was said in *People v. Rongo* (Sup.) 145 Pac. 1017:

"Undoubtedly the defendant's own story exculpates him, but it was for the jury to say whether or not that story should be believed."

See, also, *People v. Burke*, 18 Cal. App. 72, 79, 122 Pac. 435. There was sufficient evidence to justify the verdict.

[3] 2. A photograph was taken of the scene of the homicide showing the engine and tender and the body of a person posed in the position which there was evidence tending to show was the position of deceased after he fell to the ground. This photograph was admitted as a diagram for the purpose of illustration only, and not as evidence of what, in fact, occurred. The following cases are authority for the use of the photograph for the purposes as limited by the court: *People v. Phelan*, 123 Cal. 551, 564, 56 Pac. 424; *People v. Crandall*, 125 Cal. 129, 133, 57 Pac. 785; *People v. Mahatch*, 148 Cal. 200, 203, 82 Pac. 779; *People v. Figueroa*, 134 Cal. 159, 161, 66 Pac. 202; *People v. Grill*, 151 Cal. 598, 91 Pac. 515.

[4] 3. The court gave the following instruction:

"Although the jury may believe from the evidence beyond a reasonable doubt that the defendant without justifiable cause or excuse, as explained in these instructions, killed the deceased, still, if you entertain a reasonable doubt whether the killing was willful, deliberate and premeditated, or whether the fatal wounding was done with deliberate intent upon the part of the defendant, then you should find him guilty of murder in the second degree."

This instruction was one of a series defining the degrees of murder and distinguishing manslaughter from murder. Inasmuch, however, as the jury found defendant guilty of manslaughter, he could not have been prejudiced by any error, if error there was, in the instruction complained of. *People v. Ryan*, 152 Cal. 364, 368, 92 Pac. 853.

[5] 4. In the course of the trial defendant offered in evidence a rule of the railroad company reading as follows:

"No person will be permitted to ride on an engine, or in baggage, mail, or express cars (except employees in discharge of their duties)."

Upon objection the court refused to admit the evidence as immaterial and irrelevant. Defendant contends that deceased was charged with knowledge of this rule, and that going aboard of the engine in violation of it had a tendency to show that he intended to attack defendant. The rule would seem to apply particularly to persons other than employees, and, while it may also apply to the latter, unless their duties require them to board an engine or baggage or mail car, we cannot see that it was relevant or that defendant was prejudiced in being deprived of this evidence. Deceased did not enter the cab of the engine under any claim of right to do so, and the evidence was undisputed that in going aboard the engine it was not in the discharge of his duty, but was to continue the quarrel that had begun between the two while deceased was standing on the ground. The existence of the rule or its violation, or the relative rights of the two men to be on the engine under it, could not by any possibility, it seems to us, have had any tendency

to show the intent which impelled deceased to board the cab. *People v. Conkling*, 111 Cal. 618, 44 Pac. 314.

[6] 5. Testimony was offered by the people to show the good character of the deceased for peace and quiet. Objection was sustained, and the evidence excluded. In his address to the jury the district attorney said:

"He [defendant] knew that Taylor was a good man. He knew everything good about Taylor, and when he says he knew Taylor was a dangerous man he is telling you absolutely a thing that is not so. I offered to prove to this court that the reputation of Mr. A. A. Taylor in the town of Truckee was good."

Whereupon the following took place:

"Mr. La Rue (interrupting): Just a minute, Mr. Arbogast. We note an exception to the remark of the district attorney concerning this matter.

"The Court: The jury will not in any way consider the statement just made by the district attorney, and not allow it in any way to enter into their deliberations as to the guilt or innocence of the defendant.

"Mr. Arbogast: It is the truth, your honor.

"The Court: The evidence was offered and objected to and the objection was sustained, and no further reference should be made to that matter.

"Mr. Arbogast: I am perfectly satisfied on that proposition.

"The Court: No further reference should be made to it by either side. When evidence is refused admission, that forecloses any further reference to the matter, and the jury will not consider that statement whatsoever."

The admonition of the court to the jury not to consider the statement of the district attorney, and "not to allow it in any way to enter into their deliberations," we must presume, was obeyed by the jury, and hence no prejudice came to defendant. *People v. Burke*, supra; *People v. Prather*, 134 Cal. 439, 66 Pac. 589, 863.

We discover no prejudicial error in any of the rulings of the court, and none in the instructions given. There was evidence sufficient to justify the verdict of manslaughter.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

26 Cal. App. 482

LACKENBACH v. FINN. (Civ. 1424.)
(District Court of Appeal, First District, California. Feb. 5, 1915.)

1. CORPORATIONS — 309 — TRANSACTIONS ORDERED BY BOARD OF DIRECTORS — VALIDITY.

A chattel mortgage executed by a corporation to a director pursuant to a vote of the director and another director forming a quorum of the board of directors is not void, but voidable only at the instance of the corporation or stockholders; but creditors may attack the validity of the mortgage for actual fraud.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1366-1373; Dec. Dig. — 309.]

2. BANKRUPTCY — 211 — CORPORATIONS — RIGHT OF CHATTEL MORTGAGEE.

A chattel mortgagee of a corporation which is adjudged a bankrupt more than six months after the execution of the mortgage need not follow the property into the bankruptcy proceedings to prove his claim, but may maintain

an action against the sheriff levying on the property and taking possession thereof more than 6 months after execution of mortgage without tendering to the mortgagee the amount of the debt or depositing the amount as required by Civ. Code, §§ 2968, 2969, for the sheriff failing to comply with the statute converted the property and vested the mortgagee at once with right of action for damages as fixed by section 3336, but the recovery must be limited to the amount secured by the mortgage.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 321, 323; Dec. Dig. — 211.]

Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Action by F. Lackenbach against Thomas F. Finn. From a judgment for plaintiff, defendant appeals. Affirmed.

Lucius L. Solomons, of San Francisco, for appellant. H. W. Glensor and Donald K. Siebert, both of San Francisco, for respondent.

PER CURIAM. This is an action brought against the defendant, as sheriff of the city and county of San Francisco, for the alleged wrongful conversion of property by the taking thereof without having paid or offered to pay to the mortgagee the amount due on the mortgage.

The facts in the case are, in substance, as follows: It appears that Minnie Lackenbach, the daughter of the plaintiff, with others as partners, had been conducting the business of the Bellevue Hospital; that she bought out her partners, and later organized a corporation which took over the hospital business. It also appears that she was indebted to her mother, the plaintiff, in the sum of \$1,500 for money she had borrowed from plaintiff, and which money had been actually used in conducting said Bellevue Hospital and in buying out the interests of her partners just prior to the formation of the corporation. It further appears that upon the organization of the corporation she transferred to it the furniture and equipment of the hospital; and, the plaintiff having demanded a mortgage upon the furniture and equipment as security for said indebtedness, the chattel mortgage in question was thereupon executed, to wit, on August 15, 1910, and delivered to plaintiff. No money was loaned to the corporation by the plaintiff, but the corporation assumed, it seems, the indebtedness owing from Minnie Lackenbach to plaintiff. The board of directors of the corporation consisted of the plaintiff, her daughter Minnie Lackenbach, and Mrs. R. P. Gabriel. A resolution authorizing the execution of the chattel mortgage was passed by the board, being carried by the votes of plaintiff and Mrs. R. Gabriel, Minnie Lackenbach not voting, having been excused at her own request. More than six months subsequently to the execution of the mortgage and in April, 1911, the defendant herein, acting under executions in

the one case and an attachment in another, levied upon the mortgaged property and took possession thereof, but did not pay or tender to plaintiff the amount of the mortgage debt, or deposit the amount, as required by sections 2968 and 2969 of the Civil Code. In May, 1911, three creditors of the corporation filed a petition to have it declared and adjudged a bankrupt, and a writ of injunction was issued out of the United States District Court directed to the defendant herein, restraining him from proceeding to an execution sale of the property here involved pending the hearing and disposition of said petition. The corporation was subsequently adjudged bankrupt, and the property in question was delivered by the defendant to the trustee in bankruptcy. Upon the day of the filing of the petition in bankruptcy, the board of directors—the plaintiff not voting—passed a resolution ratifying the execution of the chattel mortgage.

[1] As before stated, the board of directors consisted of three members. Two, therefore, constituted a quorum (section 305, Civ. Code). At the meeting authorizing the execution of the chattel mortgage to the plaintiff all the directors were present, but one did not vote. The plaintiff, however, did vote; and, as she was an interested party, defendant contends that both the resolution and chattel mortgage were void ab initio. The authorities in this state do not go to that extent. They hold that a contract between a corporation and one of its directors, by which such director obtains property or some other advantage to himself, is not absolutely void, but is voidable at the instance of the corporation or its stockholders. *Graves v. Mining Co.*, 81 Cal. 303, 22 Pac. 665; *Fudickar v. East Riverside I. Dist.*, 109 Cal. 29, 41, 41 Pac. 1024; *Marsters v. Umpqua Valley Oil Co.*, 49 Or. 374, 90 Pac. 151, 12 R. A. (N. S.) 825; 10 Cyc. 1195. It is thus seen that the rule defendant attempts to invoke is solely for the benefit of the corporation and its stockholders, and is not available to him as a defense. Of course, the defendant here, if regarded as standing in the shoes of creditors of the corporation, might question the validity of the mortgage on the ground of actual fraud; and the cases hold that fraud will be presumed in favor of a creditor of the mortgagor at the time the mortgage was made. But the question of the good faith of the transaction was not an issue in this case; and, if it had been, the findings of the court based on sufficient evidence negative the idea that the chattel mortgage was executed with any intention to hinder, delay, or defraud the creditors of the corporation.

[2] We cannot agree with the defendant that the plaintiff was bound to follow the property into the bankruptcy proceedings for the purpose of proving her claim and minimizing the damages, or for any other

purpose. The mortgage being valid, the levy of the writs and the taking possession of the property without having complied with the provisions of sections 2968 and 2969 of the Civil Code constituted a conversion, and vested the plaintiff at once with a right of action for damages as fixed by section 3336, Civil Code, although of course the recovery must be limited to the amount secured by the mortgage. *Ritder v. Edgar*, 54 Cal. 127; *Irwin v. McDowell*, 91 Cal. 119, 27 Pac. 601.

The defendant persisted in holding the property under the writs mentioned, knowing of the existence of the chattel mortgage and the circumstances under which it was executed. The plaintiff was not required under the law in this state to go to the trouble and incur the expense and suffer the delay of following the property into the federal courts.

The judgment and order appealed from are affirmed.

26 Cal. App. 388

CONLIN et ux. v. EMANUEL LEWIS INV. CO. (Civ. 1418.)

(District Court of Appeal, First District, California. Jan. 22, 1915. On Modification of Judgment, Jan. 23, 1915.)

1. NEW TRIAL ⇨77—AMOUNT OF DAMAGES—PASSION OR PREJUDICE.

That a verdict is excessive because of the inclusion therein of improper items does not establish that it was the result of passion and prejudice.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 157-161; Dec. Dig. ⇨77.]

2. APPEAL AND ERROR ⇨1151—DISPOSITION OF CAUSE—MODIFICATION OF JUDGMENT.

A judgment will not be reversed for excessiveness of the damages because of the inclusion of improper items, where the party in whose favor the judgment was given consents to a modification thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. ⇨1151.]

3. APPEAL AND ERROR ⇨1050—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where defendant contracted to sell two lots to W., and its president pointed out to W. what he supposed were such lots, but were actually other lots, and W. went into possession of the lots pointed out and made improvements thereon and paid a portion of the purchase price and assigned the contract to plaintiffs, and defendant's president, before the assignment, and up to and after the final payment on the contract and the delivery of the deed made and continued to make the same representations to plaintiffs, in an action by plaintiffs for their damages from the misrepresentations, the admission of testimony as to the representations to W. was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. ⇨1050.]

4. ASSIGNMENTS ⇨73—CAUSES OF ACTION FOR FRAUD.

The assignment by W. to plaintiffs was not an assignment of a mere naked right to sue for fraud, but was a transfer of his interest in the lots which defendant agreed to convey; plaintiffs' cause of action arising from the dam-

age suffered through their reliance on the representations made to them.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 139-142; Dec. Dig. 673.]

5. VENDOR AND PURCHASER 645—ACTIONS FOR DAMAGES — "ACTUAL FRAUD" — QUESTION FOR JURY.

Under Civ. Code, § 1572, providing that the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true, constitutes "actual fraud," the court properly left it to the jury to decide whether the representations and mistake of defendant's president constituted fraud.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 77, 78; Dec. Dig. 645.

For other definitions, see Words and Phrases, First and Second Series, Actual Fraud.]

6. COSTS 6234—ON APPEAL—MODIFICATION OF JUDGMENT.

While the modification of a judgment by deducting therefrom a part of the sum recovered ordinarily carries costs to the appellant, where respondents conceded that the judgment was excessive to the extent that it was reduced, and appellant, by a proper motion in the trial court, could have obtained such modification, neither party should recover the costs of the appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 892-899; Dec. Dig. 6234.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by James Conlin and wife against the Emanuel Lewis Investment Company. Judgment for plaintiffs, and defendant appeals. Modified.

Denson, Cooley & Denson, of San Francisco, for appellant. Dudley D. Sales and Harold H. Maundrell, both of San Francisco, for respondents.

PER CURIAM. This is an appeal from the judgment, entered upon the verdict of a jury, against the defendant and in favor of the plaintiffs.

It appears from the evidence, and is not disputed by defendant, that the defendant entered into a contract in writing with Joseph Williams, whereby defendant agreed to sell to Williams lots 14 and 15 in block L of the Mission Street Land Company; that Emanuel Lewis, the president of the defendant company, took Williams to the property before the contract was signed, and pointed out to him what he supposed were lots 14 and 15, but which were actually lots 11 and 12. Williams went into possession of these lots, made improvements thereon, and paid a portion of the purchase price. Thereafter he assigned the contract to plaintiffs. Defendant consented to the assignment, and plaintiffs went into possession. Thereafter they paid to the defendant the balance of the purchase price in monthly installments, and received a deed to lots 14 and 15. Subsequently plaintiffs were notified by the Homestead Realty Company that they were in possession of lots 11 and 12 belonging to that

company. Plaintiffs then moved their house and improvements to lots 14 and 15, and thus incurred the damages sought to be recovered in this action from the defendant. At no time prior to the date of the notification by the Homestead Realty Company did plaintiffs know or have cause to believe that they were located on the wrong lots. No evidence was offered by the defendant, nor was any motion made for a new trial.

[1, 2] Plaintiff admits that the verdict is excessive in the sum of \$165, but it cannot be said, from the mere fact that the verdict is excessive because of the inclusion therein of improper items, that it was the result of passion and prejudice. *Adcock v. Ore. R. Co.*, 45 Or. 173, 77 Pac. 78. Nor can the judgment be reversed merely because it was rendered for an excessive amount where, as here, the party in whose favor the judgment was given consents to a modification thereof. *Fox v. Hale & Norcross S. M. Co.*, 122 Cal. 220, 54 Pac. 731. In that case it is held that appellate courts will modify the judgment appealed from whenever it appears from the record, or from the admission of the parties, that their rights can be finally determined thereby.

[3, 4] The action is based on the ground of fraud and misrepresentation by the defendant, and defendant asserts that such an action is a personal one; that it does not run with the land; that it was not transferred to the plaintiffs by the assignment of the defendant's contract with Williams; and that therefore the court committed error in permitting Williams to testify that Emanuel Lewis, the president of the defendant company, on the occasion of the purchase by Williams of the two lots in question, pointed out to him lots 11 and 12 and told him that they were lots 14 and 15, and that he went into possession of the lots designated after contracting in writing to buy them from the defendant. It is not disputed that Williams went into possession of the wrong lots as the result of representations by Lewis; but the plaintiffs' cause of action is not necessarily and exclusively based upon these misrepresentations, for it is clear from the evidence that Lewis must be regarded as having made the same misrepresentations to the plaintiffs just before the assignment of the contract, and continued to make them up to and after the final payment on the contract and the delivery of the deed. These representations are sufficiently relied upon in the complaint. Under these circumstances the admission of Williams' testimony cannot be deemed prejudicial error. Nor was the assignment of the contract by Williams to the plaintiffs an assignment of a mere naked right to bring an action for fraud, but was the transfer of the former's interest in the lots agreed to be conveyed by such contract, and the cause of action for fraud arises from the plaintiffs'

damage suffered through their reliance upon the representations made to them by the defendant's president.

[5] The defendant asserts that the evidence shows mistake and not fraud, and contends that the giving of instructions by the court on the subject of fraud was error. "False representations are legally fraudulent if made through ignorance, carelessness, or mistake, and the other party is deceived or misled thereby. *Davis v. Driscoll*, 22 Tex. Civ. App. 14, 54 S. W. 43. In the Civil Code, section 1572, the rule is declared as follows:

"Actual fraud is * * * (2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true."

The instructions complained of embraced the law as thus laid down, and left the question to the jury to decide whether or not the representations and mistake of the defendant, under all the circumstances of the case, constituted fraud. Such instructions were correct.

The testimony of Harold H. Maundrell, admitted over the objection of the defendant and now assigned as error, did not relate to an offer to compromise the matter here involved. When these plaintiffs were sued by the Homestead Realty Company for the possession of lots 11 and 12, Maundrell, acting as the attorney for the Conlins, called on the attorney for the defendant corporation with a view to settling the question of who would defend that action, and while in the office of such attorney some discussion took place, and steps were taken relative to settling the whole matter, but there was no offer made by the defendant here to settle with these plaintiffs.

We are unable to say that the evidence in any respect does not support the verdict of the jury.

The judgment is modified by deducting therefrom the sum of \$165, and as thus modified is affirmed.

On Modification of Judgment.

[6] This court on the 22d day of January, 1915, ordered the judgment of the trial court in the above-entitled cause modified by deducting from the amount thereof the sum of \$165. Under the rule of this court such modification carries costs to the appellant. It appearing, however, that the respondents conceded that the judgment of said trial court was excessive to the extent that it was so reduced, and that the appellant could, by a proper motion in the trial court, have obtained the said modification, we do not think that this is a proper case for the appellant to recover his costs of appeal. The opinion and judgment of this court filed on said 22d day of January, 1915, is therefore modified by adding thereto the words, "neither party to recover the costs of this appeal."

26 Cal. App. 509

HLADIK v. ALLEN et al. (Civ. 1421.)

(District Court of Appeal, First District, California. Feb. 8, 1915. Rehearing Denied March 10, 1915. Denied by Supreme Court April 8, 1915.)

1. BROKERS ⇐82—COMMISSIONS—ACTIONS—COMPLAINT.

A complaint in an action by a broker against a broker for a half of commissions paid for procuring an exchange of real estate, which alleged that defendant acted as agent of both principals, making the exchange, with their knowledge, and that it was agreed that plaintiff should have a half of the commissions paid by both principals, states a cause of action, though it does not allege that both principals had any knowledge of the agreement for a division of the commissions.

[Ed. Note.—For other cases, see *Brokers, Cent. Dig.* §§ 101-103; *Dec. Dig.* ⇐82.]

2. BROKERS ⇐66—COMMISSIONS—AGREEMENT FOR DIVISION—VALIDITY.

Defendant employed as broker by two principals to procure an exchange of their real estate agreed to give plaintiff a half of the commissions. Plaintiff at the inception of the negotiations was an accredited agent of one of the principals, but was never an agent of the other principal, and never informed him of the agreement to divide commissions. Plaintiff's principal was informed of, and consented to, the agreement. *Held*, that the agreement between the brokers was enforceable, for the transaction did not contravene any rule regulating the duties of an agent to his principal, and both principals contracting to pay commissions to defendant on consummation of the exchange, which was done.

[Ed. Note.—For other cases, see *Brokers, Cent. Dig.* § 51; *Dec. Dig.* ⇐66.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by J. C. Hladik against H. B. Allen and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Robert W. Harrison and Richard C. Harrison, both of San Francisco, for appellants. Russell W. Cantrell and Robert H. Borland, both of San Francisco, for respondent.

LENNON, P. J. This is an action founded upon an alleged oral agreement between broker and broker for the recovery of one-half of the commissions paid to one broker by the principals to an exchange of two pieces of real property, which exchange was alleged to have been consummated as the result of the joint efforts of both brokers.

The facts of the case as pleaded and proven upon behalf of the plaintiff are substantially these: The defendants H. B. Allen and L. D. Allen, as copartners under the name of Allen & Co., were engaged in business as real estate brokers. J. H. Bohlrig and E. P. Wingerter were the owners of two parcels of real property, which they were induced to exchange as the result of the joint efforts of the plaintiff and the defendants. At the inception of the negotiations the plaintiff alone was the accredited agent of Bohlrig; but the defendants, although originally the sole agents

of Wingerter, eventually, and before the transaction was closed, became with the knowledge and consent of Wingerter, the agents of Bohlig. The exchange was consummated in keeping with the terms and conditions of accepted written offers to exchange which passed between the owners of the property, under which Wingerter, in addition to conveying his property to Bohlig, paid the latter the sum of \$3,000. Pending the negotiations for the exchange, it was agreed between the defendants and the plaintiff that, in consideration of the latter's assistance in promoting the exchange, he should receive one-half of the commission which might be paid to Allen & Co. by either or both of the principals. Although the double character of the defendants' agency was known to, and consented to by, both Wingerter and Bohlig, the former was not informed of the agreement to divide the commission. Plaintiff, however, informed his principal, Bohlig, of the agreement to divide the commission, and the latter not only consented thereto, but, at the request of the plaintiff, paid his share of the commission to the defendants. The defendants received as commission from both principals the aggregate sum of \$2,250, but refused to pay the plaintiff any part thereof.

Upon these facts the plaintiff prayed for, and recovered, a judgment against the defendants in the sum of \$1,125, from which, and from an order denying a new trial, the defendants have appealed.

[1] The sufficiency of the evidence to justify the findings is not disputed, but it is contended upon behalf of the appellants that the complaint does not state a cause of action in this, that it does not affirmatively allege that the agreement to pool and divide the commissions was entered into with the knowledge and consent of both principals. In support of this contention the appellants invoke the familiar rule of the law of agency which, upon the ground of public policy, precludes a person from acting in the dual capacity of agent for two principals, without their knowledge and consent, in a transaction where their interests would naturally be antagonistic.

The rule relied upon has no application to the facts of the present case. The plaintiff's complaint, in effect, alleges that the defendants acted as the agents of both principals with their knowledge and consent. The dual character of the defendants' agency necessarily implied that they would be entitled to commissions from both principals, and, having knowledge of, and consenting to, the dual character of the defendants' agency, both principals presumably had knowledge of, and consented to, the defendants receiving a double commission.

[2] Passing to the facts of the case as adduced upon the trial, it is insisted upon behalf of the defendants that the evidence shows that the agreement between the plain-

tiff and the defendants to divide the commissions was not, in fact, known to Wingerter, and that therefore the agreement was void and unenforceable as being against public policy, notwithstanding the fact that the evidence shows beyond dispute that both principals knowingly consented to the dual character of the defendants' agency. More accurately stated, the defendants' contention in this behalf is that, although their contract with Wingerter was valid and enforceable because of the fact that both principals knew of, and consented to, the double employment of the defendants, nevertheless the agreement to pool and divide the commissions was void because Wingerter was not informed by either the plaintiff or the defendants of the execution and existence of such agreement. The evidence clearly shows that the relation of principal and agent never at any time existed between Wingerter and the plaintiff. This being so, plaintiff was under no obligation to inform Wingerter of the agreement to divide the commissions, and, as the evidence shows that Bohlig, the plaintiff's principal, was fully informed of, and consented to, the agreement to divide the commissions, it cannot be said that the plaintiff's position in the transaction contravened the rule relating to and regulating his duties as an agent. As a matter of course the plaintiff could not control the conduct of the defendants toward their principal, Wingerter, and, not occupying a fiduciary relationship towards Wingerter, it was no concern of the plaintiff whether or not the defendants informed Wingerter of the agreement in question. The duty, if any, in this behalf devolved upon the defendants alone; for, as was said in the case of *Dearing v. Sears*, 50 Hun, 604, 3 N. Y. Supp. 31:

"There was nothing in the contract which the law condemns, as between the plaintiff and the defendant. As we have seen, the plaintiff violated no obligation or duty towards his principal. He had the right to assume that the defendant was dealing as fairly with the principal, whom he represented, and that he had acquainted him with the proposed division of commissions. If the defendant failed to do this, or otherwise to observe the 'uberrima fides' which the law exacts from an agent towards his principal, he thereby imperiled his claim to compensation for his services, * * * but, after having received such compensation, he could not avail himself of his own wrongdoing as a means of defense against the demand for a part of the money, based upon a contract which was perfectly lawful, so far as the claimant was concerned."

Apart from the foregoing considerations, it is an undisputed fact in the case that the dual character of the defendants' agency was known and consented to by Wingerter, and there is in the record undisputed and convincing evidence that Wingerter knowingly consented to the defendants receiving double commissions. In this connection the record shows two paper writings offered and received in evidence upon behalf of the plaintiff, both of which, over the signatures of Win-

gerter and Bohlig, are addressed to and authorize the defendants, as the agents of both Wingerter and Bohlig, to negotiate upon stated terms and conditions the exchange in question, and provided that a specified commission would be paid to the defendants by both Wingerter and Bohlig upon the consummation of the exchange. Under such circumstances the defendants' right to the commissions agreed upon could not have been successfully denied by either Wingerter or Bohlig (*Jauman v. McCusick*, 166 Cal. 518, 137 Pac. 254), and being legally obligated to pay the agreed and earned commissions, it was no concern of the public or of Wingerter and Bohlig what the defendants did or agreed to do with the commissions paid to them.

For the reasons stated, the judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

26 Cal. App. 514

PEOPLE v. HUNT. (Cr. 539.)

(District Court of Appeal, First District, California. Feb. 9, 1915. Rehearing Denied March 10, 1915. Denied by Supreme Court, April 8, 1915.)

1. CRIMINAL LAW ⚡656 — TRIAL — MISDEMEANOR OF THE JUDGE.

For the trial judge to ask questions of witnesses and jurors which tended to elucidate the matter and were not objectionable, unless because asked by him, is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. ⚡656.]

2. CRIMINAL LAW ⚡1166½ — REVIEW — HARMLESS ERROR.

Where the judge emphatically disclaimed any leaning toward the prosecution, his asking questions of witnesses and jurors which tended to elucidate the matter was harmless, if erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. ⚡1166½.]

3. CRIMINAL LAW ⚡1170—APPEAL—HARMLESS ERROR.

Where it already affirmatively appeared that the accused was a duly licensed osteopathic physician, the exclusion of diplomas showing that fact was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. ⚡1170.]

4. CRIMINAL LAW ⚡823 — INSTRUCTIONS — ERROR—CURE BY OTHER INSTRUCTIONS.

In a prosecution against an osteopath for performing an operation which resulted in the patient's death, an instruction that it was unlawful for any one not a regularly licensed physician or surgeon to operate upon a person in any manner, while too broad, is harmless when taken in connection with other instructions, submitting the specific case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. ⚡823.]

5. HOMICIDE ⚡37 — OPERATION BY UNLICENSED PHYSICIAN.

One not a licensed physician or surgeon may, if he has reasonable cause to believe that an immediate operation is necessary to save the

life of another, attempt to perform the operation, and if he acts with due caution and circumspection, he is not guilty of manslaughter in the event of death ensuing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 58; Dec. Dig. ⚡37.]

6. CRIMINAL LAW ⚡830—TRIAL—INSTRUCTIONS.

The refusal of instruction which, as requested, omitted a qualification as to the right of defendant, who was not a regular physician or surgeon, to perform an operation that resulted fatally was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. ⚡830.]

7. CRIMINAL LAW ⚡1172—APPEAL—HARMLESS ERROR.

Where there was no evidence that defendant, an osteopathic physician, who attempted to perform a major surgical operation, acted with any care or caution, the error in an instruction, charging that no one but a regular physician or surgeon could operate on another, in failing to inform the jury of the right of a layman to operate in case of necessity, is harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. ⚡1172.]

Appeal from Superior Court, Fresno County; Benjamin F. Bledsoe, Judge.

A. L. Hunt was convicted of manslaughter, and from the judgment and order denying a new trial, he appeals. Affirmed.

Burns & Watkins, of Fresno, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from the judgment upon conviction of the defendant of the crime of manslaughter, and from an order denying a new trial.

The first contention of the appellant is that the information is insufficient, and that the general and special demurrer thereto should have been sustained. This contention as presented in the demurrer is twofold: First, that the information is not in the language of the statute; and, second, that it is uncertain in that the defendant was not enabled to know therefrom whether he was being prosecuted for voluntary or involuntary manslaughter, and, if for the latter, whether he was charged with manslaughter in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death in an unlawful manner, or in the commission of a lawful act without due caution or circumspection. Counsel for the appellant argue quite strenuously and forcibly, both in their opening and closing briefs, in support of this contention, citing cases from other jurisdictions to sustain their view. We think, however, that the ruling of this court is controlled by the case of *People v. Pearne*, 118 Cal. 154, 50 Pac. 376, wherein the Supreme Court has held an information in substantially the same language and form as that in this case to be sufficient.

[1, 2] The next contention of the appellant is that the court erred in denying the defendant's challenge to the juror Carl S. Poulsen for actual bias. This contention is involved in the further contention of the appellant that the judge of the court, during the examination of the jurors and the trial of the case, was guilty of misconduct prejudicial to the rights of the defendant, and that such misconduct consisted in the judge of the court undertaking to question jurors upon voir dire examination as to their qualifications, and also in the questioning of witnesses during the trial respecting certain essential elements and issues in the case. It is the contention of the appellant that the judge of the court by so doing placed himself in the attitude of a prosecutor to such an extent as to indicate to the jury that he was prejudiced against the defendant and that his sympathies were with the prosecution. We have examined the record in this case with great care in the light of these contentions, and in view of both of the constitutional inhibition against the right of courts to charge juries in regard to matters of fact, and of the express language of the Supreme Court in the early case of *People v. Williams*, 17 Cal. 147, followed in later cases, and especially commented upon and approved by this court in the recent case of *People v. Conboy*, 15 Cal. App. 97, 113 Pac. 703, wherein judges of trial courts have been repeatedly cautioned against the assumption of any attitude towards the parties or the evidence in the case which might tend to indicate to the minds of susceptible jurors the leaning of the judge in favor of or against either side. Upon such examination of this record we are unable to say that the judge who tried this case transgressed the proper limits of judicial discretion in essaying to put to the above-named juror certain questions touching upon his qualifications, and which resulted in what we hold to be a proper denial of the defendant's challenge of said juror for bias. Neither are we able to say that the judge overstepped the proper bounds of his judicial province in essaying on his own account to pursue the examination of certain witnesses in the cause beyond the distance gone upon their direct and cross-examination, with a view to elucidating certain facts touched upon but not fully brought out by questions of the respective counsel. Our attention has been called to no single question asked by the judge of the court either of a juror or of a witness, which was properly subject to any objection other than the objection that it was being asked by the judge instead of by counsel. In addition to this the record shows that at once upon the defendant's counsel making their first objection to the court's action, the judge directly and emphatically disclaimed any leaning upon his part in favor of or against either side, and instructed the jury that they were not to

consider the questions put by him as indicating in any degree the interest or attitude of the judge of the court; and the court further, in its charge to the jury, again instructed them to the same effect. Presumably the jury regarded these instructions; and, this being the state of the record, we are constrained to hold that the action of the court in the foregoing respects was without prejudicial error to the defendant.

[3] With respect to the other alleged errors of the court during the examination of jurors, we think the contention of the appellant to be without merit. We are also of the opinion that the objections to the defendant to the rulings of the court upon questions put to Drs. Couey, Hopkins, and Maupin cannot be sustained. As to the action of the court in refusing to admit in evidence the diplomas of the defendant as a graduate of several colleges, and especially of the Los Angeles College of Osteopathy, we think there was no substantial error, especially since it had already affirmatively appeared in evidence that the defendant was a duly licensed osteopathic physician.

The next and most serious contention of the appellant is that the court erred in giving certain instructions to the jury, and in refusing to give certain other instructions requested on behalf of the defendant. In order to determine the issues raised by these contentions it is necessary to briefly review the facts of the case.

The defendant was charged with manslaughter in having caused the death of a married woman named Florence Saier. The evidence showed that the deceased, who, before her marriage bore the name of Florence Williams, was of the age of about 21 years, and that she had been residing for several months prior to her death in Merced county, where she had become acquainted with one Peter Saier, with whom on several occasions she went riding on a motorcycle. On one of these trips she was thrown from the machine and severely injured; and, after being confined to her bed in Merced for a period of about 10 days under the care of a physician and nurse, it was discovered that she was advanced in pregnancy about five months, and that Peter Saier was the cause of this condition. An immediate marriage with Saier was arranged for and consummated, whereupon the woman was removed to the home of her sister, Mrs. Leona Brown, in Fresno, where she remained for several days in a sick and suffering condition, complaining of pains in her back, stomach, abdomen, and sides, and during a portion of which time she had a considerable flow of blood from the vagina. This condition continuing for several days, and, apparently increasing, her sister, Mrs. Brown, became alarmed, and called in the defendant, who was then engaged in practicing as an osteopathic physician in Fresno. When the defendant came to see

the deceased he was informed of her condition, and of the facts of her fall from the motorcycle and subsequent suffering. He gave her a hypodermic injection to quiet her, and then declared to Mrs. Brown that he was not the doctor for the case, but that a surgeon should be called in. There is evidence tending to show that an effort was made to secure the attendance of one or more regular physicians, but without result, probably owing to the fact that it was nighttime. Finally, and in view of Mrs. Brown's increasing alarm and insistence that he remain, the defendant said that he would do what he could to help the suffering woman. He then went away, returning in about half an hour with a valise; and, after requesting Mrs. Brown to furnish hot water and towels, was alone with the deceased for another half hour, at the end of which time he reappeared, stating to Mrs. Brown that he could do nothing for her sister, and that she must have a surgeon and be taken to some place where she would receive proper attention. He then went out in search of other doctors, and finally procured Dr. Couey to come to the apartments where the deceased was at about 2 o'clock in the morning. Upon his arrival Dr. Couey had the woman at once taken to a hospital, where she was examined by Drs. Couey and Maupin. They found her suffering from internal injuries which could only be reached by abdominal incision, which being made, exposed the fact that a shockingly unskillful operation had been attempted for the manifest purpose of procuring an abortion, but in the course of which vital organs had been so severed and injured that it was not likely that the patient could survive. She in fact died within the next two days from the effects of the operation which the defendant had attempted to perform.

[4] The foregoing facts were elicited upon the trial. The defendant did not take the witness stand, nor was there any evidence offered on his behalf, or otherwise, tending in any degree to show that the operation was performed with due or any caution or circumspection.

In its charge to the jury the court gave the following four instructions of which the appellant complains:

"(1) It is unlawful for any person, not a regularly licensed physician or surgeon, to operate upon or in any manner sever or penetrate any of the tissues of human beings, except the severing of the umbilical cord.

"(2) If you find from the evidence beyond reasonable doubt that the defendant, A. L. Hunt, did, at the time and place set out in the information, perform, or attempt to perform, an operation upon the person of Florence Saier for the purpose of delivering an unborn child, but that the operation or attempted operation was performed without due caution and circumspection, or, if you are satisfied beyond a reasonable doubt that the delivering of such unborn child was not necessary to save the life of Florence Saier, and you should also find and believe beyond a reasonable doubt that death resulted to said Florence Saier as the result of

such operation so performed, then you should find the defendant guilty as charged.

"(3) You are further instructed that the proofs in this case show that the defendant, A. L. Hunt, is a fully licensed osteopathic practitioner, but is not licensed to administer drugs or practice major surgery. And, if you find from the evidence that he did, in an attempt to deliver an unborn child from the body of Florence Saier during her lifetime, and for that purpose performed or undertook to perform a major surgical operation for the purpose of so delivering said child, and if you further find that death resulted to said Florence Saier as the result of said operation, then it is your duty to find the defendant guilty as charged in the information.

"(4) If you should find from the evidence in this case to a moral certainty and beyond a reasonable doubt that the defendant, A. L. Hunt, did, on or about the 6th day of April, 1914, in the county of Fresno, state of California, knowingly and intentionally perform or attempt to perform an operation upon Florence Saier while she was pregnant, for the purpose of causing her a miscarriage, when such operation was not necessary to save her life, and that by reason of such operation, said Florence Saier died, it is your duty to find the defendant guilty as charged. You are also instructed, gentlemen, that, if it be true that Florence Saier was pregnant, and from some previous injury or cause was about to have a miscarriage, and the defendant as a physician was called upon to attend, and did attend, said Florence Saier, and undertook to aid her and assist her in her impending miscarriage, and while engaged in the performance of such service performed the same with such want of due caution and circumspection that said Florence Saier died, the defendant would be guilty as charged, provided he acted with gross ignorance of his art or with gross inattention to his patient's safety, or with such neglect or lack of care for her safety and welfare as shows upon his part an indifference as to whether she recovered at all."

It is conceded by the respondent that the first of these instructions is erroneous as embracing a legal proposition entirely too broad for the facts of this case; but the respondent contends that the instructions of the court should be considered as a whole, and when so considered the first of the foregoing instructions becomes *innocuous*; and, further, that the instructions as a whole fairly set forth the several theories of the case upon any one of which the prosecution was entitled to rely for a conviction.

As to the first of the above instructions, this view is probably permissible, although the giving of instructions of that character is not to be regarded with favor.

[5-7] As to the three succeeding instructions, when read together they will be found faulty in two main respects: The first of these consists in the omission to inform the jury that if the defendant believed, and as a reasonable person, under the circumstances of the case as presented to him at the time, had reasonable cause to believe, that the attempted operation was necessary to save the life of the deceased, and that if, acting upon such belief, he attempted to perform the operation in question, and acted with due caution and circumspection, in so doing he would not be guilty of manslaughter, and that whatever reasonable doubt the jury might have upon this subject they were

to resolve in favor of the defendant. The second error in these instructions consists in the charge that the defendant was not, as an osteopathic practitioner, licensed to perform major operations, and that if he did attempt to perform such an operation upon the deceased, as the result of which her death occurred, he would be guilty of manslaughter. This is not a correct statement of the law. The right of persons to perform or attempt to perform surgical operations upon others, in the honest and reasonable belief that such operations are necessary in order to save the life of those needing such ministrations, is not confined to those who are licensed by the state to perform surgical operations of the nature of that attempted in this case. Any person actuated by the reasonable belief, based upon the circumstances, that such an operation is necessary to save life, and who acts with due caution and circumspection in the performance of such operation, cannot be held guilty of manslaughter. We think the foregoing instructions were erroneous in both the above respects, and that had the defendant asked for a proper instruction covering these points, and had there been any evidence tending to show that the defendant acted with due or any caution and circumspection in the performance of the operation in question, there can be little doubt but that the foregoing erroneous instructions would have entitled the defendants to a reversal of the judgment and a new trial in the case. The defendant did in fact request several instructions apparently intended to cover the two particular points in which the above instructions given by the court were defective; but each of the instructions asked by the defendant is also defective in the omission of an essential element, which is that the defendant must have believed, and been entitled as a reasonable man under all of the circumstances to have believed, that the operation was necessary in order to save the life of the deceased, before he would have been justified in attempting to perform it, whether he was a duly licensed surgeon or not. The omission of this essential element would have been sufficient to have justified the court in its refusal to give the instructions of the defendant in the form in which they were requested. Whether or not the court should, of its own motion, have amended these instructions of the defendant in the above respects, it is not necessary, under the facts of this case, to decide, for the reason that there was no evidence whatever before the jury which would have warranted a finding that the defendant acted with due or any caution or circumspection in the attempted performance of the operation in question, or which would have justified the jury or any member thereof in entertaining a reasonable doubt upon this branch of the case; but, on the contrary, the evidence affirmatively and

indisputably shows that the defendant, in his attempted performance of the operation in question, acted with a shocking degree of unskillfulness, evincing an almost incredible ignorance of surgery and anatomy, and utterly wanting in those elements of skill, caution, and circumspection which the law requires and which should invariably attend upon such an operation. These being the undisputed facts and uncontradicted proofs in the case, the errors of the court in giving the instructions to which the defendant has objected become immaterial, as does also the failure of the court, if the same be error, to have amended and then given instructions covering the points ineffectively presented in the requested instructions of the defendant; and this for the reason that in any event it would have been the duty of the jury to have found the defendant guilty of manslaughter, and for the jury to have failed to have performed this duty in this case would have clearly amounted to a miscarriage of justice. This being so, it becomes our duty to sustain the verdict of the jury.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

26 Cal. App. 491

COHEN v. CONNICK, Superior Court Judge, et al. (Civ. 1320.)

(District Court of Appeal, Third District, California. Feb. 5, 1915. Rehearing Denied by Supreme Court April 5, 1915.)

1. JUSTICES OF THE PEACE ⚖️159—APPEAL BOND—DEFECT IN FORM.

Where an appellant to the superior court from a judgment rendered against him in a justice court filed an appeal undertaking with sureties, as required by Code Civ. Proc. § 978, formally proper, except that, having been prepared on a printed form for use as an undertaking for costs and to stay execution as well, is contained a form for the stay of execution not filled out, such form rendered the bond merely formally defective, and so did not destroy efficacy to perfect the appeal; the sureties having effectually expressed their purpose to be responsible for any costs on appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. ⚖️159.]

2. JUSTICES OF THE PEACE ⚖️159—APPEAL BOND—DEFECT IN FORM.

An undertaking with sureties to pay costs, filed on appeal from a justice's court to the superior court, as required by Code Civ. Proc. § 978, was not so defective as to render the appeal ineffectual by its failure to provide expressly for indemnifying the respondent in case the appeal should be dismissed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. ⚖️159.]

3. APPEAL AND ERROR ⚖️784—PERFECTING OF APPEAL—FORMAL DEFECTS—TRIAL ON THE MERITS.

Where no positive violence is thereby done to any rule of procedure or practice, a cause should be heard on its merits on appeal, de-

spite any merely formal defect in the perfecting of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3126, 3127; Dec. Dig. ☞ 784.]

4. JUSTICES OF THE PEACE ☞159—APPEAL BOND—DEFECT IN FORM—PROPRIETY OF ADDITIONAL BOND.

Where appellant's undertaking for costs, with sureties, was defective in form, the respondent could not complain of such appellant's action in filing an additional bond, perfect in form, whether or not such additional bond was strictly necessary.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. ☞159.]

5. PROHIBITION ☞28—PROHIBITION TO TRY APPEAL—SCOPE OF INQUIRY.

On petition for a writ of prohibition to restrain the superior court from hearing an appeal from a justice's court on the ground that the undertaking for costs required by statute to be filed to perfect such appeal had been defective, the court could not consider the petitioner's objection to the action of the superior court in refusing to dismiss the appeal because of appellant's delay in bringing it to a hearing.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 77; Dec. Dig. ☞28.]

Petition for writ of prohibition by M. Cohen against Clifton H. Connick, as Judge of the Superior Court of the County of Humboldt, and said Superior Court. Denied.

John F. Dufur and Henry L. Ford, both of Eureka, for petitioner. Pierce H. Ryan, of Eureka, for respondents.

BURNETT, J. Petitioner seeks to prohibit the lower court from proceeding with the trial of the case of Cohen v. Blum, on appeal from the justice court of Eureka township.

In response to the alternative writ heretofore issued out of this court, respondents have filed a demurrer and an answer; the latter containing a transcript of the testimony at the hearing, by the said superior court, of the motion made therein by petitioner to dismiss the appeal, and also some other exhibits. There is no controversy as to the facts, and it is stipulated that all the documents filed herein may be considered in determining this application.

The main question is whether a purported bond filed by appellant in said justice court was sufficient to confer upon said superior court jurisdiction of the appeal.

It is not disputed that an undertaking on appeal from a justice court is a jurisdictional prerequisite. Hall v. Superior Court, 68 Cal. 24, 8 Pac. 509; McKeen v. Naughton, 88 Cal. 462, 26 Pac. 354. The statute itself is plain enough. Section 978 of the Code of Civil Procedure provides:

"An appeal from a justice's or police court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on the appeal."

There is also a further provision in the same section as to an additional undertaking in order to accomplish a stay of execution.

[1-4] It is claimed, though—and justly so—that there is a vital difference between the case where a bond, merely defective in some matter of form, has been filed and the instance where there is no undertaking at all or where it is so defective as to be entirely invalid. This distinction is clearly recognized in the decisions, and it has been held that, where an imperfect though not void undertaking has been given, another one may be filed in the appellate court. This seems to be true on appeal to the superior court, as well as to the Court of Appeal or the Supreme Court.

In *Billings v. Roadhouse*, 5 Cal. 71, the bond was defective by reason of the omission of the words "to pay to," and the county court dismissed the appeal. The Supreme Court said:

"The defect pointed out is so trifling that the obligation of the bond would not be affected by it. Even if it were otherwise, the court should have given the party leave to file a good bond."

In *Cunningham v. Hopkins*, 8 Cal. 34, the bond on appeal to the county court was defective—but in what respect does not appear—and it was held that plaintiff should have been permitted by the county court to file a good one before the motion to dismiss the appeal was determined.

In *Gray v. Amador County*, 61 Cal. 337, the Supreme Court approved of the action of the superior court in permitting the appellant to file another undertaking in lieu of an undertaking insufficient in form filed in the justice court from which the appeal was taken. It was said:

"With respect to a question of practice, like that here presented, we do not feel authorized, at this late day, to disturb a ruling intended to assist parties to a hearing in the appellate court."

In the recent case of *Werner v. Superior Court*, 161 Cal. 209, 118 Pac. 709, it was said:

"An undertaking on appeal from the justice's court, taken by the plaintiff, which erroneously provides that the sureties will pay all costs and damages awarded against 'the defendant,' instead of 'plaintiff,' * * * is defective merely and not a nullity. Such defect may be cured by the filing in the superior court of a sufficient undertaking, in pursuance of leave first obtained from that court."

Other cases cited to the point by respondents are *Rabe v. Hamilton*, 15 Cal. 32; *Moyle v. Landers*, 78 Cal. 107, 20 Pac. 241, 12 Am. St. Rep. 22; *Chicago v. Moore*, 34 Okl. 199, 124 Pac. 989; *Roberts v. Converse*, 37 Okl. 169, 131 Pac. 539; *Harper v. Pierce*, 37 Okl. 457, 132 Pac. 667, 44 L. R. A. (N. S.) 1144; *Churchman v. Payte*, 37 Okl. 649, 133 Pac. 178. To these we deem it unnecessary to devote specific attention.

In *Jarman v. Rea*, 129 Cal. 158, 61 Pac. 790, some light is thrown upon the consideration of the character of the infirmity in the bond that may be corrected by a new undertaking filed in the appellate court. Therein it is said:

"The above provision of section 954 contemplates that, although an undertaking has been filed, it may be of such a character or in such a form as not to fully indemnify the respondent against the costs and damages which he may sustain by reason of the appeal. The use of the phrase 'insufficiency of the undertaking' indicates a distinction between an undertaking which does not fully comply with all the terms of section 941 and the entire absence of an undertaking. An undertaking may be filed which is so defective as not to constitute any obligation upon the sureties therein, and which is in reality no undertaking at all. In such a case there is more than mere 'insufficiency.' There is an entire want of indemnity to the respondent, and section 954 has no application."

It is true that said section 954 specifically refers to appeals to the Supreme Court and to a district court of appeal, but the Supreme Court, in considering appeals from the justice court, has approved the same practice as that expressly authorized by said statute. And, in the decisions of the question whether a new undertaking may be filed in the superior court, the same distinction has been made between a void undertaking, or one that "is in reality no undertaking at all," and one that is merely "defective" in not fully complying with the requirements of the statute.

The vital consideration, then, is whether the bond in question filed in the justice court was and is an undertaking in reality at all, and that would seem to depend upon the question whether it is sufficient to indemnify respondent and to impose upon the sureties the obligation to pay the costs of appeal.

The said bond was prepared on a regularly printed form designed for use as an undertaking for costs and also to stay execution and, after title of the court and cause, was in the following form:

"Whereas, *M. Blum*, the defendant in the above-entitled action, has appealed to the superior court of the county of *Humboldt* from a judgment made and entered against him in the said action, in the said justice's court, on the 17th day of August, A. D. 1910, in favor of *M. Cohen*, said plaintiff, for or for the sum of *forty-three (\$43.00) dollars and costs of suit*: Now, therefore, in consideration of the premises, we, the undersigned, do hereby jointly and severally undertake, in the sum of *one hundred dollars*. And whereas, the appellant is desirous of staying the execution of said judgment, in so far as relates to the delivery of, we do further, jointly and severally, undertake and promise, in the further sum of dollars being the amount for that purpose fixed by the justice of said court, that during the so as aforesaid fixed by the said justice of said court by which the said judgment was rendered and that appellant will pay any judgment and costs that may be recovered against *him* in the said action in the said superior court, not exceeding *one hundred dollars*, as fixed by the justice of said court."

We have italicized the only written words in said instrument; the printed form having been taken as the basis of the obligation, as already stated.

In considering the sufficiency of the foregoing, it is well to recall that, while there may be a stay bond and an undertaking to pay the costs on appeal embodied in one in-

strument, only an undertaking for the payment of costs is essential to confer jurisdiction upon the appellate court. Section 978, C. C. P.; *Edwards v. Superior Court*, 159 Cal. 710, 115 Pac. 649.

We observe, also, that manifestly there was no attempt to complete the blank form of the undertaking to stay execution, and that portion of the instrument may therefore be disregarded. Rejecting the printed matter relating to a stay of proceedings, we think it sufficiently appears that the document was intended as a bond for the costs on appeal. Indeed, it is perfectly clear that such was the intention, and we believe that the expression of that intention is definite enough to be legally enforced.

The bond was properly entitled and designated, "undertaking on appeal from a judgment directing the payment of money." It was signed by the principal and two sureties, each of whom properly justified. It recites that the defendant has appealed to the superior court from a judgment entered against him in said action, on the 17th day of August, 1910, in favor of plaintiff for the sum of \$43 and costs. With the omission of the redundant portion as aforesaid, we have the obligation of the parties expressed as follows:

"Now, therefore, in consideration of the premises, we, the undersigned, do hereby jointly and severally undertake, in the sum of one hundred dollars that appellant will pay any judgment and costs that may be recovered against him in the said action in the said superior court, not exceeding one hundred dollars."

It is difficult to conceive how the sureties could more effectually express their purpose to be responsible for the payment of the costs than to declare that they "undertake" that the appellant will pay said costs. Nor is there less doubt as to what "costs" are referred to. As said in *Jones v. Superior Court*, 151 Cal. 591, 91 Pac. 506:

"It is somewhat difficult to imagine what 'costs' are alluded to in the undertaking, unless costs on appeal be intended, for the costs incurred at the trial in the justice's court had become inserted in and were a part of the judgment, and were therefore included in the promise to pay the 'judgment.' However, it is quite clear that 'all costs' include costs on appeal."

We think it equally clear that "any costs," referred to herein, would embrace all costs that might be incurred by reason of the appeal.

Petitioner contends, though, that this position cannot be maintained in view of the following decisions: *Duncan v. Times Mirror Co.*, 109 Cal. 607, 42 Pac. 147; *Estate of Fay*, 126 Cal. 457, 58 Pac. 936; *Zane v. De Onativia*, 135 Cal. 440, 67 Pac. 685, and *Lane v. Superior Court*, 5 Cal. App. 762, 91 Pac. 405. In the first of these it was held that:

"An undertaking on an appeal from a judgment, which fails to contain a stipulation for the payment of damages and costs in the event of a dismissal of the appeal, as required by section 941 of the Code of Civil Procedure, is ineffectual."

In *Estate of Fay*, supra, the same rule was declared, and the *Duncan Case* was cited as authority therefor.

In *Zane v. De Onativia*, supra, the appeal was taken by only one party to the action, and the undertaking purported on its face to be given on an appeal taken by several appellants, and it was held that the undertaking was insufficient to support the appeal, since, "standing upon the strict letter of their contract, the sureties could never be liable for anything upon this undertaking."

In *Lane v. Superior Court*, the sureties failed to justify when required to do so, and it was therefore held that the appeal must be regarded as if no undertaking had been given.

Of the foregoing, it is manifest that only the first two can be regarded as at all in point, and of these it is to be observed that they involved an appeal from the superior court. In such appeal the statute (section 941, Code Civ. Proc.) specifically provides that the undertaking must be "to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof," while, as stated in the *Jones Case*, supra:

"The law governing the matter of undertakings on appeal from a justice's court to a superior court is found in section 978 of the Code of Civil Procedure."

And as to this section it is to be observed that it seems to exact the specification, "if the appeal be withdrawn or dismissed," only when the undertaking is for a stay of execution.

But, conceding that this provision is applicable to a bond for costs, it would still follow, under the authority of *Jarman v. Rea*, supra, a later case than *Duncan v. Times Mirror Co.* or *Estate of Fay*, that the undertaking is not entirely void. Therein it is declared:

"It cannot be said in the present case that there is an entire want of the undertaking provided by section 941. The sureties undertake that the appellant 'will pay all damages and costs which may be awarded against him on the appeal.' The omission of a similar provision in case of a dismissal of the appeal does not defeat or impair the undertaking in case there should be an affirmation of the judgment. The undertaking is merely defective in failing to provide for indemnifying the respondent in case the appeal should be dismissed. This must be held to be only an 'insufficiency,' which may be remedied by the filing of another undertaking."

The latest expression of the Supreme Court to which our attention has been called is found in *Edwards v. Superior Court*, 159 Cal. 710, 115 Pac. 649. Therein it is said:

"The undertaking is in more than the sum of \$100, and is conditioned for the payment of the costs on the appeal. It thus contains all that is required by section 978 of the Code of Civil Procedure, to make the appeal effectual. Its validity as an appeal bond is not destroyed by the fact that it also purports to be given to stay execution. * * * Whether or not it is ef-

fectual to operate as a stay bond is not here involved."

It is true that the appeal bond therein contained the provision as to the dismissal of the appeal, but, if it had been otherwise, we think the decision would have been the same.

We think, as said in *Pacific Window Glass Co. v. Smith*, 8 Cal. App. 768, 97 Pac. 901, that:

"The conclusion we have reached responds to the spirit and corresponds with the trend of modern decisions on points of practice in general, which is that causes should be permitted to be heard on their merits where, in so ruling, positive violence is not done some rule or rules of procedure and practice."

We conclude that the bond was sufficient to bind the sureties and to give the superior court jurisdiction of the appeal. If this conclusion be sound, it would probably follow that no additional bond in the superior court was necessary. But respondent was thereby afforded greater security, and of this he cannot complain.

[5] Petitioner's objection to the action of the court in refusing to dismiss the appeal because of the long delay of appellant in bringing it to a hearing cannot be considered on this application. Clearly the court had jurisdiction to deny the motion as well as to grant it. It was addressed to the discretion of the court, and, while the excuse for the protracted delay does not seem very satisfactory, the court's action is not subject to review here.

The peremptory writ is denied.

We concur: CHIPMAN, P. J.; HART, J.

26 Cal. App. 473

BECKWITH-ANDERSON LAND CO. v. AL-
LISON. (Civ. 1259.)

(District Court of Appeal, Second District, California. Feb. 5, 1915.)

1. BROKERS ⇐60—COMMISSION — LIABILITY OF OWNER—RECOGNITION OF CONTRACT.

Where the contract of sale procured by real estate brokers left the purchaser free to refuse to complete the transaction, subject to forfeiture of earnest money paid, the act of the owner in entering into a written agreement with the purchaser after he had refused to comply with the contract of sale, reciting that the earnest money was forfeited and that by reason thereof the parties were released from further obligation, did not constitute a recognition of the validity of the contract of sale, such as rendered him liable to the brokers for a commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 91; Dec. Dig. ⇐60.]

2. VENDOR AND PURCHASER ⇐57—CONTRACT OF SALE—CONSTRUCTION—OPTION.

A contract of sale, providing that if the purchaser failed to comply with the contract the earnest money should be forfeited to the vendor and that the vendor should be released from the contract and the purchaser cease to have any rights thereunder, gave the purchaser an option to purchase without any obligation beyond

the forfeiture of the earnest money if he failed to complete the transaction.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 87; Dec. Dig. ¶57.]

3. BROKERS ¶71—COMMISSION—CONTRACT—COMPLIANCE WITH CONDITION.

A contract binding the owner to pay a commission of \$1,500 "out of the first cash payment of \$15,000" does not obligate the owner for the commission where only \$1,000 is paid by the proposed purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 56; Dec. Dig. ¶71.]

4. BROKERS ¶73—COMMISSION — RIGHT TO RECOVER—PARTNERSHIP—CORPORATION.

The procurement of a purchaser by two brokers comprising a partnership will not entitle a corporation to recover the agreed commission therefor, though the corporation's name includes the names of the partners.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 59-61; Dec. Dig. ¶73.]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the Beckwith-Anderson Land Company against W. B. Allison. From judgment for plaintiff, defendant appeals. Reversed.

C. L. Russell, of Tulare City, for appellant. Power & McFadzean, of Visalia, and G. W. Zartman, of Tulare, for respondent.

CONREY, P. J. This is an appeal from a judgment entered in favor of the plaintiff. It is presented upon the judgment roll and a transcript of the evidence.

The plaintiff is a corporation. S. B. Anderson and H. H. Beckwith are partners doing business under the name of Beckwith & Anderson. The action is by the corporation, which seeks to recover the sum of \$1,500 on an alleged contract to pay commissions for services rendered in procuring a purchaser for certain real and personal property of the defendant. The material facts are as follows: On October 4, 1910, the defendant gave "to the Beckwith-Anderson partnership" the exclusive right for the term of three months to sell the property in question for \$33,500. According to the undisputed testimony, this contract was by subsequent agreement continued in force until on and after March 25, 1911. Plaintiff's action is upon an alleged written contract between plaintiff and defendant of date March 25, 1911, concerning which the evidence is as follows: On March 22, 1911, a letter signed Beckwith-Anderson Land Company was sent by Mr. Beckwith from Tulare, Cal., to the defendant at Mesa, Ariz., in which the former writing is referred to as "our option," and stated an offer received to purchase said property for \$30,000, payable \$15,000 cash on the making of the transfer and the balance in one, two, and three years at 6 per cent. The letter says:

"If you should consider this we would want to retain as a commission for ourselves 5 per cent. being fifteen hundred (\$1,500.00) dollars out of the first cash payment of fifteen thousand (\$15,000.00)."

Under date of March 25th defendant telegraphed:

"To Beckwith and Anderson, Tulare, California. Accept offer, and write me when deal is closed."

On or about April 3d and under that date an agreement was entered into "between S. B. Anderson and H. H. Beckwith," parties of the first part, and the proposed purchaser, J. E. Davidson, party of the second part, and signed by those parties. According to this agreement, the first parties agreed to sell and convey to the second party the said property for the sum of \$30,000, of which \$1,000 was paid forthwith; \$14,000 was to be paid on execution and delivery of deed, and \$15,000 in three equal installments of one, two, and three years at 6 per cent. There were recitals showing that the title to the property was in the defendant and the agreement made subject to his approval and ratification and that it was made by the first parties as his agents. It was further provided that upon failure of the second party to comply with the terms of the agreement, both as to depositing in the First National Bank of Tulare the said sum of \$14,000 and as to the mortgage for the other installments, "then the said parties of the first part and their principal W. B. Allison, shall be released from all obligations in law and equity to convey said property, and all rights of said second party herein shall cease, and the said sum of \$1,000 paid hereunder shall be forfeited as damages for the nonfulfillment of the conditions hereof by said second party."

On or about April 6th the defendant arrived at Tulare and examined said agreement. Although he did not sign any approval of it, the evidence shows that it was acceptable to him and that he was at all times ready and willing to convey the property if the purchaser complied with the terms of agreement. On or about April 23d, Mr. Davidson decided to abandon his purchase and so informed the parties of the first part named in his said agreement. On or about May 5, 1911, a writing was signed between defendant and J. E. Davidson referring to said agreement and its terms; to the fact that Davidson did not complete the purchase and that said sum of \$1,000 thereby became and was "forfeited to said Allison under said agreement, and as the only penalty thereof," and it was mutually agreed that by reason of the premises and of said forfeiture the parties were released from the obligations thereof.

[1, 2] It is contended on behalf of respondent that this last-mentioned agreement is not only a recognition of the validity of the contract of April 3d, but it is also a voluntary act of the defendant which gave consent to the nonperformance thereof. There would be much force in this contention if Davidson's obligation as to completion of the purchase had been dependent upon the consent

of Allison. But the abandonment which had previously taken place was within Davidson's rights under the contract which he had made, and the agreement of May 5th added nothing to that situation. The case is clearly distinguishable from *North Stockton Town Lot Co. v. Fischer*, 138 Cal. 100, 70 Pac. 1082, 71 Pac. 438, cited by respondent's counsel. There it was provided in the contract that on default in payment of any installment of the purchase price the whole of the balance should immediately become due and payable, at the option of the plaintiff, and the amounts already paid should be forfeited. It resulted, of course, that the forfeiture also was optional with the vendor, since his exercise of the right to demand complete and immediate payment would necessarily be inconsistent with forfeiture of the payments that had been made. But in the present case it was, as is above shown, unconditionally provided that, upon failure of Davidson to comply with the conditions to be performed by him, the \$1,000 payment should be forfeited as damages for nonfulfillment of those conditions. Under such circumstances, the proposed purchaser has an option to purchase, without any obligation beyond the fact that he is subject to the loss of his forfeit money if he does not complete the transaction. *Pehl v. Fanton*, 17 Cal. App. 247, 252, 119 Pac. 400.

There is nowhere in the record any writing signed by the defendant in which he recognizes the plaintiff corporation as the agent with whom he was dealing. The defendant Allison afterwards recovered judgment against Beckwith and Anderson for said sum of \$1,000. In that action they claimed the money personally as Beckwith and Anderson, and after the judgment against them they paid the amount thereof to W. B. Allison, plaintiff in that action and defendant here.

On the facts shown by the record, of which we have stated the material parts, we are of the opinion that the plaintiff is not entitled to recover any commissions from the defendant.

[3, 4] If the letter of March 22d and the defendant's reply telegram of March 25, 1911, could be treated as an agreement between plaintiff and the defendant, the plaintiff could not recover herein for two reasons: First, the letter proposed that the commission should be paid "out of the first cash payment of \$15,000." No such payment has ever been made, nor can the failure to make it be chargeable as caused by any fault of the defendant. The condition so stated under which the commission might become due has never occurred. Second, the plaintiff did not perform any service in connection with the proposed sale. The transactions which followed in the making of the contract with Davidson were conducted solely by the Beckwith and Anderson partnership.

A considerable portion of the evidence was

received against objections made by the defendant, which objections, under the view of the case which we have stated, should have been sustained. It is, however, not necessary to review the rulings on evidence.

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

26 Cal. App. 485

MERCHANT et al. v. GRANT. (Civ. 1266.)
(District Court of Appeal, Third District, California. Feb. 5, 1915.)

1. DEDICATION ⇐20—EVIDENCE—USE AS HIGHWAY.

Evidence that the owner of a strip of land lying between a warehouse and highway treated it for years as a public highway shows an intention to dedicate it to the public, notwithstanding a second grant by him to the owner of the warehouse of a part only of the strip.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 17-30; Dec. Dig. ⇐20.]

2. BOUNDARIES ⇐20—DESCRIPTION—METES AND BOUNDS.

Where a grantor conveyed part of his land for a warehouse site, and dedicated the strip between the warehouse and the road as a highway, and thereafter the boundary of the highway was so located as to leave a strip between the warehouse site as described and the road, so that access to the warehouse from the road would be cut off, the boundary of the site was the highway, though it was described by metes and bounds with no reference to the highway.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 123-130, 132; Dec. Dig. ⇐20.]

3. BOUNDARIES ⇐20—HIGHWAYS—CONVEYANCE OF FEE.

Under Civ. Code, § 831, providing that an owner of land bounded by a road or street is presumed to own to the center of the street or road, but the contrary may be shown, and section 1112, providing that a transfer of land bounded by a highway passes title to the soil of the highway to the center thereof, unless a different intent appeared from the grant, a grantee under a deed which described the land by metes and bounds without reference to a highway, but which was intended to convey the land to the highway, acquired title to the fee to the center of the highway, since the fact that the highway was not mentioned does not show an intent not to convey the fee under deed.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 123-130, 132; Dec. Dig. ⇐20.]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action to quiet title by Mary L. Merchant and another against John D. Grant. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. T. Coffman, of Healdsburg, for appellant. T. J. Butts, of Santa Rosa, for respondents.

CHIPMAN, P. J. This is an action to quiet plaintiffs' title to a strip of land 243 feet long, 13 feet wide at its eastern end, and 16 feet wide at its western end, and alleged to be bounded on the south by the county road running from Healdsburg to

Santa Rosa, in Sonoma county. The court made findings in favor of plaintiffs and entered its decree accordingly. Defendant appeals from the order denying his motion for a new trial.

It is conceded that defendant is the owner of the land in dispute, unless the court was justified from the evidence in finding that two certain deeds under which plaintiffs claim title were intended to make the said county road the southern boundary of the land.

On June 11, 1887, John D. Grant and S. Cohn conveyed to William Van Alen a block of land 36 feet wide and 168 feet long, bounded on the north by the right of way land of the San Francisco & North Pacific Railroad Company, and from the point of beginning at the railroad land the line ran at right angles to the railroad track southerly 36 feet, "thence at right angles parallel with said railroad 168 feet, thence at right angles northerly 36 feet to railroad property, thence westerly at right angles along railroad property to place of beginning, and canning rights," etc. This block of land had been in use for, and on it had been erected, a warehouse covering nearly the entire tract. On November 7, 1887, Grant and wife conveyed to Van Alen a strip of land described as "commencing at the southeast corner of the warehouse lot, thence 6 feet southerly on line with easterly line of warehouse lot, thence westerly 243 feet parallel with south line of warehouse lot, thence northerly and at right angles 42 feet to railroad line, thence easterly 75 feet to the northwesterly corner of warehouse lot, thence southerly and easterly following line of said warehouse lot to the point of beginning." By this deed a strip of land 6 feet wide was added to the south side of the warehouse lot first above described, and also a piece on the west 42 feet wide and 75 feet long; the two deeds thus conveying a block of land 42 feet wide and 243 feet long. The land in controversy is an additional strip, as above stated, along the southern boundary of this block of land, 13 feet wide at its eastern end, and 16 feet wide at its western end. No mention is made, in either of these deeds, of the county road, or reference to it in any way as constituting the south boundary of the land in question.

Appellant contends that the block of land, described by these two deeds, cannot be extended beyond the metes and bounds mentioned therein; that the strip of land in controversy lies between the highway and the land conveyed by these deeds, and is part of a tract of land to which he holds title from the same ancestor in estate as the one through whom plaintiffs claim title. Plaintiffs claim that the county road was in fact the southern boundary of the land conveyed by these deeds, and although not made so by their terms the fact that the southern boundary coincided with the northern boundary

of the road—i. e., that the land conveyed was intended to be so bounded—the result is the same as if the deeds had so declared. There was evidence that a county road leading from Healdsburg to Santa Rosa and passing south of the land in controversy has been in existence and traveled by the public for more than 50 years; that a warehouse was built on the land described in the deed dated June 11, 1887, about the time the said railroad was completed to Healdsburg, in 1872 or 1873, and the land had been known thereafter as the "warehouse lot." The established location of the north and south lines of the county road at this point was not shown farther than it seems to have been conceded that the southern boundary of the county road was marked by a fence and this boundary remains unchanged. There was evidence that the warehouse was used by the public for storing grain and hay for several years—up to 1887, and probably a little later (the witnesses were not certain as to dates), when Van Alen converted it into a cannery, and so used it until it burned down about 1894, since which time the land has been unoccupied for any purpose and has been open on all sides except on the line of the railroad. Describing the situation, witness Petray testified:

"South of the warehouse and this parallelogram (referring to the plat of ground as shown on the map used at the trial) there was just a country road and open space. The county road was wider there, all of what we called the county road, and it went up to the platform of the warehouse. * * * As long as I can remember (he had been familiar with the premises for 40 years) there was no obstruction between the warehouse lot and the county road. People going to and coming from the warehouse just simply pulled off a little to one side of the road to get to the platform of the warehouse. The platform of the warehouse was next to the county road. I never heard of any objection to the public traveling there. I have traveled there myself, and I have passed on the road and rode up to the warehouse with my father many times. No objection was made to my going there. I know it was a public warehouse, and neighbors hauled and stored there."

Witness Pettis testified:

"When the warehouse was put there, there was nothing to the south of it but a wagon road. The width of the wagon road there at that time was the whole thing just from the warehouse—the warehouse was 30 feet wide and 150 feet long. * * * The space next to the warehouse, the 13 feet on the east and 16 feet on the west, was never used for anything since I can remember, that I know of. People got to the warehouse by driving along the wagon road, they had no other way than over this strip of land. * * * I never knew of any objections being made to the people traveling on that road. I traveled over it myself for the last 42 years."

[1, 2] There is abundant evidence that while Grant, Sr., owned the land and warehouse, and while Van Alen owned it, the owners treated the space south of the tract occupied by the warehouse as part of the county road, and the evidence would seem to warrant the conclusion that they intended to and did dedicate to the public for the purposes of a highway the land south of

the warehouse lot. *Barnes v. Daveck*, 7 Cal. App. 487, 94 Pac. 779. Appellant suggests that the second deed, made in November, 1887, indicates a contrary purpose. Why this deed was made does not appear. It is altogether probable that this additional 6 feet was conveyed to make more certain that the tract was intended to extend to the highway. We cannot say, from any evidence in the record, precisely where the north boundary of the road was with reference to this tract of land, for there was no evidence of its definite location. All we know is that the land south of the warehouse lot was given over by its owners to the public for, and was used by the public as, a public road from 1872 to about 1894. This would seem to fix the status of the land, and if the north line of the road has since been definitely located along the south boundary of the strip of land in controversy, and this latter is no longer used or needed by the public, it would seem but just that it should belong to plaintiffs, and that the southern boundary of their land should be the highway. Any other view would make their land absolutely inaccessible from any direction. Furthermore, it is not probable than Van Alen would have purchased the land, if it had been surrounded by lands of his grantor, with no access to the land he purchased.

[3] In its decree the court described the property claimed by plaintiffs so as to locate the south boundary along "the center of said Santa Rosa and Healdsburg road 243 feet." This was on the theory that the intention of the grantors was to make the road the boundary of the land, and hence conveyed the fee to the center of the road, subject, of course, to the easement enjoyed by the public. The evidence would seem to justify this conclusion. It is undoubtedly the rule that where a public street or public highway is made a boundary of land the owner is presumed to own to the center of the street or road (Civ. Code, § 831); and "a transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front of the center thereof, unless a different intent appears from the grant" (Civ. Code, § 1112).

We do not think that where the land as described in fact abuts upon a street or highway, though the street or highway be not mentioned as the boundary, the grant necessarily shows "a different intent." The rule is well established that the conveyance of a lot bounded upon a street in a city carries the land to the center of the street. And it was held, in *Bissell v. N. Y., etc., R. Co.*, 23 N. Y. 61, "there is no distinction in this respect between streets of a city and county highways." The rule, it was said, "seems to be based on the supposed intention of the parties, and the improbability of the grantor desiring or intending to reserve his interest

in the street when he had parted with his title to adjoining land, such intention will never be presumed." *Devlin on Real Estate* (3d Ed.) vol. 2, § 1028a. In *Sizer v. Devereux*, 16 Barb. (N. Y.) 160, it was held that, "when in the deed of land the description of the lines is by courses and distances and no road is named, but by proof on trial it appears that one line must be on a road, the land to the center of the road is included." In *Champlin v. Pendleton*, 13 Conn. 23, the south line of the land conveyed was the same as the north line of the highway, although the highway was not mentioned or referred to in the deed, and it was held that the fee passed to the center of the highway. It would seem to us to be unreasonable to hold that the grantors of Van Alen intended to retain in themselves the ownership of the land included in the highway which could have been of no possible use to them and might result to the serious injury of their grantee. All the circumstances and facts are opposed to any such presumption.

There are some other questions presented by appellant's brief, but the case in fact turns upon the effect of the deeds above considered and the evidence in respect of the intention of the grantors. All other questions are of minor importance and do not call for special mention.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

26 Cal. App. 468

BENEDICT v. GREER-ROBBINS CO.
(Civ. 1598.)

(District Court of Appeal, Second District, California. Feb. 4, 1915.)

1. SALES ⇐477—CONDITIONAL SALES—TERMINATION OF CONTRACT.

A seller in a conditional sale contract does not waive his right to terminate the contract for the buyer's default in payment of the price by accepting a partial payment, and extending time for payment of the balance, in the absence of any consideration therefor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1411-1417; Dec. Dig. ⇐477.]

2. CONTRACTS ⇐75—CONSIDERATION.

A promise to render what a person is under legal obligation to render is not such consideration as will support a new contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 273-285; Dec. Dig. ⇐75.]

3. SALES ⇐477 — CONDITIONAL SALES — RIGHT OF SELLER—WAIVER.

A seller under a conditional sale contract does not waive his right to retake the property for the buyer's default in payment by subsequently accepting a partial payment and extending time for payment of the balance, in the absence of any consideration therefor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1411-1417; Dec. Dig. ⇐477.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by John Benedict against the Greer-

Robbins Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Neighbours, Sproul & Hoag, of Los Angeles, for appellant. James, Smith & McCarthy, of Los Angeles, for respondent.

JAMES, J. This is an appeal taken by the plaintiff from a judgment entered in favor of the defendant. By his action plaintiff sought to recover the sum of \$800 alleged to be the value of a certain automobile which it was alleged had been appropriated and converted by the defendant.

Plaintiff, in January, 1913, entered into an agreement with the Hollywood Garage Company to purchase a six-cylinder automobile truck. The machine was not a new one. He agreed to deliver certain personal property other than money in part payment therefor, which arrangement was carried out. He then took possession of the truck, and, to provide for the payment of the additional consideration required of him, he executed the following instrument:

"For value received, on or before the 15th day of May, 1913, I or we, or either of us, promise to pay to the order of Hollywood Garage Company at their office in Los Angeles, California, three hundred and fifty and no/100 dollars (\$350.00) payable in gold coin of the United States of America, with interest thereon from date until paid, in like coin, at the rate of seven (7%) per cent. per annum. In case a suit or action is instituted to collect the money above mentioned, or any part thereof, I promise to pay such additional sum as the court in which said suit or action is instituted may adjudge reasonable as attorney's fees in such suit or action.

"This note is given upon and for the consideration that the said Hollywood Garage Co. has agreed and promised that upon the payment of this note, principal and interest, at maturity (time being the essence of the contract) they will sell and transfer to the undersigned at the price of said principal and interest, the Mitchell truck #22,175 which the said Hollywood Garage Co. has this day intrusted to the care of the undersigned.

"It is admitted and agreed that the said property so intrusted is the property of the said Hollywood Garage Co. and shall remain in said company until it shall make the aforesaid sale and transfer.

"Demand, presentment for payment, protest and notice of protest are hereby waived.

"This note is payable in installments of one hundred dollars (\$100.00) per month commencing February the 15, 1913, and last payment \$50.00 on May 15, 1913.

"Maker's P. O. _____

"[Sign here] J. Benedict."

Some time prior to June 11th the Hollywood Garage Company sold and transferred to respondent all of its interest in the contract above set forth and the automobile, and thereafter plaintiff dealt with the defendant and made payments to it. The contract matured on May 15, 1913. On that date but \$150 had been paid by appellant. On June 11th appellant paid the sum of \$100 on account, which left him still in arrears in the sum of \$100. He requested of respondent's agent at that time that he be allowed to pay the balance in two payments of \$50 each. This agent said that he would see his em-

ployers about that matter. Subsequently respondent wrote to appellant the following letter:

"July 9, 1913.

"J. Benedict, c/o Sherman Heights Grocery, Sherman, Cal.—Dear Sir: On June 10th our Mr. Hartley granted you an extension of time on payment of your note which was \$100.00, giving you the privilege of paying one-half of this amount \$50.00 on July 10th and the other \$50 August 10th. Will you please arrange to let us have this \$50.00 to-morrow July 10th promptly when due as we have given you all the extension of time it is possible for us to do and we must have the money.

"Very truly yours,

"Greer-Robbins Co., by _____"

This letter appellant testified he received "after the 10th or 11th, somewhere right about there." A check dated July 18th for the sum of \$50 was sent to respondent and received by the latter on July 19th, and the amount of money represented thereby was collected. Nothing more was paid, and on August 1st respondent took possession of the automobile. The property was later sold for an amount sufficient to pay the remainder of appellant's indebtedness.

[1, 2] That the contract provided for a conditional sale and reserved title to the property in the vendor until performance had been fully made is not disputed by the appellant. His claim is that the letter of July 9th, written by respondent, and the acceptance of the payment of \$50 made on July 19th, worked a waiver of the right to terminate the contract. There was no consideration furnished for the alleged agreement to extend the time. The \$100 was all then due, and a promise to render what a person is already under legal obligation to render cannot amount to a sufficient consideration as will support a new contract. Parsons on Contracts (9th Ed.) vol. 1, p. 474, and cases cited thereunder. See, also, Liening v. Gould, 13 Cal. 598.

[3] The second contention, that a vendor under a conditional sale contract, by accepting partial payment of money then overdue, waives the right to take the property, is not sustained by the decisions. Hegler v. Eddy, 53 Cal. 597; Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339. The last decision cited is very pertinent to the claim of estoppel urged against respondent here. In that case the vendor allowed the possession of property to be transferred to a third party and accepted payments from the latter with apparently full knowledge of all of the facts and without notifying the new party that the original vendee was in default. The Supreme Court held that the original vendor was not estopped from taking possession of the property on account of the default committed by its vendee as to payments due prior to the time the new party obtained possession of the property. Under the evidence in this case, even conceding validity to the agreement as to the extension of time, it is plain that appellant did not live up to the conditions of

that understanding. He did not send in the \$50 required of him on July 10th, until July 19th, which was a delay of more than one week. This fact alone would have authorized respondent to have treated the agreement for extension as being abrogated and to insist upon taking advantage of appellant's default, which had already continued for more than two months. It has been noted that the partial payment of an amount due will not operate to prevent a vendor from retaking possession of property contracted to be sold. Appellant could not have bound respondent by remitting a partial payment on account with the express stipulation that the payment was made on condition that time be extended for payment of the remainder of the money then due. The appropriation of the money so remitted could not work an acceptance of a new offer, because the respondent, under its contract, was already legally entitled to collect that money.

The judgment of the superior court is affirmed.

We concur: CONREY, P. J.; SHAW, J.

169 Cal. 663

WAGNER v. EUSTATHIW. (Sac. 2139.)(Supreme Court of California. March 24, 1915.
Rehearing Denied April 19, 1915.)**1. SPECIFIC PERFORMANCE** ⇨51—**CONTRACTS**
ENFORCEABLE—FAIRNESS.

Under Civ. Code, § 3391, subd. 2, declaring that specific performance cannot be enforced against a party when the contract is not, as to him, just and reasonable, a contract, whereby defendant agreed to sell to plaintiff his interest in a restaurant and lodging house property, owned jointly with plaintiff, for \$15,000, a fair valuation, without any fraud or unfair practice, upon payment of \$100 at the date of the contract, \$400 on delivery of the deed, and the balance by note payable in installments of at least \$100 a month, with interest at 7 per cent., the note to be secured by a first mortgage on the real property, was not so unjust and unreasonable to defendant as to be unenforceable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 154; Dec. Dig. ⇨51.]

2. SPECIFIC PERFORMANCE ⇨28—**CONTRACTS**
ENFORCEABLE—DEFINITENESS.

A contract for the purchase and sale of real and personal property, to be paid for by installment notes secured by mortgage on the realty, not setting forth all the terms and conditions of the mortgage, was sufficiently definite, because the usual and reasonable terms found in such mortgages are, in contemplation of the parties, part of their contract, and because the contract itself clearly showed what the terms were to be.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61-68; Dec. Dig. ⇨28.]

3. INTEREST ⇨23—**CONTRACT—CONSTRUCTION**
—TIME OF PAYMENT.

An executory contract of sale, fixing the interest on the unpaid balances at 7 per cent. per annum, without any definite provision as to the payment of interest monthly or annually, would be construed as a contract that the interest should be paid as customary in contracts of that kind.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 4; Dec. Dig. ⇨23.]

Department 2. Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by William Wagner against N. K. Eustathiw. Judgment for defendant, and plaintiff appeals. Reversed.

E. T. Manwell, M. T. Brittan, and J. E. Ebert, all of Marysville, for appellant. W. H. Carlin, of Marysville, for respondent.

HENSHAW, J. This is an action for the specific performance of a contract for the conveyance of land. Judgment passed for defendant, and plaintiff appeals.

The uncontradicted evidence shows that plaintiff and defendant were friends and neighbors, and had been such for many years. They owned adjoining lots of land on Third street in the city of Marysville. Upon these lots buildings had been erected, the plaintiff using his building as a saloon, the defendant using his as a restaurant. There was an opening in the dividing wall which allowed access to and from the saloon and restaurant. In 1908 they agreed to build jointly two stories over the one-story build-

ings on their properties. These stories were built and were used without boundary wall or division, as a single building. They were maintained as a lodging house and contained 54 rooms. The management and control was simplified by plaintiff leasing to defendant the lodging house and its business, while defendant leased to plaintiff his ground floor used as the restaurant. In October, 1911, defendant became possessed of a desire to sell his property. He stated this desire to plaintiff's witnesses. He had made repeated efforts to sell the property to plaintiff, and plaintiff had declined to consider the sale upon the ground that he did not have money enough to purchase it. Defendant approached plaintiff in his place of business upon October 9th and urged him to purchase his interest in these properties, saying that he would be content with a small payment and an extension of time for later payments. He said he would take \$15,000 for his properties, with \$500 paid at the time of the execution of the deed, and \$100 a month thereafter, the unpaid balance to bear 7 per cent. interest, secured by mortgage. Defendant labored with plaintiff for five hours to induce him to purchase upon these terms. Finally plaintiff assented, and a formal executory contract of sale was entered into. An attorney was asked to draw this paper and did so. The document signed by defendant was an agreement to sell to plaintiff the property above sufficiently described, with the furniture contained in the lodging house, the price being \$15,000. "Said Wagner is to pay said purchase price as follows: \$100.00 at this date; \$400.00 to be paid at time of making and delivery of deed; the balance to be paid by a promissory note from said Wagner to me payable in installments of at least \$100.00 per month or more at option of said Wagner with interest at the rate of seven per cent. per annum, said note to be secured by a first mortgage on the real property hereby agreed to be sold." Defendant accepted the \$100 and went his way. Several days elapsed, during which defendant expressed no dissatisfaction with the contract, but, to the contrary, declared himself quite satisfied with it. But afterward he informed Mr. Ebert, the attorney who had drawn the contract for both the parties and at the request of both, that he did not desire to carry it out, and asked Mr. Ebert to show the contract to Mr. Carlin, his (defendant's) attorney. This was done. Mr. Carlin, for the defendant, sought a modification, to which plaintiff would not agree. Essentially, the modification desired was a larger monthly payment on account of the principal. The note, the mortgage, and the \$400 to be paid upon the execution of the deed, were tendered to the defendant for signature and acceptance. He declined to proceed with his contract and this action was brought. No word is offered

by the defense of advantage taken or unfair practices.

[1] The defense rests solely upon the terms of the contract itself, from which terms it is contended that as to the defendant, against whom specific performance is sought, the contract is not just and reasonable. Civ. Code, § 3391, subd. 2. Even the question of the value of the property, as compared with the price fixed in the contract, is not here in dispute. The contract price was \$15,000 for the real property, with the personal property in the building. Defendant offered to stipulate that the reasonable value of the property was \$15,000; \$13,500 representing the value of the real property, and \$1,500 representing the value of the personal property. In addition to this there was uncontradicted and abundant evidence to establish the fact. The price being adequate, we must turn to the terms and the conditions of the payment of that price to find support for the judgment of the court that the contract was unjust and unreasonable as to the defendant. The court manifestly, we think, based its decision upon an erroneous construction which it put upon that contract. This is clearly indicated by the opinion of the learned trial judge, wherein he says:

"Such a contract I believe to be unfair and unreasonable. It would take the plaintiff a long time to complete the payment for this building. The first year he would reduce the principal a little over \$200. The monthly payments amount to but little more than the monthly interest on the principal."

Under this construction of the contract, the court's conclusion was not unwarranted. But the construction itself is erroneous. What the contract called for was a payment upon the principal sum of the indebtedness of not less than \$100 a month exclusive of interest, the indebtedness to be secured by mortgage.

[2] True, all of the terms and conditions of the mortgage are not set forth in this executory contract, but there is no principle of equity requiring this to be done: First, because the usual and reasonable terms found in such mortgages are, in contemplation of the parties, a part of their contract; and, second, because this contract clearly evinces what those terms are to be.

[3] True it is that while it fixes the interest at the rate of 7 per cent. per annum, there is no definite provision as to the payment of interest monthly or annually. But in such a case custom steps in, and it would be considered that in contemplation of the parties the interest would be paid as is customary in contracts of the kind. In precise point upon this may be cited *Ehrenstrom v. Phillips* (Del. Ch.) 77 Atl. 81. The trial court did not hold, nor is it conceivable that it would hold, that a contract providing for the payment of \$100 a month upon a principal indebtedness of \$14,500, with interest upon

all sums due, this indebtedness secured by mortgage upon the property acquired, the price being the full value of the property, presents any feature of injustice or inadequacy. To the contrary, while one man might greatly desire that the full cash price should be paid immediately, another might much prefer to treat the debt secured by mortgage as an investment, with payments covering the period of time contemplated by this contract.

The peculiar situation of these parties to the land in question affords an especial reason, over and above those ordinarily present in an action specifically to enforce a contract for the sale of real estate, why in this case the plaintiff should be allowed to appeal to a court of equity, rather than be sent into a court of law for legal damages.

The judgment appealed from is reversed.

We concur: LORIGAN, J.; MELVIN, J.

169 Cal. 640

STANWOOD et al. v. CARSON et al.
(L. A. 3406.)

(Supreme Court of California. March 20, 1915.)

1. APPEAL AND ERROR ⇨347—TIME—APPEAL FROM JUDGMENT.

Appeal from a judgment, taken more than six months after its entry, is too late.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1897-1899; Dec. Dig. ⇨347.]

2. APPEAL AND ERROR ⇨1047—HARMLESS ERROR—RULINGS ON EVIDENCE.

Where all the evidence either party had was introduced, failure to specifically rule on the questions reserved in the stipulation of the evidence of the admissibility of parts of it, was harmless; the objections being necessarily overruled by the conclusion reached by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. ⇨1047.]

3. TRIAL ⇨395—FINDINGS OF FACT—NECESSITY.

Where the stipulation on which trial is had embraces all the evidence, specific findings thereon are unnecessary, but the court's conclusion of law that the assessment in question is valid is a determination of the ultimate fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927-934, 939; Dec. Dig. ⇨395.]

4. MUNICIPAL CORPORATIONS ⇨294—STREET IMPROVEMENTS—PUBLICATION OF NOTICE—NEWSPAPERS.

As regards notices of improvement of a street in a city being published in a paper published and circulated in that city, as required by the Vrooman Act (St. 1835, p. 147), it is immaterial that, while the part of the building containing the presses is in such city, the part containing the business office is outside its line.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 776-788, 791; Dec. Dig. ⇨294.]

5. MUNICIPAL CORPORATIONS ⇨335—STREET IMPROVEMENTS—AWARD OF CONTRACT.

The award of contract for improvement of a street being by a three-fourths vote of the

trustees of the city, approval of the president of the board was unnecessary.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 860, 861, 863; Dec. Dig. ☞335.]

6. MUNICIPAL CORPORATIONS ☞335—STREET IMPROVEMENTS—AWARD OF CONTRACT—CERTIFICATION OF RESOLUTION.

The law not requiring the certificate of the clerk to the resolution of award of a contract for improvement of a street, absence thereof is immaterial.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 860, 861, 863; Dec. Dig. ☞335.]

7. MUNICIPAL CORPORATIONS ☞362—STREET IMPROVEMENT—EXTENSIONS OF TIME.

Extensions, by resolutions of city trustees, of the time for performing a street improvement contract, become operative, though the city clerk does not observe directions of the resolutions as to certifying to their passage and giving notice of the extensions.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 894, 895; Dec. Dig. ☞362.]

8. MUNICIPAL CORPORATIONS ☞446—STREET IMPROVEMENTS—SEASONABLE COMPLETION—ASSESSMENTS.

Though, after the time limited by a contract and its legal extensions for a street improvement, the city council, on appeal to it, decreed that work had not been performed according to the contract, and ordered further work done within a fixed time, it having been so done, the work was completed seasonably, as regards validity of assessments therefor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1066, 1067; Dec. Dig. ☞446.]

9. MUNICIPAL CORPORATIONS ☞533—STREET IMPROVEMENTS — DEMAND FOR PAYMENT — PARTIES.

Owners of property assessed for a street improvement may not complain of demand for payment being made by the original contractor, though he had assigned his contract.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1252; Dec. Dig. ☞533.]

10. MUNICIPAL CORPORATIONS ☞339—STREET IMPROVEMENTS—VALIDITY OF CONTRACT.

The contract for a street improvement is not invalidated by inhibitions against the contractor removing stakes and monuments, without consent of the city engineer, or provision that the contractor shall bear any loss from unforeseen difficulties or action of the elements.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 868, 870-873; Dec. Dig. ☞339.]

11. MUNICIPAL CORPORATIONS ☞363—STREET IMPROVEMENTS—APPEAL TO BOARD OF TRUSTEES.

The board of trustees of a city, having once finally exercised its jurisdiction under the Vrooman Act (St. 1885, p. 156) § 11, on appeal of property owners, complaining that work under a contract for street improvement has not been properly done, may not, after additional work ordered by it has been done, entertain another such appeal.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 896; Dec. Dig. ☞363.]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by John A. Stanwood and others against J. M. Carson and another. From a

judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

Haas & Dunnigan, Charles S. Burnell, Kemper B. Campbell, and Frank P. Doherty, all of Los Angeles, for appellants. Arthur M. Ellis, of Los Angeles, for respondents.

HENSHAW, J. This action was brought by certain property owners in the city of Ocean Park to secure a decree declaring null and void the proceedings under which Lake avenue in that city was improved. Plaintiffs seek to remove the cloud cast upon their respective titles by the assessments upon their properties for the work done. The trial was had upon a stipulated statement of the evidence, most of which consisted of the records of the proceedings on file in the office of the city clerk of Ocean Park. In certain instances the stipulation touching the evidence bearing upon a given matter was coupled with an objection by plaintiffs to the admissibility of this evidence. The trial court in its decision declared as follows:

"The court herewith makes its findings of fact and conclusions of law as follows:

"Findings of Fact.

"(1) That a stipulation in writing was entered into by the parties in this action concerning the facts involved and the issues raised by the pleadings, which stipulation was and is in the words and figures the following, to wit:"

The whole of the stipulation of the parties, including their objections to the admissibility of certain portions of the evidence, is then set forth in extenso. Then, so declares the court, "as conclusions of law from the foregoing facts found, the court finds" that each of the assessments is valid and is a valid lien upon the respective lots against which it is levied.

Judgment for defendants followed accordingly. Plaintiffs appeal from the judgment and from the order denying their motion for a new trial.

[1] The appeal from the judgment was taken too late; more than six months having elapsed between the entry of the judgment and the date of the appeal taken. That appeal, therefore, is not entitled to consideration. *Henry v. Merguire*, 111 Cal. 1, 43 Pac. 387; *Brownlee v. Reimer*, 147 Cal. 641, 82 Pac. 324.

[2] The first proposition advanced is that the order must be reversed for the failure of the court to rule upon the objections to the admission of evidence and to make any findings of fact whatsoever. To illustrate the first of these contentions, it is shown that the stipulation is to the effect, "that it may be considered that E. A. De Camp, a witness for the defendants, being duly sworn, would testify as follows, and that said statements may be considered as in evidence subject to the objection of plaintiffs that they are in-

competent, irrelevant, and immaterial." Again, it is stipulated that copies of the Evening Journal, issued during the period involved in these street proceedings, "purported to be published in Ocean Park, and bore the following headings, 'Evening Journal,' and under that, 'The Official Paper,' and under that, 'Ocean Park, Cal.,' followed by the date of the paper, but that plaintiffs object that such facts are incompetent, irrelevant, and immaterial and are declarations made by one not a party to the action." The stipulation contains numerous other declarations of evidence, accompanied by like objections upon the part of plaintiffs to its admissibility. Upon no one of these objections did the court make a distinct ruling. For its failure so to do it is insisted that a new trial should be granted, and such cases as *Mayo v. Mazeaux*, 38 Cal. 442, *City of Stockton v. Dunham*, 59 Cal. 609, and *Raymond v. Glover*, 122 Cal. 471, 55 Pac. 398, are relied on. It is true, and always has been, that the practice of deciding a case without in terms declaring upon reserved rulings touching the admissibility of evidence is a practice to be reprobated and deplored. In some cases it may work substantial injustice to a litigant. In any case where it can be shown that such a result follows, the error is of sufficient gravity to call for a reversal. But it does not follow that injury is worked in every such case, and it is quite plain that it is not worked in the present case. It may be assumed as being the assumption of greatest benefit to appellants, and as being borne out by the decision which the court reached and expressed in its conclusions of law and judgment, that every one of plaintiffs' objections was overruled. The next matter for consideration is whether any of them of material consequence to plaintiffs' case was erroneously overruled, and, finally, whether by this method plaintiffs were denied the opportunity of introducing other evidence to meet, rebut, and overcome the evidence to the admission of which they objected. But it would unduly and unnecessarily prolong this consideration to discuss at length all of the objections advanced by plaintiffs to the admission of evidence. For the most part the evidence was record evidence. The objections were all founded upon the contention that for various omissions and irregularities this record evidence was inadmissible and void. Thus the stipulation declares:

"That it may be considered that defendants have put in evidence the original of the reissued assessment, warrant, and diagram, all, however, subject to plaintiffs' objection that it is irrelevant, immaterial and incompetent; that, there is no showing that the warrant after its alleged reissue was ever recorded," etc.

Again, plaintiffs alleged that the assessment was invalid because it did not describe in any way the pieces and lots of land upon which it was supposed to be levied. It is

here apparent that these objections directed against the admissibility of evidence really involve the consideration of questions of law, namely, the legality and regularity of the proceeding, which questions of law were resolved against the contention of plaintiffs in the conclusions of law which the court made; the essential conclusion being that the assessments constituted valid liens against plaintiffs' property. To reach this conclusion the court necessarily must have considered these proceedings and the record of them to be valid. It must, therefore, of necessity have overruled plaintiffs' objection to the introduction of these records. We may reserve for later consideration the legal questions presented by these objections, and conclude this branch of the discussion by saying that, assuming the rulings to have been correct, plaintiffs were not injured. Their case is quite different from that of *Raymond v. Glover*, supra. There it happened, as it may sometimes happen, that the evidence to the admission of which objection was made was of such character that, if the objection was overruled, the objecting party might be compelled, and should have the right, to meet it by rebutting evidence. And so in *Raymond v. Glover* it was declared:

"That in the present case appellant, if advised by a decision of the court admitting the evidence, might have rebutted such evidence."

No such situation is here before us. All of the evidence which either party could introduce upon any of the issues was introduced, and therefore we repeat, considering the court's action as being a ruling in each instance against plaintiffs' objection, they were not injured, unless some one or another of those rulings was erroneous upon an issue vital to their cause, which matter will meet with consideration hereafter.

[3] Much of what has been said is applicable to the second proposition advanced by plaintiffs, namely, that the court failed to find upon any of the matters in issue; that the stipulation was but an evidentiary stipulation; and that it was still incumbent upon the court to weigh the evidence and declare by its findings the result of such weighing, namely, the proof or absence of proof. But here again it is to be remembered that all of the evidence is in the stipulation; that the questions presented at the trial, while in a sense questions of fact, were questions of fact precisely as the construction and meaning of a contract is a question of fact. It is a question of fact mixed with and determinable upon more or less intricate questions of law. Thus, to illustrate by one example, plaintiffs alleged that the so-called assessment was invalid for the reason that it did not in any way describe the pieces or lots of land upon which it purported to be levied. This was denied. The stipulation sets forth what is agreed to be a correct copy

of the assessment in so far as the assessment describes or attempts to describe the property. The complaint is made that the court did not in terms find whether the assessment did so describe the property. But what was the court called upon to do? It was called upon to inspect and analyze the assessment, and, applying to this inspection and analysis the governing principles of law, finally to declare as a fact that the assessment did or did not do this thing. The conclusion which the court would reach, while it may be described as a finding of fact, manifestly was the determination of a mixed question of law and fact. What the court did do in its conclusions of law was to sustain the assessment as constituting a valid lien, and in so doing necessarily to determine and declare that the property was sufficiently described. But we need not elaborate further upon this matter, for it is well settled that, where a stipulation embraces all of the evidence, specific findings upon that evidence are not necessary. The conclusion of law that the assessments were valid is itself a determination of the ultimate fact. The matter is satisfactorily and conclusively disposed of by such cases as *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364; *Muller v. Rowell*, 110 Cal. 318, 42 Pac. 804; and *Hellman v. Shoulters*, 114 Cal. 136, 155, 44 Pac. 915, 45 Pac. 1057. Indeed, in *Gregory v. Gregory* it is aptly said that the order denying plaintiffs' motion for a new trial cannot be reviewed, because a new trial is a re-examination of an issue of fact, and "in this case all of the facts were agreed upon. There was no issue of fact to be re-examined; the only question being as to what was the law applicable to those facts." Were it not for the circumstance that plaintiffs' objection to the admissibility of certain of this evidence still remain to be considered, this discussion could be ended here.

[4] To that consideration we now come. It is not questioned but that the notices by the Vrooman Act required to be published were, in fact, published. The newspaper in which they appeared was printed in a building on the boundary line between the cities of Santa Monica and Ocean Park. That boundary line went directly through the printing office. The presses were situated in Ocean Park. The front office and editorial room and business office were situated in Santa Monica. The paper was entitled the *Evening Journal*, was designated as the official paper of Ocean Park, and purported to be published in Ocean Park. Appellants' contention is that, the presses being situated in Ocean Park, the paper was, of course, there printed; that "publication," as used in the act, means the precise place from which the paper is initially issued for circulation. Thus it is contended that the place from which this paper was issued for circulation—that is to say, was published—was not from the pressroom in Ocean Park, but from the business offices

across the imaginary line and in Santa Monica. There is no manner of doubt but that the paper in question was circulated, and widely circulated, in Ocean Park. Having in mind the purpose to be effected by the law, we hold appellants' view of the word "publication," as used in the statute, to be entirely too narrow. It is quite as rational to say, since the fact is that the circulation and distribution of the paper was in the city of Ocean Park, that the publication which followed the printing came immediately from the pressrooms in Ocean Park. It is wholly unnecessary to picture the physical transportation of these papers from the press in Ocean Park across the imaginary line into the business offices, and a primary publication being made in another room in the same building, to the end of defeating the plain purpose of the law. We will not review the authorities. None uphold plaintiffs' contention; while, to the contrary, the general principle is well established that, the vital consideration being notice by publication, such publication is the publication contemplated by law, with little or no regard paid to the mere place of printing, even when the word "printing," coupled with publication, is embraced in the statutory requirement. *State v. Hoboken*, 44 N. J. Law, 131; *Ricketts v. Hyde Park*, 85 Ill. 111; *Brown's Estate v. West Seattle*, 43 Wash. 26, 85 Pac. 854; *Hinchman v. Barns*, 21 Mich. 558; *Greenlee v. Marks*, 62 Ind. 420; *Hart v. Smith*, 44 Wis. 229. The objection to the introduction of the evidence upon this matter was, therefore, properly overruled, and the legal question involved as to the regularity of the publication in a properly authorized journal was correctly decided in defendants' favor.

[5] The award was by a three-fourths vote of the trustees. This award did not contain the approval of the president of the board. But, having been made by three-fourths of the board of trustees the approval of the president was not necessary. *McDonald v. Dodge*, 97 Cal. 112, 31 Pac. 909; *Greenwood v. Morrison*, 128 Cal. 350, 60 Pac. 971; *Clarke v. Jennings*, 98 Cal. xvii, 32 Pac. 1049.

[6] To the objection of appellants that the resolution of award is insufficient because it did not bear the certificate of the clerk, suffice it to say that the law does not require such certificate. To this and other like objections it may be answered, in the language of *Hellman v. Shoulters*, supra, that the validity of the procedure, unless made mandatory by law, does not depend upon whether or not proof was made a matter of record, but upon the fact that due notices and awards were, in fact, properly made.

[7] Extensions of time were awarded by the trustees. The objection to these extensions is that they were not certified to by the city clerk. The phraseology of each resolution was that:

"The city clerk shall certify to the passage of this resolution, and shall thereupon notify the street superintendent of the said extension of time."

But this form of certification and this form of notification were not of the essence of the extensions. Similar contentions upon like questions have been reviewed by this court and uniformly held untenable. *Oakland Paving Co. v. Barstow*, 79 Cal. 49, 21 Pac. 544; *Gay v. Engebretson*, 158 Cal. 25, 109 Pac. 876, 139 Am. St. Rep. 67. The cases cited by appellants are cases where the power to order a publication is vested with the board, and where, therefore, the publication itself is without validity, unless so ordered, and consequently a publication ordered by a clerk without authority from the board is nugatory. Of this character of cases are *Donnelly v. Marks*, 47 Cal. 187; *Donnelly v. Tillman*, 47 Cal. 40; *Himmelmänn v. Townsend*, 49 Cal. 151; *Himmelmänn v. Satterlee*, 49 Cal. 387, and *Napa v. Easterby*, 61 Cal. 509. Of like character is *Chase v. Treasurer*, 122 Cal. 545, 55 Pac. 414, where the statute required a publication in a paper designated by the council. It was held to be a nondelegable duty of the council so to designate the paper, and it had not done so. These cases, of course, have no bearing upon the question here presented, where extensions of time became operative by action of the council duly made, and the irregularity, if it can be said that it rises even to the dignity of an irregularity, was occasioned by a failure to observe the formal method indicated for giving notice that such extensions had been made.

[8, 9] Appellants' contention that the work was not completed in time arises from the following facts: Upon appeal to the council it was decreed that the work had not been performed in accordance with the requirements of the contract, and further work was ordered to be done within a fixed time. It was so done. Appellants' contention is that, because of the failure to complete it to the satisfaction of the council within the original period covered by the contract and its legal extensions, it was never fully performed within the meaning of the law, and the assessments are therefore void. This matter is fully disposed of against appellants' contention in *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500. In like manner appellants' argument that a demand could not be properly made by the contractor, Mr. Mulherron, because he had made an assignment, is answered by *Taylor v. Palmer*, 31 Cal. 240, that the property owners are not concerned over this matter. The method followed by the street superintendent in making the assessment in this case is that approved in *Creed v. McCombs*, 146 Cal. 449, 80 Pac. 679. The uncontradicted facts stipulated show that the old assessment, diagram, and warrant were properly reissued by the superintendent of streets.

[10] Certain provisions in the specifications, it is contended, render the contract in-

valid. Thus the contractor was required "to dig all stake holes and preserve all stakes for the lines, levels, or measurements of the work in their proper places, until authorized to remove them by the city engineer." This, it is contended, was an onerous provision, giving room for the play of oppression upon the one hand and favoritism upon the other; that an unfriendly city engineer could thus unduly burden and oppress the contractor in his work. A like provision is found, declaring that the contractor shall not disturb any monuments or stakes until ordered to do so by the engineer. Another is that all loss or damage arising from any unforeseen obstruction or difficulty which may be encountered in the prosecution of the work, or from the action of the elements, shall be sustained by the contractor. It is said that these specifications come within the condemnation of *Blochman v. Spreckels*, 135 Cal. 664, 67 Pac. 1061, 57 L. R. A. 213; *Grant v. Barber*, 135 Cal. 188, 67 Pac. 127; *Wollacott v. Meekin*, 151 Cal. 701, 91 Pac. 612; *Stansbury v. Poindexter*, 154 Cal. 709, 99 Pac. 182, 129 Am. St. Rep. 190, and *True v. Fox*, 155 Cal. 534, 102 Pac. 263. No good purpose would be subserved by an elaborate analysis of these cases. The earlier tendency toward a rigid strictness in these matters which has found expression in some of the cases, such as *Blochman v. Spreckels*, supra, has been much relaxed by later decisions, and wisely so, because it became apparent that a strict enforcement of the street law to its very letter often resulted in depriving street contractors who had honestly performed their work of their just compensation. The inevitable result was that subsequent contracts would not be undertaken by such contractors, owing to the hazard arising from such strict construction, excepting at largely increased prices, and in consequence, while in an individual case a property owner might through some technicality escape paying what he should in equity have paid, property owners generally would be compelled to pay excessive prices because of the imminent peril of total loss which confronted contractors. So we may say generally that no reason appears, or is shown, why the inhibition against removing stakes and monuments, without the consent of the city engineer, is unduly oppressive. There is the presumption that this officer will perform his duty. There is reason for such provision, in that the engineer and street superintendent may have an opportunity to see that the work is properly done to grade. For the other objections touching the burden cast upon the contractor to bear the loss due to the nature of the work and the action of the elements, it is sufficient to refer to *Gay v. Engebretsen*, 158 Cal. 23, 109 Pac. 876, 139 Am. St. Rep. 67, *McQuiddy v. Worswick Paving Co.*, 160 Cal. 11, 116 Pac. 67, and *Haughwout v. Raymond*, 148 Cal. 311, 83 Pac. 53, where similar, and, in some instances, the precise, specifications are up-

held. The objection that the city engineer is given discretion is answered by the case of *McCaleb v. Dreyfus*, 156 Cal. 209, 103 Pac. 924, where this court points out that after the exercise of the engineer's discretion the work must still be inspected and approved by the street superintendent. The description in the assessment was sufficient; the assessment being in this respect similar to that in *Hewes v. Reis*, 40 Cal. 261, and the objection to this assessment being answered by what is said in that case.

[11] In September disaffected property owners appealed to the board of trustees against an acceptance of the work, alleging improper and faulty construction. This appeal was sustained, and the street contractor was ordered to do additional, definite, and specified work in accordance with the contract. This the contractor did, and in December the street superintendent and an expert inspector reported to the board that the work had been fully completed in accordance with the contract and specifications, and recommended an acceptance of the work. Following this the board took action, finally accepting the street. Thereafter disaffected property owners filed a second appeal, which at first the board of trustees showed a disposition to hear. Later, the board advised by its attorney that it had no authority to consider this subsequent appeal, it was formally overruled and disallowed. Section 11 of the Vrooman Act contemplates just such an appeal as was taken by the disaffected property owners in September. Their appeal went to the character of the work, and the board of trustees, in sustaining their appeal, ordered that the work be completed in accordance with the contract. This was done, and thereafter, upon due report made to the trustees that it had been done, they finally accepted the work and the street. Section 11 of the Vrooman Act itself declares that:

"All the decisions and determinations of said city council * * * shall be final and conclusive upon all persons entitled to appeal."

The law nowhere contemplates successive appeals, and the general principle is that, where special jurisdiction of this character is conferred upon a board or tribunal, when it has once finally exercised that jurisdiction, all further powers over the matter are at an end. *Belser v. Hoffschneider*, 104 Cal. 461, 38 Pac. 312. Appellants therefore have no just complaint over the refusal of the board of trustees to entertain their second appeal.

The foregoing disposes of all of the matters arising under the objections of appellants to the admission of evidence. It appears herefrom that their objections were properly overruled.

The order appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(169 Cal. 415)

MILLER & LUX, Inc., et al. v. ENTERPRISE CANAL & LAND CO. et al.
(S. F. 0061.)

(Supreme Court of California. Feb. 19, 1915.)

1. APPEAL AND ERROR ⇐1202—ORDER FOR NEW TRIAL—EFFECT—RIGHTS OF PARTIES.

Though entry of judgment pursuant to mandate of the Supreme Court on appeal from a judgment was subsequent to an order granting motion for new trial pending the appeal from the judgment, the order vacated both judgments, and when affirmed on appeal the trial court could try the case anew.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4669; Dec. Dig. ⇐1202.]

2. WATERS AND WATER COURSES ⇐138—RIPARIAN RIGHTS—TITLE BY PRESCRIPTION.

A title by prescription cannot be acquired against a tract of riparian land by diverting the water from the stream at a point below the land and not interfering with the stream at the riparian land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 150, 151; Dec. Dig. ⇐138.]

3. DEDICATION ⇐38—PUBLIC USE—EFFECT.

Where one has suffered property belonging to him and under his control to be taken and devoted to a public use by one engaged in administering such use, and the beneficiaries rely on the continuance of the use, the owner, having knowledge thereof and making no objection or protest, will be deemed to have dedicated the property to the public use, and he cannot subsequently interrupt nor prevent the same, but his remedy is to seek compensation for the property he has allowed to be taken.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 77, 78; Dec. Dig. ⇐38.]

4. WATERS AND WATER COURSES ⇐79—RIPARIAN RIGHTS—DIVERSION FOR PUBLIC USE.

Though a right of action does not exist in favor of an upper riparian owner against one diverting water from the stream below his land, yet in case of a diversion for public use the upper proprietor is chargeable with knowledge of the fact that the people below may rely on his disuse and expect a continuance thereof, and is chargeable with knowledge that, except where the water is abundant, a subsequent taking by him for use on his own land will deprive the others thereof.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 70, 71; Dec. Dig. ⇐79.]

5. EVIDENCE ⇐8—JUDICIAL NOTICE—FACTS OF COMMON KNOWLEDGE.

The court will take judicial notice of the operation of the law of gravity as to the flow of water.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 7; Dec. Dig. ⇐8.]

6. ESTOPPEL ⇐93—RIPARIAN RIGHTS—PUBLIC USE.

Plaintiffs diverted water from a river into a canal and devoted the same to public use for more than 20 years. In reliance on the continuance of the water supply, towns and villages grew up, and hundreds of irrigated farms were established in the district supplied by the canal. A riparian owner knew the facts, but gave no warning of any objection to the use of the water and suffered it to continue. He could have prevented any interference with the flow of the water to his land. *Held*, that plaintiffs could continue the diversion of the water for

public use, and the riparian owner could not interfere with that use.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264-275; Dec. Dig. ¶93.]

7. WATERS AND WATER COURSES ¶79—RIPARIAN RIGHTS—DEDICATION TO PUBLIC USE.

Where a riparian proprietor has, by acquiescence in the public use of the water of a river by another riparian proprietor, dedicated to that use the riparian rights pertaining to his land to the extent required therefor, neither he nor his successor can regain those rights by going up the river above the place of diversion for the public use and there diverting water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 70, 71; Dec. Dig. ¶79.]

8. WATERS AND WATER COURSES ¶79—RIPARIAN RIGHTS—PUBLIC USE—STIPULATIONS.

A canal company took water from a stream into a canal, and it and other riparian owners stipulated that the canal company had, for five years immediately preceding the commencement of an action to determine water rights, continuously diverted into its canal and appropriated a specified quantity of water, that all of the water during all of the time was sold, rented, supplied, and distributed to others, including a part thereof to the company, for purposes of irrigation, watering of stock, and domestic and other beneficial purposes and that beneficial use was made of all the water so appropriated. Many thousands of acres of land, occupied by a large number of persons as owners or tenants, were irrigated with water from the canal, and there were growing crops on the lands. Villages had grown up along the canal, and the inhabitants received water for their lands and for domestic use. *Held*, that the use was a public use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 70, 71; Dec. Dig. ¶79.]

9. WATERS AND WATER COURSES ¶79—RIPARIAN RIGHTS.

As against a lower riparian proprietor, an upper riparian proprietor may go above his land and the land of intervening owners to divert water for a riparian use, provided he does so without interference with the rights of the lower riparian proprietor.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 70, 71; Dec. Dig. ¶79.]

10. WATERS AND WATER COURSES ¶44—RIPARIAN RIGHTS—RIGHT OF IRRIGATION.

The right of irrigation is a part of a riparian owner's rights in the use of water, and an upper riparian proprietor, by virtue of his superior location, may not use all of the water for that purpose to the destruction of the rights of riparian proprietors below to use their due proportion of the water for the same purpose.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 36; Dec. Dig. ¶44.]

11. WATERS AND WATER COURSES ¶40—RIPARIAN RIGHTS.

A riparian proprietor's title to water in a stream begins only when it reaches his land, and lasts only so long as it is flowing past his land, and until it reaches his land he has no right other than the protective right to see that the full flow past his land, to which he is entitled, is not illegally diminished.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 32; Dec. Dig. ¶40.]

12. COURTS ¶93—STARE DECISIS.

Decisions defining the rights of riparian proprietors are a rule of property and will not be overruled.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 336-339; Dec. Dig. ¶93.]

13. ESTOPPEL ¶93—RIPARIAN RIGHTS—DIVERSION OF WATER.

A riparian proprietor may not, over the objection of an upper proprietor, divert the water of the stream above the latter's land.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264-275; Dec. Dig. ¶93.]

14. WATERS AND WATER COURSES ¶87—DIVERSION—ACTIONS—COSTS—PREVAILING PARTY.

A riparian proprietor, recovering judgment against another riparian proprietor diverting water above his land and the intervening land of the former proprietor, is entitled to his costs in the trial court under Code Civ. Proc. § 1022, subd. 5.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 77-81, 83, 89, 90; Dec. Dig. ¶87.]

In Bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Miller & Lux, Incorporated, and another against the Enterprise Canal & Land Company and others, to determine water rights. From a judgment establishing water rights and from an order denying a new trial, plaintiffs appeal. Order denying new trial affirmed, judgment modified, and cause remanded.

J. P. Langhorne, of San Francisco, Frank H. Short, of Fresno, and Edward F. Treadwell, of San Francisco, for appellants. N. C. Caldwell and W. C. Graves, both of San Francisco, and J. M. O'Brien, of Los Angeles, for respondents.

SHAW, J. The plaintiffs have appealed from certain parts of the judgment, and from an order denying their motion for a new trial.

[1] This action was begun in 1890 by the predecessors in interest of the present plaintiffs. Judgment was entered against the predecessor in interest of the plaintiff canal company, it appealed therefrom, and on appeal the cause was on February 12, 1904, remanded by the Supreme Court with directions to the lower court to enter a certain judgment in favor of said plaintiff. *Miller & Lux v. Enterprise Canal Co.*, 142 Cal. 208, 75 Pac. 770, 100 Am. St. Rep. 115. On March 28, 1904, the lower court entered judgment in accordance with the aforesaid mandate. Pending this appeal the defendants had instituted a motion for a new trial upon the ground, among others, that the evidence was insufficient to support the decision, and the lower court had, on June 27, 1902, ordered a new trial accordingly. From this order an appeal had been taken and on January 3, 1905, the order granting the new trial was affirmed by this court. *Miller & Lux v. Enterprise Canal Co.*, 145 Cal. 652, 79 Pac. 439. Although the entry of the judgment in pur-

suance of the mandate of this court was in point of time subsequent to the order granting the new trial, nevertheless that order, in effect, vacated and set aside that judgment, as well as the original judgment which was the subject of the former appeal. As a result, the order granting a new trial set the entire case at large and gave the lower court authority to try the whole case anew. 1 Hayne on New Trial, §§ 2, 167; San Jose Bank of Sav. v. Bank of Madera, 121 Cal. 545, 54 Pac. 85; Knowles v. Thompson, 133 Cal. 247, 65 Pac. 468; McDonald v. McConkey, 57 Cal. 325; Naglee v. Spencer, 60 Cal. 10; Kent v. Williams, 146 Cal. 3, 79 Pac. 527. There was a new trial of the cause, resulting in the judgment now under review.

The original plaintiffs were corporations, named, respectively, Miller & Lux and the San Joaquin & Kings River Canal & Irrigation Company. The names of the present plaintiffs are the same, except that the word "Incorporated" is added to each name. Since the action was begun, the defendant, James Canal Company, has succeeded to the interests of the Enterprise Canal & Land Company, and the J. G. James Company has succeeded to the interest of Jefferson G. James. Substitutions of parties have been made in accordance with these changes in interest.

To an understanding of the issues a statement of the facts is necessary. Many of the facts are set forth in the cases within cited, and others in the case of Turner v. James Canal Co., 155 Cal. 82, 99 Pac. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823. The hydrographical and geographical situation presented by this case is exceptional, if not unique. The San Joaquin river, having its source in the snowclad mountains of the Sierras, flows westerly on to the level plain or valley bearing its name. At a point near the center of the valley it makes an abrupt turn northerly. At this point, and immediately below the turn, plaintiffs have for many years maintained a dam to check the flow and impound the waters of the river. On the left or westerly bank of the river, and immediately in line with the center of the stream in that part of its course above where it makes the turn northerly, is the headgate or intake of a large canal belonging to the plaintiff canal company, through which for many years it has diverted the waters of the river for useful purposes. A short distance above this headgate, and in line with the course of the river as it flows northerly from its turn and on the left or southwesterly bank of the stream, is the junction of the San Joaquin river and Fresno slough. Fresno slough is a well-defined channel extending southerly from its junction with the river for some 12 or 14 miles. During times of extreme high water the waters of Kings river flowing into the San Joaquin valley from the Sierras some 30 miles south of the San Joaquin, are carried northerly into Fresno slough and thence on down to the San Joaquin river. At

such times, of course, Fresno slough is a channel of Kings river and the lands abutting upon it are riparian to Kings river. But at such times the San Joaquin river itself is carrying an abundance of water, the excess waters are not needed and are not used, and are rather a detriment than a benefit to the landowners. Such excess waters are not here in controversy. In all other stages of the San Joaquin river its waters find their way into and up Fresno slough and rise and fall, or stand there, at practically the same level as that of the San Joaquin river itself. It is at these times and under these conditions that the ownership and right of use of the waters of the San Joaquin and of Fresno slough become important. Fresno slough has no source of supply other than the San Joaquin river except a small portion of surface water flowing into it from its immediate watershed during ordinary rains and the occasional floods from Kings river. These surface waters, however, do not seem to have been considered important in the consideration of the case and may be dismissed without further remark. The necessary effect of these conditions is that, except during the unusual floods from Kings river, and except said surface waters, the waters of Fresno slough remain stationary or rise and fall precisely as do the waters of the San Joaquin river; the waters of the slough being absolutely governed and controlled thereby. The lands of the J. G. James Company, the rights pertaining to which give rise to this litigation, are not riparian to the San Joaquin river proper, but are riparian to Fresno slough. By virtue of that fact they are also riparian to the San Joaquin river itself, except when the waters of Kings river are flowing therein. Turner v. James Canal Co., *supra*. The plaintiffs are owners of large tracts of riparian land situated both above and below the connection of Fresno slough with the San Joaquin river, and are appropriators of large quantities of water, in part taken out by means of said canal and devoted to beneficial uses upon the lands of persons to whom said water is sold, and in part by other canals and sloughs and used upon their own lands. The J. G. James Company asserted the right to go above the intake of the said canal and above the riparian lands of the plaintiffs, Miller & Lux, abutting on the eastern bank of the main river above the junction of the slough, and by a canal, owned by the James Canal Company, to take water away from the main stream and to carry it to and use it upon the lands of the James Company riparian to Fresno slough. The plaintiffs contested this right. They insisted that even if there were riparian rights pertaining to the lands of the James Company by reason of their situation upon Fresno slough, such rights could be exercised only by taking water from the slough itself, in subordination to the rights of the plaintiff canal company, and to the riparian rights of the plaintiffs'

land situated above the junction of the slough and the river. The court below awarded to the James Company the right to take out of the San Joaquin river at the head of the James Canal Company's canal, above the land of the plaintiffs, and carry through said canal to the James Company's land, the reasonable quantity of water to which said land was entitled by reason of its situation as land riparian to Fresno slough, and declared that this right was superior to the rights of the intervening lands of the plaintiffs, and also to the right of the plaintiff canal company, to take water out of the river through its said canal. It is this claim which constitutes the gravamen of these appeals.

The principal contention of the appellants regarding the canal is that, by means of their dam below the northerly turn of the San Joaquin river and said canal heading near the junction of the river and Fresno slough, the plaintiff canal company has diverted from the river and put to beneficial uses a stream of 760 second feet of water, for a period of time sufficient to give it a prescriptive title or right to continue such diversion, and that this right is superior to any riparian right pertaining to the lands of the J. G. James Company abutting on Fresno slough. That said plaintiff has acquired such prescriptive right or title against all persons as to whom the said diversion has been hostile and adverse is shown by abundant evidence, and is practically conceded. See *Stevinson v. San Joaquin & Kings River Canal & Irrigation Co.*, 162 Cal. 141, 121 Pac. 398, where this right was established against a lower riparian proprietor. The claim of the defendant J. G. James Company is that the diversion of water by the plaintiffs' canal and dam has not interfered with the riparian rights pertaining to its lands abutting upon Fresno slough, and hence that it has not been hostile or adverse to those rights, and therefore that it has not created a title against them by prescription. The court below sustained this claim of said defendant. In support thereof in finding 44, it declared as follows:

"From time immemorial all of the water flowing from the said San Joaquin river into said Fresno slough has been accustomed to naturally flow, and does now naturally flow, from said river into said slough, and over, upon, along, and by the lands of the defendant J. G. James Company, in these findings before particularly described, and out of said slough into said river, at a point on the course of said river above the point on said river where said main canal of said plaintiff commences and has its place of diversion. And the construction, maintenance, and operation of said main canal does not now impede or prevent, and never has impeded or prevented, the natural flow of any water from said San Joaquin river into the said Fresno slough."

The main canal here referred to is the canal of the plaintiffs above mentioned, heading into the San Joaquin river immediately below its junction with Fresno slough.

The theory of the court below was, and that of the defendants is, that, so far as

said canal is concerned, the owners of lands on Fresno slough are upper riparian proprietors not affected by the lower diversion and use of the waters of the stream, and, pursuant to this theory, in finding 46 it further said: "The taking and diversion of such water, either out of said slough, or out of the main channel of the said San Joaquin river," when the river is flowing into the slough, "does not cause and will not cause * * * any damage to plaintiff, * * * or to either of them."

The question thus presented relates only to the waters of the San Joaquin river. It does not relate to the waters of Kings river or to the surface waters above mentioned when such waters flow northerly through the slough into the San Joaquin river, and no controversy over the right of the J. G. James Company to a reasonable share of such waters appears to exist.

It should be further noted that the rights claimed by Miller & Lux to receive water from said canal for use on its lands are derived through and depend upon the title of the coplaintiff to the canal and water and need not be separately considered. The plaintiff canal company is the sole owner of the canal and of the right to divert water therein.

[2] Under the established law of riparian rights, a title by prescription cannot be acquired against a tract of riparian land by diverting the water from the stream at a point below such land, and not interfering with the stream at the riparian land. Thus it is said in *Bathgate v. Irvine*, 126 Cal. 141, 58 Pac. 444 (77 Am. St. Rep. 158):

"The lower appropriator invades no right of the upper riparian proprietor. The latter has no right of action to prevent such use, for he is in no wise injured, and the former should not be permitted to acquire a right in this manner which the latter is powerless to prevent."

See, also, *Hargrave v. Cook*, 108 Cal. 78, 41 Pac. 18, 30 L. R. A. 390; *Hanson v. McCue*, 42 Cal. 310, 10 Am. Rep. 299; *Lakeside Ditch Co. v. Crane*, 80 Cal. 183, 22 Pac. 76. Under this rule, assuming that the land of the James Company is riparian land situated above the point of plaintiffs' diversion, without further qualifying conditions or circumstances, the claim of a prescriptive right against the James company cannot be sustained.

[3] Recognizing the force of this rule, the appellants make the further claim that the water taken into the canal is devoted to public use, and that the defendants cannot now prevent such use, but are confined to a claim for damages estimated by the value of their riparian rights. It appears from the findings that said canal is 75 miles long, and that a large part of the water taken into it has been for many years carried down and applied to the public uses of supplying several farming neighborhoods with water for irrigation and five or six towns or villages along its course with water for domestic use. It further ap-

pears from the evidence that Jefferson G. James, who, up to the time the action was begun, was the owner of the James lands, was at all times fully aware of the fact that this water was taken for public use and was so applied, and also of the method and place of diversion from the river. It does not appear that he ever made any objection to such diversion or use until this action was begun. Upon these facts, the plaintiff canal company contends that the interests of the public have intervened so as to prevent the James Company from asserting a right to take and use on its land the waters of Fresno slough, if such taking will interrupt or destroy the said public uses, and that said defendant, as against said public uses, cannot take the water, but can only sue for compensation for its riparian rights thus appropriated by the public.

The general doctrine thus invoked is well established in this state. It has been applied and defined in the following cases: *Fresno, etc., Co. v. S. P. Co.*, 135 Cal. 202, 67 Pac. 773; *Southern C. Ry. Co. v. Slauson*, 138 Cal. 342, 71 Pac. 352, 94 Am. St. Rep. 58; *Katz v. Walkinshaw*, 141 Cal. 136, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; *Crescent Canal Co. v. Montgomery*, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940; *Newport v. Temescal W. Co.*, 149 Cal. 531, 87 Pac. 372, 6 L. R. A. (N. S.) 1098; *Barton v. Riverside Water Co.*, 155 Cal. 509, 101 Pac. 790, 23 L. R. A. (N. S.) 331; *Gurnsey v. Northern Cal. Power Co.*, 160 Cal. 709, 117 Pac. 906, 36 L. R. A. (N. S.) 185; *Burr v. Maclay, etc., Co.*, 160 Cal. 280, 116 Pac. 715. These cases for the most part relate to public uses which involved a physical entry upon the land of the private owner, or an actual invasion of property rights belonging to him. It is now insisted that the reasons upon which it is founded justify and demand the extension of the rule to cases of an upper riparian owner who, without using the water himself on his riparian land, has knowingly stood by while the water has been diverted from the stream after it had passed his land, and applied to a public use in quantities inconsistent with the use by him of the water of the stream on his own land. It is also claimed that, even if the rule cannot go to this extent, yet that, under the circumstances of this case, it should be applied to the defendants and should debar them from other remedy than an action for damages.

The importance of these questions demands a careful examination of the decisions on the subject to ascertain the principles and reasons upon which they rest. The cases of *Fresno, etc., Co. v. S. P. Co.* and *Sou. C. R. Co. v. Slauson*, supra, each involved the use of a right of way over a parcel of land, the road having been built thereon either by agreement with, or with the consent and acquiescence of, the landowner. Speaking of the right to sue in ejectment, the court, in the *Fresno Case*, says:

"A failure to bring an action, where the right exists, until after public interests have intervened, will prevent its successful prosecution. Acquiescence for a considerable period after the railroad company has entered upon its duties will defeat the action to recover possession."

In the *Slauson Case*, on the same subject, it is said: "A railroad is, in a sense, a public highway," and if the owner of the land consents to its use for a railroad, and it is thereupon so used, this "is a dedication of the same to a public use," the operation of the road thereafter is in the interests of the public, "and cannot be interrupted by an action to recover possession of any part thereof in the interest of a private party." In *Crescent Canal Co. v. Montgomery*, supra, the land in question was used as a right of way for the extension of an irrigating canal for four years, without any objection by the owners and with their tacit consent. Speaking of the effect of the extension of the canal upon the community enjoying the use of water therefrom, the court said:

"The establishment of such a community with the improvements and expenditures necessarily involved was one of the results of the acquiescence of Poyser and Johns in the extension and increased efficiency of the canal. They may have had a right to demand and receive a reasonable compensation for any damage to their lands caused by such extension. But they had no right to abate the canal by action, and no right to injure or destroy it."

In *Katz v. Walkinshaw*, supra, speaking of the right of one owner of land underlaid by water-bearing strata to enjoin another from pumping out the water for the irrigation of lands outside the water-bearing area, the court says:

"Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused. * * *"

The same question arose in *Newport v. Temescal, etc., Co.*, supra, and *Barton v. Riverside*, supra. *Newport* sued to enjoin the pumping of water from a tract of land situated some five or six miles from his own land, such water being carried away and applied to public use outside of the watershed. This had continued for three years with his knowledge and without objection by him. The court stated the rule in these words:

"Where the interests of the public are involved and the court can arrive in terms of money at the loss which plaintiff has sustained, an absolute injunction should not be granted, but an injunction conditional merely upon the failure of the defendant to make good the damage which results from its work. Such an action, if successful, should be regarded in its nature as the reverse of an action in condemnation. The defendant in effect would be held to be damaging private property without just compensation first made to the owner, and, failing to make such compensation, should be enjoined from further damage."

In the *Barton Case* the court bases the rule upon the facts that the landowner knew, or had reason to believe, that the water

tended to exhaust the landowner's supply; that it was being used outside of the common basin by a community which had established itself there in reliance upon that supply; that it was being used there in reliance upon that supply; and that the owners had stood by for nine years without complaint or protest. These two cases referred to the taking of percolating waters from water-bearing strata common to lands of both plaintiff and defendant, which injured the plaintiff, by drawing the water from under his own land.

A similar condition existed in the case of *Burr v. Maclay*, supra. The court there said that the rule "has for its basis chiefly the inconvenience to the public if the service is interrupted by the issuing of an injunction to restrain the use."

The question was more thoroughly considered in *Gurnsey v. Northern Cal. Power Co.*, supra, than in any previous case. Under a franchise from the board of supervisors the defendant had built and maintained a power line over lands of plaintiff which he had dedicated to the public solely for use as a public highway. The power line was erected without his permission, but with his knowledge and without objection from him. It did not interfere with any use he was making of his land or of the highway, but the court held that it constituted an additional servitude and was an invasion of his property right in the soil. Referring to the cases above cited, the court said that the principle upon which the right to maintain ejectment was denied in such cases was—

"that as public interests had intervened through the construction and operation of these public agencies before the actions in those cases were commenced, any right of the parties to disturb them in their possession of the property was thereby lost, and only an action to recover compensation for the land taken could be available. In principle there can be no difference, as far as the application of the rule of public policy is concerned, whether the entry is by the original consent of the owner, or he permits it to be made and attempts to assert no right until after the public interests have intervened. * * * The principle which underlies this rule is not based upon any considerations of rights pertaining to the public service corporation itself, but solely upon considerations of public policy. * * * This rule is not based so much on the application of the doctrine of estoppel, under which an owner of land, who remains inactive and permits a public service corporation * * * to enter upon his land without right and expend large sums of money in constructing and building the work, will be deemed to have acquiesced in the entrance, so that all remedies save one for compensation will be denied him. It is based mainly on the great principle of public policy under which the rights of the citizen are sometimes abridged in the interests of the public welfare. * * * Public policy requires that, under such circumstances, the remedy of ejectment should be denied to plaintiff, when the effect of a judgment in such an action would be to destroy the efficiency of the electric line system," by taking possession of part of it, "and thus destroying the public rights which have intervened."

The question received elaborate treatment in *Indiana, B. & W. Co. v. Allen*, 113 Ind.

583, 15 N. E. 446. In that action the owner of land had knowingly permitted the railroad to build its main line over his land and to operate the same for many years, so that the use by the public had become fixed therein. The court said:

"This principle does not rest upon the right of the railroad corporation so much as upon considerations of public policy. The rights of citizens are often abridged in order that the public welfare may be promoted. Chief among the fundamental maxims of jurisprudence is that which declares 'that regard be had to the public welfare as the highest law,' and this maxim underlies the rule we have under discussion. * * * It goes far enough with us to supply ample ground for denying one who has slept upon his rights a right to dispossess a railroad company charged with a service public in its nature, and important to the social and commercial interests of the country. Compensation he may recover, possession he cannot."

And again:

"All these interests, and more, combine in demanding that a citizen, who has stood by until after the completion of a line of road has involved public interests, shall not be allowed to sever the line and destroy its efficiency by wresting possession of part of it from the company. The case does not stand upon the ordinary doctrine of estoppel. The great principle of public policy enters as an important factor and controls the judgment of the court. Nor is there any great hardship upon the landowner in yielding to its dominion. Ample remedies are open to him. He may demand and secure full compensation. He may do more, for he may invoke the strong arm of the courts, but, to do this with success, he must move before public interests are involved. If he remains inactive, better that he suffer, if some one must suffer, than the community. But he need not suffer, for compensation, if seasonably asked, will always be awarded him, although possession will be denied."

And, further, referring to the argument that the defendant was a married woman, under the disability of coverture, so that her action in ejectment was not barred, the court denied this claim and said:

"In cases of condemnation and dedication, as shown by the authorities (citing *Indianapolis v. Kingsbury*, 101 Ind. 219 [51 Am. Rep. 749]), the ordinary rules do not apply. Certainly this must be so where public policy controls, for no one can do what public policy demands shall not be done. Once it is granted that the public welfare demands that a line of railway shall not be severed by a possessory action, it must inevitably follow that the disability of coverture will not avail, since the rights of the public are paramount to all others. No one can do what public policy forbids. Coverture may prevent the running of the statute of limitations in jurisdictions where it is recognized as a disability; in ours it is doubtful whether it can do so much, but surely, it may not, in any jurisdiction, prevail against a rule of public policy."

There are many cases in other states declaring the same reasons for the rule. *McAulay v. Western, etc., Co.*, 33 Vt. 321, 73 Am. Dec. 627; *Mitchell v. New Orleans, etc., Co.*, 41 La. Ann. 368, 6 South. 522; *Bourdier v. Morgan, etc., Co.*, 35 La. Ann. 947; *Reichert v. Railway Co.*, 51 Ark. 500, 11 S. W. 696, 5 L. R. A. 183; *Hanlin v. Chicago, etc., Co.*, 61 Wis. 530, 21 N. W. 623; *Goodin v. Cincinnati*, 18 Ohio St. 169, 98 Am. Dec. 95; *Roberts*

v. Northern P. R. R. Co., 158 U. S. 11, 15 Sup. Ct. 756, 39 L. Ed. 873; Northern P. R. R. Co. v. Smith, 171 U. S. 271, 18 Sup. Ct. 794, 43 L. Ed. 157; Northern Pac. R. R. Co. v. Murray, 87 Fed. 651, 31 C. C. A. 183; Saunders v. Memphis, etc., Co., 101 Tenn. 206, 47 S. W. 155; Buckwalter v. Atchison, etc., Co., 64 Kan. 403, 67 Pac. 831; Holloway v. Louisville, etc., Co., 92 Ky. 244, 17 S. W. 572; Provolt v. Chicago, etc., Co., 57 Mo. 262; Chicago, etc., Co. v. Englehart, 57 Neb. 447, 77 N. W. 1092; Omaha, etc., Co. v. Redick, 16 Neb. 313, 20 N. W. 309; Kakeldy v. Columbia, etc., Co., 37 Wash. 680, 80 Pac. 205. Upon similar reasons it is held that a part of the right of way of a railroad cannot be severed from the remainder of the public franchise and sold on execution against the railroad company, or for local taxation, unless it is expressly authorized by statute. Southern C. R. Co. v. Workman, 146 Cal. 84, 79 Pac. 586, 82 Pac. 79, 2 Ann. Cas. 583.

In substance, the doctrine established by these decisions, though not, strictly speaking, the doctrine of prescription, at least amounts to this: That where a person has suffered property belonging to him and under his control to be taken and devoted to a public use by one engaged in administering such use, and the matter has gone on so far that the beneficiaries thereof rely on its continuance and adjust their affairs accordingly, such owner having knowledge thereof and making no objection or protest, this conduct will be regarded by the courts as a dedication by such owner of the property to the particular public use, and he cannot thereafter interrupt nor prevent the same, his only remedy being to seek compensation for the property he has thus allowed to be taken, or as indicated in the Newport Case, *supra*. Upon this statement of the doctrine we proceed to examine into the circumstances of the case.

It is to be observed that in all of the above cases the public use involved an interference with the property rights of a private owner sufficient to give such owner an immediate right of action to abate or prevent the same. In the Gurnsey Case, the power line in the public road did not interfere with any private use which the owner desired to make of the land constituting the road, but it was an appropriation of the soil in which he owned the fee to uses to which he had not originally dedicated it.

[4] In the percolating water cases, the pumps would draw water from under the plaintiff's land and lower the water level thereunder. This, in effect, was a direct invasion of the plaintiff's rights which he might have enjoined by suit as soon as the injury was threatened. *Katz v. Walkinshaw, supra*. This right in the owner to enjoin the public use before it had become established appears to have constituted an important factor in the statement of the doctrine in all of the above cases. This right of action,

as we have seen, does not exist in favor of an upper riparian owner against one who diverts water from the stream at a point below his land. It is true that, in case of a diversion for public use, such upper proprietor must be supposed to take cognizance of the fact that the people below may rely on his disuse, expect a continuance thereof, take the water which he has allowed to pass, and adjust their affairs to that condition, as if possessed of a permanent right. He must also know that, except where the water is abundant, a subsequent taking thereof by him for use upon his own land will deprive the public of it, and that the consequences of such deprivation will usually be exceedingly grave. These questions present serious practical difficulties, and, as we think that the circumstances of this case place the defendants in a different situation from that of an ordinary upper riparian owner, we prefer to express no opinion concerning the application of the doctrine to such owners in general, but confine our decision to the particular case shown by the evidence herein.

[5, 6] There is no direct evidence to support the finding that the operation of the plaintiffs' main canal does not impede or prevent the natural flow of water from the San Joaquin river into Fresno slough, or the finding that the taking of water out of such slough by the James Company will not cause any damage to plaintiffs. The evidence on the subject is merely to the effect that when from any cause the level of the water in the river is higher than the level of the water in the slough, the water will flow from the river into the slough, and that when the conditions are the opposite, the water will flow from the slough into the river. No evidence was necessary to prove either of these propositions. They are the necessary result of the operation of the natural law of gravity, the level of the river and slough being practically the same, and judicial notice would be taken thereof. It was also shown that the effect of the dam placed in the river by the plaintiff canal company, when kept at its usual height, was to raise the water of the river above its natural level and force it back up the river about three-quarters of a mile, and also to back the water up the slough and along by the land of the James Company to a distance of 10 miles above the dam. The findings mentioned are really conclusions which the court deduced from these facts. The facts do not justify the conclusion. The force of gravity must, of necessity, control the action of water under given circumstances. The case is not like unto that of a stream permitted to pass the land of a riparian owner. On the contrary, the dam stops it in its course and forces it back a long distance up the stream and up the slough until it reaches approximately the level maintained at the dam. In this way the dam impounds the water designed to be taken, and it is the water so impounded that

the plaintiff canal company has taken. The space at the common junction of the river, the slough and the canal is nearly square and about 600 feet each way across. This space, with that between the banks of the river and slough, respectively, as far up as the backwater extends, form a reservoir which the plaintiff has made and used for the purpose of diverting this water thereby, as one part of its system. This reservoir is partly upon the land of the James Company and extends for a distance of several miles up the slough over its land. This use of the James land for the purposes of plaintiff's canal was continued for many years with his knowledge and without objection. It must be conceded that these operations of said canal company have and do materially interfere with and change the natural flow of the water in the river and in the slough in its course through the James land. If the flashboards be placed in the dam so as to raise the water of the river above its natural level, the headgate of the canal being closed, the water will, of course, back up into the slough, forcing more water into it than it would receive by the normal action of the stream. If, then, the headgate be opened, it will relieve the back pressure and the slough will receive less. If the dam is maintained so as to allow all the natural flow to pass down the river without raising its level, some water will pass into the slough to replace natural evaporation and seepage and, if the river is then rising, to fill the slough to the level of the river. At such times, if the headgate is opened it will take a large quantity of water from the river at the junction, lower its level accordingly, and cause less water to flow into the slough. Measuring around what may be called the perimeter of the junction, the headgate may be as much as 300 feet from the mouth of the slough, but it is not so far away, the lines of the banks and the rate of flow of the stream being considered, that the taking out thereat of a flow of 760 second feet would not lower the surface level at the mouth of the slough. Such a flow is no insignificant stream, being the equivalent of a stream 200 feet wide and 3.8 feet deep moving at the rate of 1 foot per second. When from any cause the water runs out of the slough into the river, the headgate of the canal is, with respect to that current, below the James lands. But when the water runs from the river into the slough, it is, with respect to that current, above the James lands, and it is so near to the course of the current from the river into the slough that the diversion of 760 second feet through the headgate must of necessity draw water from that current and diminish the quantity passing into the slough. When the water at the junction is stationary, it is similar to a lake or pond, and the diversion of so large a quantity into the headgate must lower the level of the entire body and draw water both from the slough and the river. *Duckworth v.*

Watsonville, etc., Co., 150 Cal. 528, 89 Pac. 338; *Turner v. James Canal Co.*, supra, 155 Cal. 91, 99 Pac. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823. These consequences would be more plainly apparent if the James Company should actually take water out of the slough and use it on its lands. This would at once start a current from the river into the slough to replace the water so taken. This current would pass very near the headgate of the canal. The opening of the headgate at such times would inevitably divert into the canal water that would otherwise pass into the slough. This would be the result alike when water stands at the natural river level, and when it is backed up the slough by the dam. The two uses, if made simultaneously, would necessarily be inconsistent and antagonistic. For these reasons, the finding cannot be true that the natural flow of the water from the river into the slough is not and never has been impeded by the operation of said canal.

Likewise, the statement that the taking of water out of the slough by James to be used upon his lands would not damage the plaintiff, cannot be true, except upon the hypothesis that the plaintiff has no right to the water. In that case it would suffer no legal damage, but actual damage must of necessity ensue. If the plaintiff has a right thus to take the water, such diversion by the defendant would cause it legal damage.

These conditions have been maintained by the plaintiff canal company at all ordinary stages of the river, for more than 25 years before this action was begun. In reliance upon the continuance of this water supply, towns and villages have grown up, and hundreds of irrigated farms have been established in the district supplied by said plaintiff's canal. With all these circumstances James was familiar, and he gave no warning of any objection to such use, but suffered it to continue. His land along the slough was used by the canal company as a part of its reservoir in which to collect the water for distribution. By that means the water has been taken all these years, with his knowledge and tacit consent. To permit him or his successor now to take out the water therein stored for diversion by said canal company would, in effect, permit him to destroy or seriously impair and injure the water system of which his property has constituted an important part and in the establishment of which he has acquiesced. Every consideration of regard for the general welfare and public good, so much emphasized in the decisions above mentioned, applies with the greatest force to the conditions here shown. He was not, as in the case of an upper riparian owner, powerless to interfere with the use of the water. He could have maintained an action to prevent the backing up of the water on his land to form the reservoir and force the water into the canal and to prevent any interference with the flow

into the slough. The doctrine is applicable to him and to the James Company as his successor.

Therefore the plaintiff canal company is entitled to continue its diversion for public use as it has heretofore done, and the J. G. James Company cannot be allowed to interfere with that use. The part of the judgment which declares that the J. G. James Company may, when the water of the river is flowing into Fresno slough, take the same and use it on its riparian land along the slough, regardless of the effect of such taking to diminish the flow into said plaintiff's canal to an amount less than 760 second feet, is, to that extent, erroneous. The defendants cannot be allowed to divert the water so as to cause such diminution, or so as to prevent that quantity from flowing into said canal.

[7] What has been said with respect to the taking of water from Fresno slough by the J. G. James Company for the irrigation of its land applies also to the taking of water for the same purpose from the San Joaquin river through the Enterprise canal, now maintained by the James Canal Company. As Jefferson G. James, by his acquiescence in the public use of the water by the plaintiff canal company has, in effect, dedicated to that public use the riparian rights pertaining to the James land, to the extent required therefor, he, or his successor, cannot be allowed to regain those rights by the expedient of going up the river and there diverting the water to the same riparian land through the Enterprise canal. If the James Canal Company be regarded as a mere appropriator of water from the stream above the plaintiff's dam, its diversion is, on well-settled principles, unlawful as against the plaintiff's prior appropriation below, so far as it is injurious thereto.

[8] The respondents question the proposition that the plaintiff canal company is devoting the water it takes into its canal to public use. The parties stipulated in writing, for the purposes of the trial, that the said canal company had, for the five years immediately preceding the commencement of the action, continuously diverted into its canal and appropriated the 760 second feet of water in controversy, and that:

"All of said water during all of said time was sold, rented, supplied and distributed to others, including a part thereof to the plaintiff, Miller & Lux, for purposes of irrigation, the watering of stock and domestic and other beneficial uses, and that beneficial use was made of said water so appropriated, and all thereof."

This was incorporated into and made part of the findings of the court. The court also found that many thousands of acres of land, occupied by a large number of persons as owners or tenants, were irrigated with water from said canal, and that they had thereon many thousands acres of growing crops of grain, fruits, and other crops. The evidence shows that there were many hundreds of

such persons. And, as before stated, a number of villages have grown up along the canals, the inhabitants of which receive water therefrom for their lands and for domestic use. The use described in the stipulation, and the facts disclosed by the uncontradicted evidence, show that the water was devoted by the canal company to public use. There is no merit in the contention to the contrary. It may be that some of it has been disposed of to Miller & Lux at rates more advantageous than to others, but that is an abuse which the proper public authorities may prevent or regulate; it does not convert the use into a private use.

[9] Upon a former hearing of this case an opinion prepared by Mr. Justice Henshaw was rendered by the court in bank in pursuance of which the judgment was modified in certain particulars. This opinion embraced all of the points involved in the case. A rehearing was granted by the court, solely for the purpose of again considering the questions relating to the public use of waters taken by the San Joaquin & Kings River Canal & Irrigation Company, Incorporated; upon which we have now reached the conclusions heretofore stated. The portions of the opinion relating to the other matters presented by the appeals were and are satisfactory to the court, and we now adopt the same as the opinion of the court upon this hearing. They are as follows:

Entirely different are the questions presented by the second branch of this appeal. The James Company was not alone awarded the right to the use of a reasonable quantum of water from Fresno slough, but was given the further right to divert this water from the San Joaquin river proper, the point of diversion being, by the meanderings of the river, some 20 miles above the junction of Fresno slough with the San Joaquin river, and something more than 10 miles above in a direct line. There was thus accorded the right to the James Company to go above their lands and above the lands of intervening owners to divert water for riparian use. That this may be done when it may be done without interference with the rights of the lower riparian proprietors, that is to say, lower than the land upon which the water is to be used, has been decided and is not questioned. *Turner v. James*, supra. But it is contended that the permission thus awarded the James Land Company here works an illegal and unwarranted interference with the plaintiffs as intervening riparian proprietors, as well as an interference with their rights to water through the canal. Before entering upon this consideration something more needs to be said of the geographical conditions. The court decreed that this reasonable quantity could be diverted through the Enterprise canal, now controlled by the James Canal Company. Between the intake of the Enterprise canal to the east and the junction of Fresno slough with the San Joaquin river to the west, a distance of some 20 miles by the meanderings of the river, plaintiff Miller & Lux owns large tracts of riparian land on the northerly bank of the stream. Three sloughs, originally natural channels of the San Joaquin, take out of the river and cut through these northerly riparian lands. The first of these and nearest to the head of the Enterprise canal is Aliso slough. It formerly took water out of the river only at high stages, but it has been deepened and improved so that it is now able to and does

take water out at lower stages. Two or three miles below the head of Aliso slough is Brown slough, also a natural water channel and taking water out of the river under about the same conditions as does Aliso slough. A few miles below the head of Brown slough the channel known as Lone Willow slough leaves the San Joaquin. Into Lone Willow slough flow Aliso slough and Brown slough. Lone Willow slough carries these commingled waters until it returns them to the main channel of the San Joaquin some 13 miles below Fresno slough. It is asserted by appellants, but it is against the findings, that Lone Willow slough carries water at all stages of the San Joaquin, the amount being about 10 per cent. of the total flow of the river. The waters of each of these sloughs are controlled by weirs or gates and conducted by canals and ditches to the irrigation of lands. Two canals have been constructed leading out of Lone Willow slough. The Chowchilla canal diverts water in a northerly direction to the lands of plaintiff and to the distant nonriparian lands of others. The Columbia canal diverts water out of the slough for purposes of irrigation, and for many miles conducts this water along or near the bank of the San Joaquin river, distributing it over the riparian land of plaintiffs.

The further findings declare that the three sloughs above described were originally "high water" sloughs, that is to say, that their beds were so far above the bed of the San Joaquin river at their junctions therewith that they originally received water from the San Joaquin river only during periods of high water and at only such times as Fresno slough was carrying the waters of Kings river into the San Joaquin; that these sloughs, more than 10 years ago, were by plaintiffs and others "developed, improved, cut down, enlarged, and the course and direction thereof changed, and their natural condition changed, and the flow of water therein so regulated, controlled, increased, and diminished by artificial means and all of the water flowing therein conducted to and upon the lands, in, over, and upon which said sloughs did not naturally run and take their course, whereby the said Brown slough, Aliso slough and Lone Willow slough ceased to be natural sloughs and natural water courses, and the land, in, over, and upon which said sloughs naturally ran, ceased to be riparian lands bordering upon said San Joaquin river, or any branch, water course or channel thereof, and said sloughs are not now, and for more than 10 years before the commencement of this action have not been, natural branches of water courses of the San Joaquin river." The findings proceed to declare that Miller & Lux have for more than 10 years used these sloughs in their changed and artificial condition, taking water from the San Joaquin river to irrigate lands which they own that never bordered the sloughs while the sloughs were in their natural condition, and to irrigate and supply with water lands not bordering upon the San Joaquin river, and to supply water for stock, domestic, and other purposes. But it is further found that the taking and the use of these waters through these sloughs "has never prevented and does not now prevent the flow of water from said San Joaquin river into said Fresno slough, and over, along, and upon the lands of the defendant J. G. James Company"; and the waters of the San Joaquin river "continued to flow and do now flow into the said Fresno slough and fill the same as the same were accustomed to do before the taking and diversion of any water from the river through the sloughs." The purport of these findings is, of course, that these sloughs which naturally took water from the river at its high stages have, by artificial means, been converted from their character of natural water courses into the character of irrigation ditches or canals, but that neither in their natural state nor in their changed artificial con-

dition did or do they prevent the natural flow of the San Joaquin river into Fresno slough. True, if, by their changed condition, they were enabled to take and did take more water out of the San Joaquin than when they were in their natural state this would have a direct tendency to reduce at such times the amount of water which would flow from the San Joaquin into Fresno slough. But it is further found that before and after this change of character in the sloughs the San Joaquin river always continued to flow and to fill Fresno slough in its accustomed manner. The court finds that the defendant James Company has been diverting, and has the right to divert, to its lands through the Enterprise canal a reasonable quantity of water, and that this water can be and is and may in the future be so diverted without injury to any of the lands of plaintiff.

Appellants insist that under the common-law doctrine of riparian rights, as that doctrine is expounded, not alone by the common-law courts and the courts of sister states, but as accepted and declared by the decisions of this state, this may not be done, for that it is well settled that each riparian proprietor is entitled to the full flow of the stream, saving as that flow is reduced by the reasonable use of reasonable quantities of water by upper riparian proprietors, and, second, that the right to such flow is a property right of great value. Respondent answers that it recognizes that the common-law doctrine accepted in sister states is as appellants declare, but that this court has over and over asserted (as it has) that it would not be bound by that doctrine where it was found unsuited to our radically different conditions and needs; that the use of water for irrigation is so highly necessary a use as to demand a modification of the common-law doctrine and the declaration that the lower riparian proprietor may go above an intervening riparian proprietor and take water for use upon his lower lands; provided he can do so without substantial injury to the intervening proprietor; that whether or not substantial injury results is a question of fact to be determined in each case by its circumstances, and that in this case the findings of the court, fully supported, declare that the taking could be made without injury. To this appellants make reply that it will be difficult, if not impossible, to conceive of a case where this could be done without injury, that is to say, without an impairment or destruction of a right of property which has by this court repeatedly been declared to rest with the upper riparian proprietor by virtue of the situation of his lands and his right to the uninterrupted flow of the stream. But that even if a case could be imagined where such a diversion could be made without injury, this is not such a case, and the findings so declaring are without support.

With this epitome of the diverse contentions of the parties, we may the better proceed to a consideration of the matter. And, first, it is to be remembered that we are here dealing with the correlative rights of riparian proprietors in the matter of irrigation.

[10] Since the leading case of *Lux v. Haggin*, 69 Cal. 256, 4 Pac. 919, 10 Pac. 674, the right of irrigation has been declared to be a part of the riparian owner's rights in the use of water. In many respects, too, definitions and limitations have been put upon the right to use water for irrigation. Thus an upper riparian proprietor, by virtue of his superior location, is not entitled to use all of the water for that purpose to the destruction of the rights of riparian proprietors below to use their due proportion of the water for the same purpose. Thus it is said: "The common-law rule, as interpreted in this country, is that the right to the waters of the stream, with certain exceptions not material here, belongs to the riparian proprietors in common and equally, and may be exercised by each as the necessities of the situation may require

only so as not to infringe upon the equal rights of the others." *Charnock v. Higuerra*, 111 Cal. 473, 44 Pac. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195. And again it is said: "It is accordingly well settled here that each riparian owner has a right to a reasonable use of the water on his riparian land for the irrigation thereof, and that the so-called common-law right of each to have the stream flow by his land without diminution is subject to the common right of all to a reasonable share of the water." *Turner v. James Canal Co.*, supra. And so in such cases as *Harris v. Harrison*, 93 Cal. 681, 29 Pac. 325, and *Wiggins v. Muscupiabe L. & W. Co.*, 113 Cal. 190, 45 Pac. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337, instead of dividing the flow of the stream in portions, the full flow was apportioned amongst the riparian owners during specified periods of time; and in *Rose v. Mesmer*, 142 Cal. 322, 75 Pac. 905, it is said: "A riparian owner may, for the more convenient use of the water on his riparian land, go upon the land of another farther up the stream, with the consent of such landowner, and there divert the water for use upon land below, or he may raise it to the surface of his land by pumps or other artificial means. In either case his act in so doing is not necessarily different from the exercise of his right as a riparian owner, and such a diversion above his land may or may not be considered as an attempt to make an appropriation of the water independent of the riparian right, according to the circumstances that appear with respect to the particular case." Of the language of our opinions, which respondent insists favors its contention, these are the strongest and are for that reason quoted. But in no one of them, it will be noted, is there any declaration that a lower riparian proprietor may so go above an upper riparian proprietor and take water without his consent.

In *Charnock v. Higuerra* the exercise of the common and equal right of the riparian proprietors to take and use the water is carefully limited by the declaration that it must be done "so as not to infringe upon the equal rights of others." In *Turner v. James Canal Co.*, supra, the lands of the objecting riparian owner were entirely below the James lands upon which it was proposed to use the water. In *Rose v. Mesmer* the right of the lower riparian proprietors to go above his lands to take water is put under the limitation that it be done with the consent of the upper proprietors. Therefore it is certain that there is no declaration by this court that a lower riparian proprietor may so take his water as matter of right, and in truth the decisions are otherwise.

[11] It is to be remembered that a riparian proprietor's title to the water begins only when it reaches his land and lasts only so long as it is flowing past his land. Until it reaches his land he has no title whatsoever, and no right other than the protective right to see that the full flow past his land to which he is entitled is not illegally diminished. Thus it has been said: "Neither a riparian proprietor nor an appropriator has title or ownership in the water of the stream before it reaches his land or point of diversion respectively. This has been expressly decided with respect to appropriators. *Parks C. & M. Co. v. Hoyt*, 57 Cal. 46; *Riverside Water Co. v. Gage*, 89 Cal. 410, 26 Pac. 889; *McGuire v. Brown*, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384. The same rule applies to a riparian owner." *Duckworth v. Watsonville*, etc., 150 Cal. 520, 89 Pac. 338. Moreover it is to be noted that as to an upper riparian proprietor the effect of a diversion above him is the same whether it be said that the diversion is but a mere appropriation or whether it be said that the diversion is to place and use the water upon lower riparian lands. That an appropriator could not so take the water is not disputed. The riparian proprietor, as we shall see, would not even be called upon to prove the direct

damage. He would be protected against such a taking because such a taking is an impairment and destruction of his right of property in the water, which right of property, as has been frequently said, is the right to its full flow past his land. Thus, as early as 1886, in the case of *Stanford v. Felt*, 71 Cal. 249, 16 Pac. 900, objection was made by a lower riparian proprietor to the unwarranted use of the water by an upper riparian proprietor, in that the upper riparian proprietor did not permit the surplus waters to return to the stream, and this court in bank there declared: "By the common law of England, the right of the riparian proprietor to the flow of a stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy nor suspend it. The right of such proprietor extends to the natural and usual flow of all the water of the stream, unless when the quantity has been diminished as a consequence of the reasonable use or appropriation of it by other riparian owners for proper and legitimate purposes. * * * Nor is the owner lower down the stream required to show, in order to procure an injunction, any actual present damage." In *Heilbron v. Water Ditch Co.*, 75 Cal. 117, 17 Pac. 65, in an action to restrain a diversion, it is said: "And it seems clear, upon principle and authority, that the diversion of natural water from land is 'an injury done to the inheritance.' The flow of natural water over land is a continuous source of fertility and benefit; and its withdrawal is followed by consequences which are perpetually injurious to the freehold. * * * The flow of the water of a stream, whether it overflows the banks or not, naturally irrigates and moistens the ground to a great and unknown extent, and thus stimulates vegetation; and the growth and decay of vegetation add, not only to the fertility, but to the very substance and quantity of the soil." In *Southern California, etc., Co. v. Wilshire*, 144 Cal. 68, 77 Pac. 767, the action was to quiet title to the waters of a certain stream. Both plaintiff and defendant were riparian owners, the plaintiff being the inferior riparian proprietor. Defendant was taking waters beyond the watershed of the creek, which were thus lost to plaintiffs' lands, precisely as here; respondents seek to take waters which from time immemorial have flowed past plaintiffs' lands and to carry them around and below them. In speaking of such attempt the court said: "As such riparian owner, it has the right to have the stream continue to flow through its lands in the accustomed manner, and to use the same to irrigate an additional area thereof, undiminished by any additional or more injurious use or diversion of the water upon the stream above. This right is a part of the estate of the plaintiff—parcel of its land,—and whether it is or is not as valuable in a monetary point of view, or as beneficial to the community in general, as would be the use of a like quantity of water in some other place, it cannot be taken by the defendants without right, or, in case of a public use elsewhere, without compensation. It is not necessary in such cases for the plaintiff to show damages, in order that it may be entitled to a judgment. It is enough if it appears that the continuance of the acts of the defendants will deprive it of a right of property, a valuable part of its estate." Again, in *Anaheim, etc., Co. v. Fuller*, 150 Cal. 327, 88 Pac. 978, 11 L. R. A. (N. S.) 1062, where the contention was made that the riparian lands of plaintiff were not injured by an upper diversion, and that he must show injury to enjoin such diversion, the rule and doctrine of the cases previously cited are, after a review of all of them, strongly reaffirmed. And, finally, in the case of *Shurtleff v. Kehrer*, 163 Cal. 24, 124 Pac. 724, it is declared: "The diversion of water of the stream is an injury to the freehold of the riparian own-

er and may be enjoined without a showing of other immediate monetary damages." Again, calling attention to the fact that the diversion of the lower riparian proprietor for use of the water upon his lands is, in its effects, no different from those which would result if the water were taken by a mere appropriator for any other purpose, the conclusion may not be avoided that this court from the first has declared that this may not be done and has in this respect affirmed and adopted the common-law doctrine that the riparian proprietor is entitled to the full flow of the stream, reduced only by the proper riparian uses which may be made of the water by proprietors above him. It has said that he may restrain such a taking without showing damage, upon the broad doctrine of riparian rights; that the taking itself is an interference with his freehold which he is entitled to restrain lest it ripen into a prescriptive right. And, finally, some of the reasons for the doctrine are set forth in the quotation of *Heilbron v. Water Ditch Co.*, supra. And it may be added in this connection that the findings in this case declare: "And by such natural flow of the waters of said San Joaquin river, a large part of plaintiffs' lands have been naturally wet and irrigated and made fit for cultivation and pasture and have been supplied with water for stock and other agricultural purposes and for all other purposes for which owners of land bordering upon a running stream have the right to use the waters thereof, and the waters which have been diverted by the defendants in this action would, but for such diversion aforesaid, actually flow in and through the main channel of said San Joaquin river, along, by, through, over, and upon a large part of plaintiffs' lands in the complaint mentioned and herein found to be riparian to said San Joaquin river."

[12] Respondents, in yielding a reluctant acknowledgment of the force of these decisions, in effect, request that they be swept aside, and ask why "if a diversion made by a lower owner should defeat in part the natural irrigation of his upper neighbor's land, upon the policy of our laws, it should not be so." The answer is this: Many questions touching the use of waters arise in this state which were never known to the common law. As those questions arise they will be treated as cases of first impression and the common-law doctrine will or will not be followed as shall seem best for our changed conditions. *San Joaquin, etc., Co. v. Fresno Flume Co.*, 158 Cal. 626, 112 Pac. 182, 35 L. R. A. (N. S.) 832. But this precise question in other forms has been frequently presented and as frequently determined. The rights of the riparian proprietor in this respect have often been defined, and his right to this uninterrupted flow of the full stream has been declared to be a valuable right and a part of his title to the soil, as at common law it was also declared. These decisions, therefore, have become and stand as a rule of property, and at this day to overthrow them would not only work a destruction of property rights, but would result in interminable confusion and litigation in the scrambling efforts of every riparian proprietor to go as far up the stream as possible to get water. The cases at common law, or where the common law was applied, which dealt with this question, were naturally not cases of irrigation. Generally speaking they arose over the diversions of water around an upper proprietor for power or mill purposes. *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739; *Kimberly Co. v. Hewitt*, 75 Wis. 371, 14 N. W. 303; *Shamleffer v. Peerless Mill Co.*, 18 Kan. 24. But in *Miller v. Baker*, 68 Wash. 19, 122 Pac. 604, the Supreme Court of Washington, in a case like this, involving rights of irrigation, announces the doctrine here declared.

[13] The conclusion thus reached, that the respondent may not, under the objection of appellants, divert its water above their riparian

lands, even under the findings made by the court, renders unnecessary any detailed consideration of those findings. In certain respects the findings are declared to be against evidence, as, for example, the finding that Lone Willow slough is a high-water slough. The evidence tending to show that Lone Willow slough was not a high-water slough, but that at all stages of the river drew water from the San Joaquin is pointed out, and respondents are challenged to produce evidence to the contrary. They do not accept the challenge nor point out such evidence, and it is not to be supposed that this court, under these circumstances, will itself study the record to determine whether or not there be such supporting evidence. Again, the tenor of the court's findings as to the three sloughs—Aliso, Brown, and Lone Willow—seems to be that because they were deepened, and because their waters were controlled by weirs or floodgates, and because some of their waters by ditches and canals were carried to lands not riparian to the sloughs, and therefore not riparian to the San Joaquin river, their whole character as natural water courses was changed, with the result that those lands which still lay along their natural channels ceased to be riparian, and those lands strictly riparian to the San Joaquin river, and which were supplied by its waters through the ditches and canals leading out of these sloughs, also ceased to be riparian in character. This of course could not be. Moreover, the deepening of the sloughs so that they could and did take water from the San Joaquin at lower stages than their natural state permitted did not change their character as natural water courses, nor can it be said that to control the water of such sloughs by dams, weirs, and floodgates can have the effect of destroying their natural character so as to render the lands fronting on them nonriparian. Logically, if this was so, the dam which plaintiffs have maintained for many years across the San Joaquin river would have the effect of destroying the riparian character of all the lands below. And finally upon this point it should be said the court's findings disclose that by these sloughs, superior in location to Fresno slough and thus to the James land, large quantities of water for many years have been taken and devoted to beneficial purposes; some to irrigation and domestic use on lands unquestionably riparian; others for like uses on land nonriparian either to the river proper or the slough. But this last use, open, notorious, and in interference with the flow of the river waters to Fresno slough and so to the James land, has given to these appropriators a prescriptive right to continue this use. The finding of the court that these sloughs in their natural state took water from the San Joaquin river only during the time when the Kings river was flowing into the San Joaquin river through the Fresno slough does not militate against this: First, because the deepening and improvements of the sloughs whereby they took water at very much lower stages of the river were made more than 10 years before the commencement of the action, and the use of the water under the changed conditions has ripened into a prescriptive right; and, second, because the finding itself is not supported by the evidence.

[14] Appellants were entitled to their costs in the trial court as of course against the Enterprise Canal & Land Company and the James Canal Company, since the action against them involves the title to real property. Code Civ. Proc. § 1022, subd. 5.

Our final conclusions upon these opinions are as follows: The J. G. James Company is entitled to take from Fresno slough its reasonable quantity of water for use upon its riparian land, except that such diversion and use must not interfere with the diversion by the San Joaquin & Kings River Canal & Ir-

rigation Company, Incorporated, by means of its dam, headgates, and canals at and near the junction of the San Joaquin river and Fresno slough, from said river, of a stream of water equivalent to a flow of 760 cubic feet per second for public use. The right of said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, to take said quantity of water from said river and devote the same to public use is paramount to the riparian rights of the J. G. James Company as owners of lands riparian to Fresno slough. The defendants are not entitled to divert water for said lands, or at all, through or by means of the Enterprise canal, or the James Company's canal, but may take the same only from Fresno slough.

The findings are full and complete and, with the exceptions stated, are sustained by the evidence. Those which are not are, according to the views which we have expressed as to the law, unimportant and may be disregarded. Those remaining are sufficient to support a judgment in harmony with our conclusions. We see no reason to believe that a retrial would or should produce essentially different findings of fact. A new trial is not necessary.

It is therefore ordered by the court that the order denying a new trial be affirmed, that the parts of the judgment appealed from be vacated and the cause remanded to the court below, which shall thereupon proceed to modify its judgment to make it conform to this opinion. Appellants to recover costs.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.

169 Cal. 447

MILLER & LUX, Inc., et al. v. ENTERPRISE CANAL & LAND CO. et al. (S. F. 6085.)

(Supreme Court of California. Dec. 20, 1913.)

WATERS AND WATER COURSES ⇐78—DIVERSION OF WATER—RIGHTS OF PARTIES.

A riparian proprietor may not divert water from the stream at times when more is carried than is actually put to economic use, where the diversion will injure the freehold of another riparian proprietor.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 67-69; Dec. Dig. ⇐78.]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Miller & Lux, Incorporated, and another against the Enterprise Canal & Land Company and others, to determine water rights. From a judgment establishing rights, defendant James Canal Company cross-appeals. Affirmed.

The opinion on rehearing (147 Pac. 567) on the appeal of plaintiffs, setting forth the issues involved, supersedes in part the original opinion on appeals of both parties, but without affecting the opinion on the cross-appeal of defendant James Canal Company, which is as follows:

HENSHAW, J. The foregoing discussion materially shortens the consideration of this appeal. The nature of it has been outlined. It is a request upon the part of the court to overthrow the decisions previously considered and the decisions of Miller & Lux v. Madera C. & I. Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391, and Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. 115, 27 L. R. A. (N. S.) 772, and to decree that notwithstanding the injury to the freehold of the respondents worked by the diversion, the appellants may still divert waters from the San Joaquin river at times when more is carried than is actually put to economic use. This proposition does not present a question of first impression where the action of this court would be free. The proposition has been decided repeatedly against appellants' contention, and for the reasons given in the foregoing consideration those decisions must be adhered to and this appeal denied.

The portion of the judgment appealed from is affirmed.

We concur: SHAW, J.; LORIGAN, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.

169 Cal. 652

TURNER et al. v. EAST SIDE CANAL & IRRIGATION CO. (Sac. 2268.)

(Supreme Court of California. March 23, 1915.)

1. APPEAL AND ERROR ⇐194 — REVIEW — PLEADINGS AND DENIALS.

Where complaint alleged illegal diversion of water of a stream, which the answer denied, which allegations of the answer by express operation of Code Civ. Proc. § 462, were deemed controverted so as to form an issue, and a cross-complaint merely restating the affirmative allegations of the answer was not denied, and the case was tried on the theory that the facts alleged in the cross-complaint were in issue, the objection that its allegations were admitted by failure to deny them could not be first urged on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241-1246; Dec. Dig. ⇐194.]

2. WATERS AND WATER COURSES ⇐87 — DIVERSION — INJUNCTION — FINDING — CONTRADICTION.

A finding that the defendant had no right to divert any greater quantity than 281 second feet was not contradicted by finding that defendant had occasionally, since 1890, diverted 400 second feet, and at times when the flow was less than 400 and more than 281 second feet had diverted all the water, or by a finding that its diversion of 400 second feet was made uninterruptedly with plaintiffs' knowledge, and occasionally since 1890, since neither of the latter findings declared that the taking of more than 281 second feet was adverse, or under a claim of right, or was continuous.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 77-81, 83, 89, 90; Dec. Dig. ⇐87.]

3. WATERS AND WATER COURSES ⇐87—ACTION TO ENJOIN DIVERSION—FINDINGS AND JUDGMENT.

Findings that defendants had no right to divert more than 281 second feet; that it had

not continuously since 1890 diverted 400 second feet, and when the flow was less, but more than 281 cubic feet, had diverted all; that the diversion of 400 second feet was uninterrupted and known to plaintiff, and was occasional since 1890; that the excess above 281 second feet was not beneficially used, because applied where it was not needed, or not used at all, and permitted to run to waste, were harmonious, and insufficient to sustain defendant's claim that it was entitled to judgment for water in excess of 281 second feet.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 77–81, 83, 89, 90; Dec. Dig. ☞87.]

4. WATERS AND WATER COURSES ☞138—RIPARIAN OWNER—ADVERSE USER.

A prescriptive right to water to a stream cannot be obtained against a riparian owner, unless such use is adverse and under claim of right.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 150, 151; Dec. Dig. ☞138.]

5. WATERS AND WATER COURSES ☞143—ADVERSE USER—BENEFICIAL USE.

To establish a right to divert water from a river adverse to the right of a riparian owner, the water diverted must be actually and beneficially used continuously for five years; and the adverse user of 281 second feet and the occasional hostile diversion of all, when there was only 400 second feet or less flowing, did not entitle defendant to continue taking 400 second feet, when only 281 second feet was actually used.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 152; Dec. Dig. ☞143.]

6. APPEAL AND ERROR ☞934 — REVIEW — FINDINGS—CONSTRUCTION.

Findings must be construed so as to uphold a judgment rather than to require a reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3777–3781, 3782; Dec. Dig. ☞934.]

7. WATERS AND WATER COURSES ☞138—RIPARIAN RIGHTS—ADVERSE USER—CLAIM OF USER—NOTICE OR APPROPRIATION—"BENEFICIAL USE."

A riparian owner has a vested right to the use of water before his appropriation begins, which cannot be divested by the mere assertion of another's intention to claim the water, nor by posting notices of appropriation or beginning work in pursuance thereof, nor by the actual diversion for less than five years, with a view to a future public use, if the water is not used in the meantime or not applied to a public and beneficial use; and the taking of the water for a canal and allowing it to run to waste in the expectation that customers would be found to use it at some future time was not such a present "beneficial use" of the water as would initiate the period of prescription.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 150, 151; Dec. Dig. ☞138.]

For other definitions, see *Words and Phrases*, First and Second Series, Beneficial Use.]

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action for an injunction by Elizabeth Turner, as administratrix of the estate of William C. Turner, and another, against the East Side Canal & Irrigation Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

James F. Peck, of Oakland, for appellant. George F. Buck, of Stockton, for respondent Thomas C. Turner. Frank H. Short, of Fresno, and Edward F. Treadwell, of San Francisco, for other respondents.

SHAW, J. The record presents an appeal by the defendant from the judgment, upon the judgment roll alone. The same judgment roll was before the court heretofore upon an appeal by the plaintiffs from that part of the judgment declaring that the defendants were entitled to divert from the San Joaquin river 281 second feet of water. *Turner v. East Side, etc., Co.*, 168 Cal. 103, 142 Pac. 69. Upon the appeal by the plaintiffs above referred to the part of the judgment appealed from was reversed, and the cause was remanded for a new trial to determine whether or not the defendant was entitled to divert from the river a flow of water exceeding 75 cubic feet per second, or second feet, as it may be called for brevity, and not exceeding 281 second feet. The order of remand left the judgment below standing, in so far as it adjudged that the defendant was not entitled to divert more than 281 second feet. The claim of the defendant here is that under the findings it is entitled to divert at least 400 second feet of water from the river.

[1] The defendant makes the preliminary claim that the allegations of the cross-complaint were not denied, and that upon these allegations, which, in contemplation of law, as it claims, stand admitted the defendant is entitled to a judgment declaring its right to take 500 second feet of water from the river. This contention cannot be sustained. The complaint, in substance, alleged that the plaintiffs were the owners of land riparian to the river and as such entitled to the benefit of its natural flow, that the defendant had the right to divert therefrom 75 second feet of its waters, and no more, but that it claimed the right to take 500 second feet of water, and that it threatened to do so. The answer denied the alleged limitation upon defendant's right to take said water, and averred that it had the right to divert 500 second feet of water from the river, and that whenever less than 500 second feet was flowing therein, defendant had the right to take it all. These allegations, by operation of law, were deemed controverted, and an issue was thereby formed. Code Civ. Proc. § 462. The cross-complaint merely restated the affirmative allegations of the answer. It presented no new issues. The defendant went to trial on the pleadings thus framed, and the findings of the court completely cover every fact presented by the cross-complaint. The failure to answer was a technicality wholly without effect, and in no wise prejudicial to defendant in the trial of the case. It does not appear that it was suggested to

the lower court as a reason for demanding such judgment, no default was taken, and the findings conclusively show that the case was tried below upon the theory that all the facts stated in the cross-complaint had been put in issue. In such cases the objection that the allegations were admitted by a failure to deny the same cannot be successfully urged on appeal. *Gervaise v. Brookins*, 156 Cal. 110, 103 Pac. 332.

[2-4] The defendant also urges that the judgment should be reversed because the findings are contradictory. We think they are harmonious, but as this question involves the facts upon which it is claimed that the judgment should have given the defendants a right to divert 400 second feet of water, it is proper to state it more elaborately. Finding No. 20 is as follows:

"The defendant has not, and never had, the right to divert from said San Joaquin river at any time, any greater quantity of water than 281 cubic feet per second."

The part of the findings claimed to be contradictory of this is a portion of finding 25 reading as follows:

"The defendant, not continuously, but occasionally, since the year 1890, has diverted from said San Joaquin river at the head of its said canal at said river 400 cubic feet per second of the water flowing in the said San Joaquin river at that place, and at times when less than 400 and more than 281 cubic feet of water per second was flowing in said river at said place, the said defendant diverted all the water then flowing in said San Joaquin river at said place."

Also a part of finding 26, which is as follows:

"The said diversion of said 400 cubic feet of water per second from said San Joaquin river was made openly, notoriously, peaceably, and uninterruptedly, with the full knowledge of said plaintiffs and their predecessors and grantors, and has been made occasionally ever since the said year 1890."

It will be observed that neither of these findings declare that the taking of the water in excess of 281 second feet was adverse to plaintiffs or that it was under a claim of right to do so, nor that it was diverted continuously. A prescriptive right to water from a stream cannot be obtained against a riparian owner unless such use is adverse and under claim of right. Without this element the finding cannot be considered as contradictory of the explicit statement in finding 20 that the defendant's right does not exceed 281 second feet. Furthermore, other parts of the findings show that the excess above 281 second feet was not beneficially used. Finding 25 proceeds to state that this excess was caused to run down the canal of defendant to distances unknown, and that no greater amount was intended to be used at the particular time than was necessary to irrigate the lands described as having been irrigated with said quantity of 281 second feet, and that "the application of any greater amount of water to said lands than 281 second feet would have been waste." As to the 281 second feet the court, in finding 26, found ex-

pressly that it was made openly, notoriously, exclusively, uninterruptedly, and adversely to plaintiffs, under a claim of right against plaintiffs and with plaintiffs' knowledge, ever since the year 1890, and the latter part of finding 27 states that all of the said 400 second feet "so diverted occasionally by defendant from said San Joaquin river could be beneficially applied to the irrigation" of lands along the canal, but that at such times, when all the water diverted was not used for irrigation, stock, and domestic purposes, "the quantity not so used was permitted by the defendant to escape from" the canal into natural channels, and was not thereafter reclaimed or used for any beneficial purpose. These statements of findings 25 and 27 show that the excess over 281 second feet was either applied where it was not needed and consequently not to beneficial use, or that it was not used at all and was permitted to run to waste from the canal. The taking of more than 281 second feet and applying all of it to land for which 281 second feet was sufficient would not constitute an application of the excess to beneficial use. Without such beneficial use of water diverted from a stream, no prescriptive right thereto can be acquired. *California, etc., Co. v. Madera, etc., Co.*, 167 Cal. 78, 138 Pac. 718. It is obvious from these considerations, therefore, that the findings are not only not contradictory, in effect, in this particular, but that they are not sufficient to sustain the claim of the defendant that it is entitled to judgment thereon declaring that it is entitled to water in excess of 281 second feet.

[5, 6] The defendant argues that as it appears from the findings that at the times when the 400 second feet was diverted the 281 second feet constituted a part of it, and that as the taking of 281 second feet was found to be adverse, it necessarily follows that the entire diversion was adverse because it constituted an entire and indistinguishable body of flowing water. The adverse character of the actual taking of the excess may be admitted for argument's sake, in the sense that it was hostile, but as there is no finding that the excess was devoted to a beneficial use, the defendant, as we have seen, cannot acquire a right to continue taking it by doing so for any period of time. For like reasons, the finding that when there was only 400 second feet flowing in the river, or less, the defendant has diverted it all does not give the defendant a right to continue taking that quantity, the reason being that only 281 second feet was at such times actually put to use. Furthermore, here again the period of taking is not specified, the finding stating merely that it was done "at times" when the flow was 400 second feet or less, but not stating that it was during all of such times. Findings must be construed so as to uphold a judgment rather than to require a reversal. There is a statement in finding 21

that the defendant "has claimed and now claims adversely to plaintiff" the right to divert 500 second feet of water from said river. A mere claim cannot establish a prescription. The finding does not state that this water was actually used, nor that it continued five years, nor that it was uninterrupted for that period.

[7] There is no merit in the argument that when a person appropriates water to a public use he not only begins his adverse possession of the water he actually takes and puts to such use, but that he also at once institutes an effectual adverse claim to all that he in good faith intends to take or use in the future. The taking of water into a canal and allowing it to run to waste in the expectation that customers may be found who will use it at some future time does not constitute a present beneficial use of the wasted water, so as to initiate the period of prescription therefor. As to other appropriators under the Code, the law may give the first appropriator a reasonable time for delivery of the water to those for whose use it was intended, but if this be so, which we do not say, no such rule applies to a riparian owner. Such owner has a present vested right before the appropriation begins, and his right cannot be divested by the mere assertion of an intention to claim the water, nor by posting notices of appropriation or beginning work in pursuance thereof, nor even by the actual diversion for less than five years, with a view to a future public use, if the water is in the meantime wasted, or not applied to public or beneficial use.

With respect to the excess over 281 second feet, the findings lay no foundation for the application of the doctrine of acquiescence in public use, recently announced in *Miller & Lux v. Enterprise Canal Co.*, 147 Pac. 567 (S. F. No. 6061), decided February 19, 1915, for that excess, so far as appears, has not been devoted to public use nor to any useful purpose whatever.

We find no other points requiring discussion.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

26 Cal. App. 577

DONNELLY v. DONNELLY. (Civ. 1535.)

(District Court of Appeal, Second District, California. Feb. 17, 1915.)

1. APPEAL AND ERROR ⇐877 — QUESTIONS REVIEWABLE.

A denial to defendant of the privilege of introducing tendered evidence is not available on appeal by plaintiff as reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. ⇐877.]

2. DIVORCE ⇐27 — GRIEVOUS MENTAL SUFFERING—EVIDENCE.

Whether there has been inflicted grievous mental suffering justifying a divorce is a question of fact deducible from the circumstances of the particular case, keeping in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 62-83; Dec. Dig. ⇐27.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Martha Donnelly against Henry M. Donnelly. From a judgment denying plaintiff a divorce, she appeals. Affirmed.

Trask, Norton & Brown, of Los Angeles, for appellant. Andrew J. Copp, Jr., of Los Angeles, for respondent.

SHAW, J. This is an appeal by plaintiff from a decree of court denying her a divorce upon the ground of extreme cruelty. Aside from physical acts of cruelty set forth therein, the complaint alleged the use by defendant of language towards plaintiff and accusations made against her which, if so used and made, might have caused her grievous mental suffering to an extent constituting extreme cruelty towards plaintiff. The court, however, upon conflicting evidence, made finding, upon which no attack is made, to the effect that the allegations were untrue.

[1] Appellant complains that the court ruled that no inquiry could be made as to acts of the defendant and occurrences prior to a certain date. In support of this contention we are referred only to rulings made by the court wherein it denied defendant the privilege of introducing certain evidence tendered. Thus limiting the cross-examination upon defendant's inquiry was not a ruling, even if erroneous, which could be attacked on appeal by plaintiff as constituting reversible error. Moreover, our attention is not directed to any adverse ruling to the plaintiff made by the court to which she interposed objection.

The act of physical cruelty alleged was an assault and battery committed by defendant upon plaintiff. The evidence clearly tended to prove this allegation, but the court, it appears, was satisfied that the assault, as shown by defendant's testimony, was technical, rather than real.

[2] The married life of the parties appears to have been accompanied with much bickering and mutual fault-finding, and it may be conceded that defendant made accusations against his wife, using language that if applied in some cases would have caused grievous mental suffering to a degree that should be deemed extreme cruelty. But "there is no scale by which to gauge the purely mental susceptibilities and sufferings of another. * * * Whether in any given case there has been inflicted this 'grievous mental suffering' is a pure question of fact, to be deduced from all the circumstances of each

particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party; and no arbitrary rule of law as to what particular probative facts shall exist in order to justify a finding of the ultimate facts of its existence can be given." *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660. The trial judge had the parties before him, and, thus having the opportunity of judging of the degree of intelligence, refinement, and delicacy of feeling possessed by plaintiff, concluded that the course of conduct of defendant towards plaintiff and any accusations of a want of chastity made against her, so far as established upon a conflict of testimony adduced, were not such in this case as to cause grievous mental suffering to an extent that would constitute extreme cruelty.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 551

NANCE v. AVENALL. (Civ. 1406.)

(District Court of Appeal, First District, California. Feb. 15, 1915.)

1. VENDOR AND PURCHASER ⇐102—RESCISSION BY VENDOR—SALE TO THIRD PERSON.

A contract for the sale of a lot was not rescinded by the vendor by the making of a contract for the sale of a larger tract, including such lot, to third parties, where such third parties were told of the prior contract, and it was agreed that the vendor was to have such lot back if he wanted it, and that the third parties were in such case to have a credit on the contract price; there having been no intention to rescind.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 175-177; Dec. Dig. ⇐102.]

2. VENDOR AND PURCHASER ⇐335—DEFAULT BY PURCHASER—RECOVERY OF PAYMENTS.

Where a vendor was not in default, and had not repudiated the contract, but was insisting upon performance of its terms, the purchaser, who had failed to make a payment required by the agreement, could not recover back an installment of the purchase price which had been paid, and the vendor was warranted in retaining such installment, and in considering the purchaser's rights in the land terminated, especially as the contract provided that upon the purchaser's default he should forfeit payments previously made, and that they might be retained by the vendor.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 981-983; Dec. Dig. ⇐335.]

Appeal from Superior Court, Fresno County; M. L. Short, Judge.

Action by Green Nance against C. P. Avenall. From a judgment for plaintiff, defendant appeals. Reversed.

M. B. Harris and E. M. Harris, both of Fresno, for appellant. Everts & Ewing, of Fresno, for respondent.

PER CURIAM. This is an action brought to recover from defendant money paid him

by plaintiff on a contract for the purchase and sale of certain land.

In April, 1911, the plaintiff and defendant entered into a written contract for the sale to plaintiff by defendant of 20 acres of land, known as lot 9 in a larger tract, in Fresno county, for the price of \$6,500, to be paid \$500 down, \$2,000 on the 1st day of January, 1912, and \$4,000 in five years, to be secured by a mortgage on the premises. The \$500 was paid, and the contract with a deed from the owner were, as agreed, placed in escrow in the First National Bank of Fowler, where these documents remained until this suit was brought. Plaintiff did not take possession of the property at any time. On the 18th day of January, 1912, a draft of \$750 was received from the plaintiff by the said bank, but it was returned to plaintiff because not complying with the escrow. On January 15, 1912, William Flack (who now held the legal title) entered into a contract, which was recorded, for the sale of a tract, which included lot 9, to A. K. and John K. Kazanjian. It did not refer to plaintiff's contract, but the Kazanjians testified that before signing their contract they were told by defendant of plaintiff's contract, and that, if the defendant came back and wanted the 20 acres, he was to have it, and they were to have a credit of \$6,500 on their contract price, to which they orally consented.

Without paying or tendering the amount due under the contract, the plaintiff commenced this suit for the recovery of the \$500 paid defendant as hereinbefore stated.

The findings of the lower court followed substantially the allegations of the complaint, and were against the defendant on the theory that the plaintiff had fully performed his part of the contract, that defendant had rescinded the contract, and refused to return the \$500 or execute a deed. Judgment went for plaintiff for the recovery of the \$500 paid, and the appeal is by defendant from that judgment.

[1] Of course, under the facts just narrated, the contract to sell the property in controversy to the Kazanjians did not amount to a rescission by the defendant of the contract here under consideration, for the reason that there was no intention on the part of the defendant to rescind, as is shown by the above-mentioned arrangement made by him with the subsequent vendees.

[2] It plainly appears without conflict that the plaintiff failed to make the second payment as required by his written agreement; that the defendant performed all the contract required of him up to the time of the plaintiff's default; and that, not repudiating the contract but insisting upon the performance of its terms, he was warranted in retaining the installment of the purchase money paid, and to consider plaintiff's rights in the land terminated. The authorities abundantly sustain this position.

Where the purchaser without cause refuses to perform his contract, or is in default in making a payment thereunder, he is in no position to recover an installment which he has already paid. Accordingly, in such a case, if the vendor is not in default no recovery can be had; and especially is this true where the contract provides, as the one here does, that upon default of the purchaser he shall forfeit payments previously made by him, and that the same may be retained by the vendor, although it has been held in this state that such a provision is unnecessary and wholly immaterial. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; 39 Cyc. 2005, 2025; *Oursler v. Thacher*, 152 Cal. 739, 93 Pac. 1007; *Leach v. Rowley*, 138 Cal. 709, 72 Pac. 403.

The judgment is reversed.

26 Cal. App. 574

WILLIAMS v. TINGEY et al. (Civ. 1625.)

(District Court of Appeal, Second District, California. Feb. 17, 1915.)

1. MUNICIPAL CORPORATIONS — 348 — CONTRACTOR'S BOND—ACTION AGAINST SURETY — CONDITIONS PRECEDENT—SUIT AGAINST SUBCONTRACTOR.

The surety on a municipal contractor's bond which provided that, if the principal failed to pay for any materials furnished for the work, the surety would do so, can be sued for the value of materials furnished to a subcontractor to be used in the work without the subcontractor having first been sued, and the fact established that the materials were used in the work; since the defense that it was not so used is open to the surety in the action on the bond.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 878; Dec. Dig. — 348.]

2. MUNICIPAL CORPORATIONS — 348 — CONTRACTOR'S BOND — ACTION AGAINST SURETIES—PARTIES—SUBCONTRACTOR.

The subcontractor is not a necessary party to such action.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 878; Dec. Dig. — 348.]

3. MUNICIPAL CORPORATIONS — 347 — CONTRACTOR'S BOND — LIABILITY OF SURETY — CONDITIONS PRECEDENT — PERSONAL LIABILITY OF PRINCIPAL.

The surety on a municipal contractor's bond, which provided that, if the principal should fail to pay for any materials furnished for the work, the surety would do so, is liable for materials furnished to the subcontractor and used in the work, though the principal contractor was not personally liable for the value of such material.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 876, 877; Dec. Dig. — 347.]

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by E. D. Williams against C. H. Tingey, the United States Fidelity & Guaranty Company, and others. Judgment for the plaintiff, and the defendant United States Fi-

delity & Guaranty Company appeals. Affirmed.

Patterson Sprigg, of San Diego, for appellant. Luce & Luce, of San Diego, for respondent.

SHAW, J. This is an action to recover from the United States Fidelity & Guaranty Company as surety upon the bond of C. H. Tingey, given as contractor for the doing of certain street work in the city of San Diego. Judgment went for plaintiff, from which, adopting the alternative method, the defendant United States Fidelity & Guaranty Company appeals.

The bond was given by C. H. Tingey, to whom the contract for doing the work was let by the city, and, after reciting that the obligors, namely, Tingey, as principal, and the United States Fidelity & Guaranty Company, as surety, were bound unto all persons performing labor or furnishing materials to be used in the work called for by said contract, contained a provision to the effect that, if the principal therein, said Tingey, failed to pay for any materials or supplies furnished for the work, or for any labor done thereon, said United States Fidelity & Guaranty Company, as surety thereon, would pay the same to an amount not exceeding the sum specified in the bond.

Tingey, as contractor, sublet a part of the work to one Rubendahl, to whom plaintiff furnished certain materials used in the performance of the work, and, payment not being made therefor, he, within 30 days from the completion of the work, filed with the street superintendent a verified statement of his claim and nonpayment thereof, as required by the act.

Notwithstanding the fact that the appeal is had pursuant to the alternative method, in which case, as provided by section 953c, Code of Civil Procedure, the parties are required to print in their briefs such portions of the record to which they desire to call the court's attention, appellant fails to direct our attention to anything in the record in support of its claim for a reversal.

[1, 2] Without merit is the contention that, as a condition of maintaining the suit, plaintiff should first have sued the subcontractor, and established therein that the materials were actually used in the work. This fact was one of the controverted issues, and the allegation of the complaint to the effect that they were so used was found to be true. The fact that Rubendahl, the subcontractor, was not made a party defendant to the action, could not affect appellant's right to plead and prove any defense which it was entitled to make, and, it appearing that the materials were furnished to be used in the performance of the work, and were so used, plaintiff was entitled to judgment in accordance with the condition of the bond; and hence Ruben-

dahl was not a necessary party defendant. *People's Lumber Co. v. Gillard*, 136 Cal. 35, 68 Pac. 576; *French v. Powell*, 135 Cal. 636, 68 Pac. 92.

[3] It is further urged that no facts are found showing that Tingey was personally liable to plaintiff. The action was not to recover by reason of any personal liability of Tingey, but to recover upon the obligation of the bond.

The findings clearly support the judgment, and, upon this record, since our attention is not directed to anything to the contrary, we must assume that the evidence justifies the findings.

Judgment affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 576

PANAMA COMMERCIAL CO. v. TINGEY
et al. (Civ. 1643.)

(District Court of Appeal, Second District, California. Feb. 17, 1915.)

MUNICIPAL CORPORATIONS — CONTRACTOR'S BOND — LIABILITY OF SURETY — AMOUNT.

A surety on a municipal contractor's bond, which required it to pay for materials furnished to the contractor to be used in the work, is liable for the value, not the selling price, of such materials furnished to a subcontractor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 876, 877; Dec. Dig. ¶347.]

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Panama Commercial Company against C. H. Tingey and the United States Fidelity & Guaranty Company. Judgment for the plaintiff, and defendant United States Fidelity & Guaranty Company appeals. Affirmed.

Patterson Sprigg, of San Diego, for appellant. Morganstern, McGee, Henning & Hendee, of San Diego, for respondent.

SHAW, J. The facts in this case are identical with those in the case of *Williams v. Tingey et al.* (Civil No. 1625), 147 Pac. 584, an opinion in which was this day filed affirming the judgment. Plaintiff obtained judgment, from which defendant United States Fidelity & Guaranty Company appeals.

The only point made herein by appellant, other than those presented in the other case, is that the action was to recover on the bond the value of the materials furnished, and it appeared in the course of the trial that the materials were furnished pursuant to a contract made with one Rubendahl, subcontractor under Tingey. The action was to recover upon the covenant contained in the bond to the effect that defendant Tingey and appellant would pay for the materials used in the performance of the work. While the price specified in the contract would be the

measure of recovery in an action thereon against Rubendahl, with whom the contract was made, nevertheless, as against defendants, in an action on the bond the measure of recovery as against them was the value of the materials, which appears to have been as specified in the contract under which the materials were furnished to Rubendahl.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 532

BEGGS v. SMITH, Sheriff, et al. (Civ. 1272.)

(District Court of Appeal, Third District, California. Feb. 12, 1915. Rehearing Denied March 15, 1915; Denied by Supreme Court April 13, 1915.)

1. PLEADING — 403 — COMPLAINT — DEFECTS — CURE BY ANSWER.

In claim and delivery by a married woman to recover property levied on under an execution against her husband, in which the complaint alleged that she was the owner and entitled to the possession of such property at the time it was seized under such execution, the failure of the complaint to allege that she was the owner and entitled to the possession thereof when the action was commenced was cured by the denial in the answer that she was the owner at the time of the seizure or at any other time, or at all, whereby her ownership and right to possession was made one of the issues submitted for trial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1343-1347; Dec. Dig. ¶403.]

2. REPLEVIN — 60 — COMPLAINT — SUFFICIENCY.

A complaint alleging that plaintiff, on the 3d of September, was the owner and entitled to the possession of certain property, she having purchased it with her separate funds and money from her separate estate, that such property was located on real estate described, that defendants, for the purpose of satisfying a judgment against B. (plaintiff's husband), and in favor of one of the defendants, and by virtue of an execution on such judgment, entered upon such land, and, without plaintiff's consent, wrongfully took such personal property from her possession, and still held the possession thereof, and that plaintiff was not obligated on such judgment or any part thereof, and did not owe it or any part thereof, and was not a party interested in the action against the husband, was not uncertain and ambiguous, but alleged in plain and clear language facts showing that defendants wrongfully took from plaintiff's possession certain of her sole and separate property, and wrongfully retained and refused to redeliver it to her; the failure to allege her ownership and right of possession when the action was commenced having been cured by the answer.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 219-222; Dec. Dig. ¶60.]

3. APPEAL AND ERROR — 1043 — HARMLESS ERROR — GRANTING OF INJUNCTIONS.

Where in claim and delivery the judgment adjudicated plaintiff's ownership and right to the possession of the property in dispute, and such judgment was supported by the evidence and the findings, defendants were not prejudiced by injunctions restraining a sale of the property by them, whether or not the complaint stated sufficient facts to justify such injunctions; as the injunctions merely facilitated the recovery

by plaintiff of specific property to which she was justly and legally entitled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4115-4121; Dec. Dig. ☞ 1043.]

4. REPLEVIN ☞72 — SUFFICIENCY OF EVIDENCE—OWNERSHIP OF PROPERTY.

In a married woman's action in claim and delivery to recover property levied on under an execution against her husband, evidence held sufficient to support findings that plaintiff was not interested in, or obligated by or upon, the judgment upon which such execution was issued, and that the property involved belonged to her.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 292-295; Dec. Dig. ☞72.]

5. SHERIFFS AND CONSTABLES ☞100 — LIABILITY FOR ACTS OF DEPUTIES.

Where a deputy sheriff, in seizing and taking property from plaintiff's possession under an execution, was assisting his principal, the sheriff, in the execution of his official duty respecting the writ, a judgment against him in claim and delivery was unwarranted; his acts being those of the sheriff himself.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 158-173; Dec. Dig. ☞100.]

6. JUDGMENT ☞19—PLEADINGS AND PROOF.

In an action in claim and delivery to recover property taken under execution on a judgment in favor of the R. Co., where, though the complaint connected R. and G. individually with the taking of the property by alleging that the sheriff delivered it to the R. Co., R., and G., there was no testimony supporting such allegation with respect to R. and G., or tending to connect them as individuals with the taking and detention of the property, and there was no finding respecting the delivery of the property by the sheriff, though the allegation of the complaint was put in issue by the answer, a judgment against R. and G. by without any support.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. ☞19.]

7. APPEAL AND ERROR ☞1071 — HARMLESS ERROR — INSUFFICIENCY OF EVIDENCE TO SUPPORT IMMATERIAL FINDING.

In claim and delivery to recover property taken under execution, in which, as incidental or ancillary to the main relief, an injunction against a sale of the property was asked, where the judgment awarded plaintiff the specific property for which she sued, it was immaterial whether a finding that a sale would cause great and irreparable injury was supported by the evidence, as the injunction could do no more than the judgment itself did.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. ☞1071.]

8. REPLEVIN ☞8 — RIGHT TO POSSESSION — NECESSITY.

To sustain replevin plaintiff must show that he is entitled to the possession of the property, though it is not essential that he should show that he ever had actual possession.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 45-68; Dec. Dig. ☞8.]

9. REPLEVIN ☞93 — FINDINGS — RIGHT TO POSSESSION.

In claim and delivery, where, though the court, following the averments of the complaint, found that plaintiff was the owner and entitled to possession when the action was commenced, the answer denied her ownership at any time or at all, and the court further found that the allegations of the complaint not inconsistent with the specific findings were true, and that the al-

legations of the answer inconsistent therewith were untrue, there was a sufficient finding that plaintiff was the owner and entitled to the possession of the property at the commencement of the action.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 360-368, 371-375; Dec. Dig. ☞93.]

10. APPEAL AND ERROR ☞1071 — HARMLESS ERROR—FAILURE TO FIND.

In claim and delivery to recover property taken from plaintiff's possession under an execution against B., where the court explicitly found upon sufficient evidence that B. at no time owned or had any interest whatever, in the property, it was immaterial, so far as defendants were concerned, whether or not plaintiff was the owner and entitled to the possession of the property when the action was commenced, and the failure to find such ownership and right to possession did not prejudice defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. ☞1071.]

11. APPEAL AND ERROR ☞1071—HARMLESS ERROR—FAILURE TO FIND.

A judgment will not be reversed because of the failure to find on a particular issue, where the want of such finding is not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. ☞1071.]

12. REPLEVIN ☞107—JUDGMENT—ALTERNATIVE JUDGMENT.

Under Code Civ. Proc. § 667, providing that in an action to recover the possession of personal property judgment for plaintiff may be for the possession or the value thereof in case a delivery cannot be had, and damages for the detention, where the possession of the specific property may be obtained or the property itself can be delivered to the party claiming it, as where the property seized under execution was left by the sheriff in plaintiff's physical possession as his representative, a failure to make the judgment alternative in form is not erroneous.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 424-428; Dec. Dig. ☞107.]

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by Genevieve Beggs against John K. Smith, Sheriff, and others. From a judgment for plaintiff, defendants appeal. Affirmed in part and reversed in part.

W. H. Early, of Petaluma, for appellants.
E. J. Dole, of Petaluma, for respondent.

HART, J. This is an action in claim and delivery and, incidentally, for an injunction to prevent the defendants from selling or disposing of the personal property described in the complaint. The plaintiff was awarded judgment, restoring to her the possession of the property in dispute, and enjoining the defendants from "interfering with or selling or advertising for sale the said personal property or any part thereof." This appeal, supported by a bill of exceptions, is prosecuted by the defendants from said judgment.

The defendants Smith and Rasmussen are, respectively, sheriff of the county of Sonoma

and constable of Petaluma township in said county.

The complaint alleges that the plaintiff was, on the 3d day of September, 1913, the owner and entitled to the possession of 1,200 laying hens, she having, previously to said date, "purchased the same with her separate funds and money from her separate estate"; that, at the time mentioned, said hens were "located on that certain lot, piece, or parcel of land commonly known as the 'Isaac Kuffel place,' * * * in Petaluma township, in Sonoma county," etc.; and that, on said day, the defendants, for the purpose of satisfying a judgment theretofore given and entered against one William P. Beggs and in favor of the defendant Rauer's Law & Collection Company, by the superior court of the city and county of San Francisco, and by virtue of a writ of execution issued by the clerk of said court on said judgment, entered upon the lands and premises above referred to, and "without the plaintiff's consent, wrongfully took said above-described personal property from the possession of the plaintiff, and the defendants still withhold the possession thereof from the plaintiff." It is averred that the plaintiff "is not obligated on the said judgment or any part thereof, and does not owe said judgment or any part thereof, and was not a party interested in the said action between defendant, Rauer's Law & Collection Company, a corporation, and said William P. Beggs." It is further alleged that the defendant sheriff and the defendant constable, at the request and upon the direction of the other defendants, commenced, on the said 3d day of September, 1913, to advertise said personal property for sale, "and did proceed to sell the same, and will sell and dispose of the same to satisfy the alleged claim aforesaid of the said * * * collection company * * * against the said William P. Beggs unless restrained and prevented and enjoined from selling and disposing of the property by an order of this court."

The complaint declares that, after the personal property was so taken from her possession, the plaintiff demanded possession and redelivery of the same to her, but that the defendants refused to surrender or redeliver said property to her, and that ever since the defendants have retained, and still hold and retain, possession of the said personal property, "against the will, wishes, and consent of this plaintiff, and without any right so to do."

It is alleged that the said William P. Beggs did not, on the 3d day of September, 1913, or at any other time, have any interest in or ownership of said personal property or any part thereof, but that the plaintiff was at all times "heretofore and now" the sole owner of the same; that the plaintiff uses and employs said hens as the sole and only means whereby she has earned and does earn her livelihood; and that "the income derived

therefrom is needed and necessary for the plaintiff to support and maintain herself in the conduct of her poultry business."

The plaintiff prays for the recovery of said personal property, and for an injunction preventing the defendants from in any manner interfering with or advertising it for sale or sale, or, in case a redelivery of the said property cannot be had, for a judgment for the sum of \$1,200, the alleged value thereof, and \$500 as damages for the wrongful taking and detention of the same.

A demurrer to the complaint upon both general and special grounds was overruled. The special grounds of the demurrer involve the objection that the complaint is uncertain and ambiguous in certain particulars pointed out therein.

The defendants Smith and Rasmussen, in a joint answer, defend by alleging that the property was seized by them, as sheriff and the latter's deputy, respectively, under the writ of execution above referred to; that said sheriff placed the plaintiff in charge of the property as the keeper thereof for him as such officer; that thereafter the plaintiff demanded the release of said property and the return of the same to her possession; that the sheriff thereupon notified the defendant collection company of said demand, and demanded from it indemnification as provided by section 699 of the Code of Civil Procedure, and that said company thereupon executed an indemnity bond in the sum of \$1,400 in favor of said sheriff; that, upon so being indemnified, said sheriff at once took the necessary steps to sell said property, advertising it for sale under and by virtue of the power vested in him so to do by the said writ of execution.

The other defendants, joining in an answer for themselves, denied the material allegations of the complaint, and alleged that the plaintiff, at all times mentioned in the complaint, was and is the wife of William P. Beggs; that the latter and the plaintiff, at all of said times, "were and now are living together as husband and wife upon the property described in plaintiff's complaint as the 'Isaac Kuffel place'; that said defendants are informed and believe, and, basing this allegation upon that ground, allege the fact to be, that said personal property, to wit, 1,200 laying hens, were purchased as and for community property and for the benefit of said community, and that the same is community property of the said William P. Beggs, and that the same is liable for the debts of the said William P. Beggs, and that the said plaintiff has no right, title, or interest therein or thereto."

The first point in support of the appeal is that the court erred in its order overruling the demurrer.

[1] The complaint is, perhaps, wanting in the statement of a cause of action in claim and delivery, in that it does not appear to contain a direct averment, essential in a

complaint in such an action, that the plaintiff was, at the time of the commencement of the action, the owner and entitled to the possession of the property sued for. The general demurrer, for this reason, should perhaps have been sustained. But the answer, we think, cured the defect thus pointed out in the complaint by its denial that the plaintiff was the owner of the property on the 3d day of September, 1913, or "at any other time or at all," whereby the plaintiff's ownership and the right to the possession of said property at the time the complaint was filed was made one of the issues submitted for trial.

[2] And, aside from the defect above mentioned, the complaint is not amenable to the criticism that it is uncertain and ambiguous. Treating the omission referred to as having been supplied by the denials or allegations of the answer, the complaint may then be said to contain, in orderly sequence, and in plain and clear language, a cohesive narration of facts from which it is to be readily inferred that the defendants wrongfully took from the possession of the plaintiff certain of her sole and separate personal property, that they still wrongfully retain and refuse to redeliver to her the possession of said property, and that they have taken the preliminary steps for the sale of the same to satisfy a judgment which in no way concerns or affects or has bound her to any obligation arising thereupon or therefrom.

[3] The injunctive relief asked for and which was allowed by the court was and is only incidental or ancillary to the main relief sought by the action; viz., to obtain the return of the specific property alleged to have been wrongfully seized.

Whether the complaint states sufficient facts to have authorized the granting of a temporary restraining order or an injunction pendente lite or any injunction whatever is a question which we regard as unnecessary to consider; for the judgment is an adjudication that the ownership of and the right to the possession of the property in dispute are in the plaintiff, and, if said judgment is supported by the findings, as undoubtedly it is, and they in turn are sustained by the evidence, the effect of the injunction, even if erroneously granted, has only been to facilitate the accomplishment of the primary object of the action; viz., the recovery by the plaintiff of the specific property to which she is justly and legally entitled. In other words, the temporary injunction merely had the effect of keeping the property intact and in a condition whereby its specific recovery was made certain in case the plaintiff established her ownership of the property and the right to its possession. As before stated, the injunction constituted a remedy only in aid of the primary purpose of the action, and, since it transpires that the plaintiff established her right to the property, the injunc-

tions, both the temporary and permanent, assuming that they were improperly granted, in no respect prejudiced the rights of the defendants.

[4] It is next contended that the findings do not derive sufficient support from the evidence. An examination of the evidence has not led us to that conclusion.

The testimony shows that the judgment against William P. Beggs and to satisfy which the property in dispute was attached, was obtained by the defendant collection company in the superior court in and for the city and county of San Francisco on a claim wholly incurred by Beggs some time before the fire and earthquake in said city in the year 1906. William P. Beggs testified that the plaintiff never at any time was indebted to the collection company, and was in no manner or measure concerned in or obligated upon the claim upon which said judgment was founded. He further testified that the personal property in dispute was purchased by the plaintiff with money which she had obtained from her father's estate, and that he did not contribute anything toward paying for the property. He also said that the "Kuffel place," on which the property was located at the time it was taken by the defendants, was leased, and the rent therefor paid by the plaintiff out of her separate funds, obtained from her father's estate. The lease to said land was, he said, in his name, but this was owing to the fact that the owner of the premises declined to give the plaintiff the lease, because he was opposed to doing business with a woman, and so he (Wm. P.), acting for his wife, took the lease in his name, she paying the rent. Beggs continued to say that he lost everything he had in the San Francisco fire of 1906; that thereafter his health became greatly impaired; and that he had since lived part of the time on his mother's ranch and part of the time with the plaintiff on the Kuffel place.

The plaintiff corroborated her husband in all the important particulars of his testimony. She, too, declared that the property described in her complaint was purchased by her with her own money, having received said money from the estate of her father, and that her husband, William P. Beggs, had no interest whatever in said property. She said that she gave her individual check, drawn on her separate funds in the Sonoma County National Bank, to the party from whom she purchased the hens, in payment therefor. This check was received in evidence.

George P. McNear, a witness called in behalf of the defendants, testified that he had had business relations with the plaintiff and her husband; that he loaned them money and sold them grain on credit; that the credit was extended to the plaintiff; that the book account was opened entirely on the credit of Mrs. Beggs (plaintiff); that "Mr. Beggs had failed in business before that

time and had nothing." He further testified that the plaintiff had an interest in her father's estate, and "had been getting advances from the estate right along."

The foregoing brief summary of the testimony is quite sufficient to show that the findings that the plaintiff was not interested in or obligated by or upon the judgment in favor of the defendant collection company and against William P. Beggs, and that the property described in the complaint and upon which the sheriff levied the writ of execution belonged to plaintiff, are amply supported. It is conceded by the plaintiff, however, that neither the testimony nor the findings support the judgment as against the defendants Rasmussen, Rauer, and Graf.

[5] Rasmussen was merely shown to have been a deputy under the defendant sheriff at the time of the levy, and that whatever part he took in the seizing and taking the property from the possession of the plaintiff was only in assisting his principal in the execution of his official duty respecting the writ; in other words, the acts of Rasmussen in the execution of the writ were merely those of a deputy sheriff, and, as such, those of the sheriff himself. And the finding relative to Rasmussen's part in the transaction goes no farther than the testimony thereon, as indicated, and it is wholly insufficient to support any judgment against him.

[6] As to the defendants Rauer and Graf, it is to be remarked that the complaint connects them with the taking of the property by the allegation only that the sheriff, upon attaching or seizing the property under the writ, delivered it into the possession of the defendants collection company, Rauer, and Graf. But there is no testimony which supports that allegation, so far as are concerned Rauer and Graf. Indeed, there is no testimony connecting or tending to connect Rauer and Graf, as individuals, with the taking and detention of the property in dispute. And, although the answer of those defendants denies that the sheriff "delivered the said property into the possession of any of his codefendants," thus making a direct and material issue upon that proposition, the court failed to make any finding thereon as to the said defendants Rauer and Graf. The judgment as to them, therefore, is without any support.

[7] It is further objected that there is no evidence which supports the finding that, unless the defendants are restrained from selling the property distrained, as, according to the complaint, they have threatened to and will do, the plaintiff will, by reason of such sale, suffer great and irreparable injury. This objection, if tenable, cannot, for reasons heretofore given as to the effect of the injunction under the circumstances of this case, be of any practical or advantageous avail to the appellants. The plaintiff, by the judgment, is awarded the specific property for which she sued, and since, under the

circumstances as shown here, the permanent injunction could do no more than the judgment itself could do, independently of the injunction, toward securing to her the actual possession of said property, it becomes immaterial whether it was granted or not, or, having been granted, whether upon an unsupported finding.

[8, 9] It is next claimed that there is no finding that the plaintiff was the owner and entitled to the possession of the property at the time of the commencement of the action. It is undoubtedly the law that, to sustain an action in replevin, the plaintiff must show that he is entitled to the possession of the property, although it is not essential that he should show that he ever had actual possession of it. Wells on Replevin, § 91; Cobbey on Replevin, §§ 96, 100; Cardinell v. Bennett, 52 Cal. 476; Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750; Garcia v. Gunn, 119 Cal. 315, 317, 51 Pac. 684.

In this case the findings follow the averments of the complaint, which, as seen, alleged that the plaintiff "is now, and on the 3d day of September, 1913, was, the owner of, and entitled to the possession of, the following personal property," etc.; "that, on said 3d day of September, she was in the actual possession and control of said 1,200 laying hens," etc.; that said defendants Smith and Rasmussen, on said 3d day of September, wrongfully took said described property from the possession of the plaintiff, and said sheriff still wrongfully withholds the possession thereof from the plaintiff; that, ever since said date, said Smith and Rasmussen have kept and retained, and do keep and retain, possession of said property, "against the will, wishes, and consent of the plaintiff, and without any lawful right so to do; that said William P. Beggs did not, on the 3d day of September, 1913, or at any other time, have any right, title, interest, estate, lien, or claim in or to the said personal property, and each and every part thereof is now, and was on the 3d day of September, 1913, the separate property of the plaintiff; and that she was the sole owner of said personal property"—having purchased the same with her separate funds, etc.

Substantially, in the foregoing language, the court made its findings as to the plaintiff's ownership of and right of possession to said property, and, in addition thereto, made the following finding:

"That all the allegations of plaintiff's complaint not inconsistent with the foregoing findings are true; that all of the allegations of the answers on file herein inconsistent with the foregoing findings are untrue."

The defendants, as seen, denied that the plaintiff was the owner of the hens on the 3d day of September, 1913, or "at any other time or at all," and alleged that they constituted the community property of William P. Beggs and were liable for his debts.

Thus, as before stated, the question wheth-

er the plaintiff was the owner of the property at the date of the commencement of the action was put in issue and tried, and, assuming that the specific findings do not quite measure up to a conclusion of fact that the plaintiff was the owner and entitled to the possession of the property at the time of the commencement of the action, the general finding certainly does; for it directly negatives the denial of the answer (which in reality amounts to an allegation that she was not the owner of or entitled to the possession of the property at said time) that the plaintiff was such owner or entitled to such possession when the complaint was filed.

"It is a well-settled rule that the findings of fact made by the trial court are to receive such a construction as will uphold, rather than defeat, its judgment thereon." *Paine v. San Bernardino, etc., Co.*, 143 Cal. 654, 656, 77 Pac. 659; *Pac. States Corporation v. Arnold*, 23 Cal. App. 672, 674, 139 Pac. 239; *Ballou v. Sunflower Gold Min. Co.*, 165 Cal. 557, 559, 132 Pac. 1036.

We think the findings as a whole, and considered and construed in connection with the pleadings and the issues, sufficiently show or warrant the inference that the plaintiff was the owner and entitled to the possession of the property described in her complaint at the time of the commencement of the action.

[10] But, even if this be not true, it must become obvious, upon the most casual reflection, that the failure to find upon that proposition cannot in any manner or degree prejudice the defendants. The only claim vital to the defendants in the action and upon which the right to dispute the plaintiff's ownership and right to the possession of the property alone rested was that William P. Beggs was an owner of the property at the time it was taken possession of by the sheriff, and that it could, therefore, be subjected to the satisfaction of the judgment subsisting against him alone. The court explicitly found, upon sufficient evidence, that William P. Beggs at no time owned or had any interest whatsoever in said property, and therefore whether the plaintiff was or was not the owner and entitled to the possession of the property at the time this action was instituted is wholly immaterial, so far as the defendants are concerned. In other words, the court having found that William P. Beggs, a judgment against whom was sought by the defendants to be satisfied by a seizure and sale of the property, never at any time owned or had any interest therein, failure to find that the plaintiff was the owner and entitled to the possession of said property at the time of the commencement of the action would manifestly be of no assistance or importance to the defendants.

[11] The rule, as enunciated in the cases, is that a judgment will not be reversed on the ground of failure to find on a particular issue where the want of such a finding is not

prejudicial to the defendant. *McCourtney v. Fortune*, 57 Cal. 617, 619; *Winslow v. Gohransen*, 88 Cal. 450, 26 Pac. 504.

[12] The only one of the remaining points requiring notice involves the contention that the judgment is fatally defective in that it is not in the alternative. This contention is based upon section 667 of the Code of Civil Procedure, which, among other things, provides that:

"In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention."

This is, of course, the general rule as to such actions, but it has often been held that, where it is made to appear in actions for the recovery of personal property that the possession of the specific personal property may be obtained or the property itself can be delivered to the party so claiming it, failure to make the judgment alternative in form is not erroneous. *Claudius v. Aguirre*, 89 Cal. 501, 504, 26 Pac. 1077; *Erreca v. Meyer*, 142 Cal. 308, 310, 75 Pac. 826.

In *Claudius v. Aguirre* it is said:

"The evident purpose of this provision (section 667, above quoted from) is that, if the plaintiff, after obtaining judgment for its possession, is unable to obtain a delivery of the property, he may, in the same action, have a judgment for its value. The primary object of the action is to recover the possession of the property. *Whetmore v. Rupe*, 65 Cal. 238 [3 Pac. 851]. But, if the plaintiff has already obtained this possession before judgment, there is no occasion for any judgment for its value, as the condition is wanting upon which such clause * * * is authorized; viz., 'if a delivery cannot be had.'"

Erreca v. Meyer, supra, approved the foregoing language. It is there said:

"A judgment that is not in the alternative is not, however, void, and whether or not such a judgment is even erroneous must depend upon the facts of the particular case."

See, also, *Caruthers v. Hensley*, 90 Cal. 559, 27 Pac. 411; *Black v. Hilliker*, 130 Cal. 190, 193, 62 Pac. 481.

It was admitted that the plaintiff never parted with the actual physical possession of the property in dispute; the sheriff having, upon attaching said property, placed her in the control and possession thereof as his representative. It is true the legal possession, after the seizure, was in the sheriff, but the property nevertheless remained intact and in a situation where the possession of it by the plaintiff in her own right was readily obtainable by her under the judgment. It thus appears that the property sued for was susceptible of redelivery to the plaintiff, and therefore she was not entitled to recover from the defendants the value thereof. *Etchepare v. Aguirre*, 91 Cal. 288, 27 Pac. 668, 929, 25 Am. St. Rep. 180.

Conformably to the foregoing views, the judgment as to the defendants R. L. Rasmussen, J. J. Rauer, and R. J. Graf, is reversed, and as to the remaining defendants, J. K.

Smith, as sheriff, and Rauer's Law & Collection Company, it is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

26 Cal. App. 544

PEOPLE v. PRICE. (Cr. 281.)

(District Court of Appeal, Third District, California. Feb. 13, 1915. Rehearing Denied March 15, 1915. Denied by Supreme Court April 14, 1915.)

1. RAPE $\S$ 53—PROSECUTION—EVIDENCE—SUFFICIENCY.

Evidence held to warrant conviction for an attempt to commit statutory rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. $\S$ 78-81; Dec. Dig. $\S$ 53.]

2. CRIMINAL LAW $\S$ 1170—EVIDENCE—ADMISSIBILITY.

In a prosecution for statutory rape, where accused was convicted only of an attempt, rulings on questions as to penetration to a witness who was not qualified as an expert are harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S$ 3145-3153; Dec. Dig. $\S$ 1170.]

3. CRIMINAL LAW $\S$ 823—INSTRUCTIONS—LIMITING EFFECT OF EVIDENCE.

Where preceding and following instructions showed that the jury could not have failed to understand the court had reference to the crime charged, an instruction on attempt, which did not confine them to the crime charged, was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S$ 1992-1995, 3158; Dec. Dig. $\S$ 823.]

4. CRIMINAL LAW $\S$ 783—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In a prosecution for statutory rape, where evidence of other acts was received, it is proper for the court to charge that they were received only as bearing on the question of whether the act of intercourse charged in the information was committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. $\S$ 1734, 1735, 1872-1876; Dec. Dig. $\S$ 783.]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

L. E. Price was convicted of an attempt to commit statutory rape. From the judgment and an order denying new trial, he appeals. Affirmed.

Henry C. McPike, of Oakland, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. An information was filed against the defendant by the district attorney of San Joaquin county, charging the defendant with rape upon the person of one Nancy Baker, a girl under the age of consent. Defendant was convicted of an attempt to commit rape and sentenced to serve a term of 10 years at San Quentin prison. He appeals from the judgment and from the order denying his motion for a new trial.

Appellant's brief is devoted chiefly to a discussion of the evidence and to a challenge of its sufficiency to support the verdict. The

prosecuting witness testified that defendant had sexual intercourse with her; that there was actual penetration of her private parts. A physical examination of the girl by physicians shortly after the alleged crime, and other evidence, created such doubt in the minds of the jury that they found the defendant guilty only of an attempt to commit the crime. It is hence argued that this finding of the jury, together with many circumstances and facts pointed out, shows that the story told by the girl is wholly unworthy of belief, and in fact purely the creature of her imagination.

[1] At the time of the alleged commission of the crime, defendant and his wife were guests of Nancy Baker's stepfather and her mother, who were living in a small house, in the city of Stockton, consisting of a sitting room back of which was a bedroom in which the parents slept, and back of this another bedroom, where their three girls, Nancy, aged 12, Ruth, aged 14, and the third much younger, slept. Opening on the side of this latter bedroom was a room used as a diningroom, back of which was the kitchen. The girls' bedroom was given to the guests, and at night a mattress was laid in the dining room at the kitchen door on which these three children slept, Nancy with her head towards their bedroom and the younger sister beside her and the older with her head at the other end of the mattress. Nancy's testimony was that, on Saturday night, September 13, 1913, defendant came to where she was sleeping and there had sexual intercourse with her. For the purpose of showing an adulterous or lascivious disposition towards this girl on the part of defendant the prosecutrix testified that, three days prior to the date named in the information he had sexual intercourse with her, coming to her bed on the floor as on the later occasion; that when she and her sister were playing outdoors near the house he put his hand under their clothing; that he came one night, prior to September 13th, to the place where they were sleeping and displayed his private parts, and on another occasion he came to the door leading from the diningroom to the bedroom where he slept, and attracted the attention of the girls, who were on the mattress, and again exposed his privates. Nancy also testified that, on the afternoon of September 13th, her mother and aunt (defendant's wife) were away; defendant bought some beer and cheese and gave the girls; that thereafter she went to her bedroom "to fix her hair," and defendant "threw her on the bed and he said, 'Let me —';" that "she called her sister, and she came in, and he hid in the closet." Ruth Baker corroborated Nancy's testimony concerning defendant's indecent exposure of his person; she also testified that she went to the bedroom when called by Nancy, and the

defendant was coming out of the closet, and Nancy coming out of the door. Nancy made no complaint, and told no one of defendant's having tampered with her the first time, but, the morning after the second like occurrence (Sunday) she told her mother, and Dr. Craviotto, the family physician, was called. He testified that he made a superficial examination, and ordered the girl brought to his office the next morning. Of this examination he testified: "I found the hymen had been ruptured, and the inflammatory condition that I had seen on Sunday was very much more than I anticipated." He took some specimens of secretions and examined them under a microscope. He testified: "I then called in Dr. Dozier, who was a specialist along this line of microscopical work." He examined Dr. Craviotto's slides and some made by himself. Both testified to having found human spermatozoa. Defendant introduced expert testimony which tended to show that the tests made by Dr. Dozier were not made in accordance with the best approved methods to determine with certainty the presence of spermatozoa, and in some other respects disputing the conclusions reached by Drs. Craviotto and Dozier. Certain facts were brought out by defendant's witnesses and by the cross-examination of the witnesses called by the people which tended, in some degree, to show the improbability of the testimony of Nancy, at least so far as actual intercourse with her by defendant is concerned. Defendant also urged with much confidence that Nancy and Ruth invented the entire story for the purpose of retaliating upon defendant for having deprived them of the comfort of their bedroom and thus compelling them to sleep on the floor. There was no evidence tending in the least to support this supposed motive, and it rests entirely upon the assumption that it was a natural thing for these girls to do. We cannot believe that children of their age would conceive and attempt to carry out such a scheme of revenge upon such slight provocation. We must assume that the jury believed the testimony of Nancy, and it was not without corroboration. We must also assume "that the jury reached a verdict with full realization of their sworn duty, free from passion and prejudice," and "that the learned trial judge was satisfied with the verdict or he would have granted the motion for a new trial." *People v. Lewis*, 18 Cal. App. 359, 364, 123 Pac. 232, 234. We cannot say that the story told by Nancy was so obviously and inherently improbable as to justify us in setting aside the verdict. She may have been mistaken as to the fact of penetration and may have willfully lied as to that fact. Still that would not necessarily discredit the evidence which tended to show that there was an attempt to commit the crime. Dr. Dozier testified that the presence of spermatozoa in the vaginal canal could be accounted for without actual

penetration of the male organ, by reason of their affinity for the secretions of a virgin and because of their mobility which would cause them, by their own action, to find their way from the outside into the vaginal canal.

[2] Some objections to rulings of the court and to instructions will be briefly noticed.

Some questions were asked of the witness, Mrs. Boring, Nancy's grandmother, calling for an opinion as to whether Nancy's "sexual organs had ever been entered by a human being." Mrs. Boring was the mother of 14 children, and she testified that she had assisted many times at the birth of children. It is doubtful whether she qualified as an expert, and it is by no means clear that had she done so the question would be admissible. The court refused the question. Inasmuch as the conviction was for an attempt, the ruling was without prejudice.

[3] The court gave the following instruction:

"You are instructed that an attempt to do or perform a particular thing is an effort or endeavor put forth to accomplish an act, coupled with a present intent so to do, which falls short of the act intended."

The objection urged is that no reference is here made to any criminal act, and that the jury is left to infer that an attempt to do or perform a particular thing, regardless of its character, would warrant a verdict of attempt to commit a crime. The preceding and following instructions show that the jury could not have failed to understand the court to have reference to the crime here charged.

[4] The court instructed the jury as follows:

"The court instructs you that evidence of previous acts of sexual intercourse between the defendant and the prosecutrix and of improper familiarities on the part of the defendant towards and with the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence to prove the adulterous disposition of the defendant herein, and as having a tendency to render it more probable that the act of sexual intercourse charged in the information was committed on or about the 13th day of September, 1913, and for no other purpose."

The criticism is that the charge is upon questions of fact; that it assumes: First, that defendant has an adulterous disposition; and, second, that "some act of sexual intercourse between the prosecuting witness and the defendant was committed at some particular time, but that it was rendered more probable that it was committed on or about the 13th day of September, 1913." We do not think the instruction obnoxious to the objection urged. Its purpose was, as plainly appears, to inform the jury that evidence of acts of previous sexual intercourse is received as tending to render it more probable that the act of sexual intercourse charged was committed "and for no other purpose." It is not disputed that such evidence was offered and received, and that it was admissible and for the purpose only as stated. It

was quite proper, therefore, that the jury should be told of this limitation.

The judgment and order are affirmed.

I concur: BURNETT, J.

HART, J. I concur in the judgment for the reason that it appears that the testimony of the doctor who professionally examined the prosecutrix, and who said that, upon such examination, he found the existence of conditions or evidence indicating that the prosecutrix had been carnally known by some one of the male sex, furnished some corroboration of the child's story that some one had had sexual relations with her. Then there are the provisions of sections 1159 and 663 of our Penal Code, which expressly authorize a verdict of any offense the commission of which is included within that with which the defendant is charged, or (the last-mentioned section) a verdict of an attempt to commit a crime, when the defendant is charged with such attempt, notwithstanding that the evidence may show that the crime intended was itself actually committed. The court instructed the jury that, under the law, they were at liberty to find the accused guilty of an attempt to commit the crime of rape, if the evidence was sufficient. It must be assumed, I presume, that the jury acted under that instruction, since the verdict was for an attempt to commit the crime.

But, were it not for the provisions of the Code sections above referred to, I should say that the verdict necessarily implies that the jury discarded the story of the prosecutrix. I am not prepared to say that the verdict should not be so construed in any event. The prosecutrix unequivocally asseverated that the defendant actually had sexual intercourse with her. The jury say by the verdict that he did not, and that the story of the prosecutrix as to the most important fact to which she testified was not true. Under this view, the verdict rests almost entirely upon the story of a witness whose testimony is, to some extent at least, discredited. But, as suggested, the law of this state authorizes such a verdict, and while some doubt necessarily arises as to the verity of the story of the prosecutrix, it seems to me, in view of the testimony of the doctor, that it can hardly be said, justly and as a matter of law, that the verdict is wholly without justification.

With perfect propriety, however, attention may be directed to the fact that in many other jurisdictions the higher courts have refused to uphold verdicts, such as the one here, which have been given in cases charging rape and in which the prosecuting witnesses have positively sworn that the crime as charged was actually committed by the accused. Indeed, in our own state, in its earlier judicial annals, the Supreme Court frequently dis-

played a disposition not to uphold convictions in this class of cases where the prosecutrix was not corroborated and where the acts constituting the charge were claimed to have been committed under such circumstances (similar to those here) as to create some doubt of the verity of her story. See *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Hamilton*, 46 Cal. 540; *People v. Ardağa*, 51 Cal. 371; *People v. Castro*, 60 Cal. 118. See, also, *People v. Harden*, 24 Cal. App. 522, 141 Pac. 1075.

A case of singularly cogent pertinency to the present discussion is that of *State v. Mitchell*, a Kansas case, reported in 54 Kan. 516, 38 Pac. 810. In that case the defendant was charged with the crime of rape, but the jury found him guilty only of an attempt to commit that offense. The court reversed the case upon the ground that the verdict was evidently the result of a compromise and founded solely upon the testimony of the prosecutrix who, the court said with much justification, was discredited and disbelieved by the jury as to the most important fact involved in the charge against the accused. I need not take the time to quote from the opinion in that case, but I commend it as involving a forceful and instructive view of the proposition in hand.

The higher courts cannot too often emphasize the importance of the application by those required to determine the question of the guilt or innocence of persons accused of crime of the greatest care and circumspection in considering the evidence in cases of this character, as to which, as a general proposition, it may truly be said that popular prejudice against the accused, by some subtle or inscrutable means, finds lodgment in the jury box. As was well and correctly said, in the case of the *People v. Benson*, supra:

"There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenseless, and courts, in view of the facility with which charges of this character may be invented and maintained, have been strict in laying down the rule which should govern the jury in their finding."

26 Cal. App. 529

IMPERIAL LAND CO. et al. v. IMPERIAL IRR. DIST. et al. (Civ. 1517.)

(District Court of Appeal, Second District, California. Feb. 11, 1915.)

1. DRAINS — 75 — ASSESSMENTS — LEVY — MANDAMUS — DUTY OF OFFICERS.

Under St. 1897, p. 254, as amended by St. 1911, p. 1111, providing that the board of directors of an irrigation district may levy a special assessment, not exceeding 2 per cent. of the taxable value of the property, without a vote of the district, but that, if 15 per cent. of the voters shall petition for an election relative to such an assessment, the assessment shall not be levied without the election, the board of directors cannot be compelled by mandamus to call an election, though a proper petition has

been filed, since the act does not impose that duty on them, but only prevents the levying of the assessment without such election, and Code of Civ. Proc. § 1085, provides that mandamus can only issue to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 72; Dec. Dig. ¶75.]

2. MANDAMUS ¶3—ADEQUATE REMEDY—INVALID ASSESSMENT.

The petitioners for such election have a plain, speedy, and adequate remedy under St. 1897, p. 276, § 69, providing that the taxpayers of the district may bring an action to determine the validity of an assessment if the board of directors failed to do so.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 8, 10, 11, 16-34; Dec. Dig. ¶3.]

Appeal from Superior Court, Imperial County; Louis W. Myers, Judge.

Petition for mandamus by the Imperial Land Company and others against the Imperial Irrigation District and others. From a judgment granting the writ, the defendants appeal. Reversed and remanded, with directions to dismiss.

See, also, 166 Cal. 491, 137 Pac. 234.

A. Haines and Haines & Haines, all of San Diego, and M. W. Conkling, of El Centro, for appellants. Valentine & Newby, of Los Angeles, for respondents.

FINLAYSON, Judge pro tem. Respondents, owners of real property within the Imperial Irrigation District, filed a petition in the superior court praying for a writ of mandate to compel appellants to call an election submitting to the electors within the district the question of levying a special assessment of 2 per cent. After the trial the court rendered judgment granting the writ, and the defendants appeal therefrom.

The basis of the application for the writ is found in section 59 of the Bridgeford Act, as amended in 1911 (Stats. 1897, p. 254; 1911, p. 1111), which, after certain provisions respecting special assessments initiated by the vote of the electors, is as follows:

"An assessment of not to exceed two per centum of the value of the assessable property within the district may be levied in any one year without such vote by the adoption of a resolution by at least four-fifths of the members of the board of directors; * * * provided, further, that if a petition signed by qualified voters in the district equal in number to fifteen per centum of the votes cast at the last preceding general election in such district, shall, * * * be filed with such board petitioning that an election relative to the levying of such assessment be held, such assessment shall not be levied without the election provided for in this section."

The district's board of directors unanimously adopted a resolution resolving that "it is necessary * * * that the sum of \$28,935 be raised by special assessment for the general fund," and that, to that end, "there be and is hereby levied an assessment of .002 upon the dollar." Thereafter re-

spondents filed a petition for an election, as follows:

"We, the undersigned qualified voters in the Imperial Irrigation District, equal in number to 15 per centum of the votes cast at the last preceding general election in such district, hereby petition that an election relative to the levying of the special assessment made by you on the 24th day of September, 1913, be held in the manner and at the time required by law, and that such assessment be not levied or enforced until such election shall have been held and the result declared."

At a meeting of the board of directors of the district, a motion was adopted whereby the board declared that it found no affidavit or other evidence had been submitted in support of or tending to establish the genuineness of the signatures attached to the petition for the election, that "there is affirmative evidence upon the face of said document tending to show that a number of the subscribed names thereto are not the genuine signatures of the persons whose names purport to be thereunto subscribed," and that the board "is not satisfied from the showing made * * * that said petition is signed by qualified voters in the district equal in number to 15 per cent. of the votes cast at the last preceding general election." From these findings the board concluded "that it is not justified in calling an election on said document," and that "the filing of such document constitutes no reason or ground to suspend or in any way affect the levy of the assessment." It also appears from the admitted allegations of respondents' petition for the writ that appellants refuse to submit to the electors the question of whether the assessment should be levied, and likewise that they are now proceeding to enforce the assessment without submitting it to a vote.

[1] When the board of directors of an irrigation district has passed a resolution providing for an assessment of less than 2 per centum of the value of the assessable property within the district and not exceeding the sum of \$75,000, and when, following the adoption of such resolution and within the time specified in the act, a sufficient number of qualified voters have filed with the board a petition for an election, the act provides that "such assessment shall not be levied without the election provided for in this section." The effect of these provisions is that the filing of such petition stays the proposed levy of assessment until such election has been held and the requisite number of votes cast in favor of the assessment. There is nothing in the statute requiring the board of directors to call the election. A failure to call the election, if a sufficient petition therefor has been filed, is, in substance, an abandonment of the proceeding. The writ of mandate can issue only "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." Section 1085, Code Civ. Proc. The law does not specially or at all

enjoin the holding of the election, even though the requisite number of qualified voters have petitioned therefor. From this it follows that the writ sought for in this case should not issue.

[2] If a sufficient petition for an election be filed, and if, notwithstanding such petition, the directors of a district attempt to levy and collect the assessment without holding the election, the act itself provides a plain, speedy, and adequate remedy. For, in addition to any other existent remedy, relief can be had by proceedings on the part of the assessment payers in accordance with section 69 of the act, whereby it is provided that if the board of directors of the district fail to bring an action to determine the validity of the assessment, any assessment payer, within 30 days after the levy, may bring such an action.

The judgment is reversed and the cause remanded, with directions that the proceeding be dismissed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 499

MANSFIELD v. CHAMBERS, State Controller. (Civ. 1325.)

(District Court of Appeal, Third District, California. Feb. 5, 1915.)

1. OFFICERS ⇐4—ABOLITION OF OFFICE—POWER OF LEGISLATURE.

The office of superintendent and cashier of the motor vehicle department, being wholly of legislative creation, in the absence of constitutional limitation upon the power of the Legislature, was subject to abolition at any time by act of the Legislature, since a public officer, whose term and compensation are not prescribed by the Constitution, has no contract right whereby he can hold either office or salary against the will of the Legislature.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 5; Dec. Dig. ⇐4.]

2. STATUTES ⇐159—REPEAL BY IMPLICATION.

Where there is no express repeal of a prior statute by a later one, the courts will not declare a repeal by construction, unless there is an irreconcilable repugnancy between the two acts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. ⇐159.]

3. STATES ⇐44—OFFICERS—SUPERINTENDENT AND CASHIER OF MOTOR VEHICLE DEPARTMENT—LEGISLATIVE POWER OVER OFFICE.

St. 1905, p. 816, established a system to regulate the use of motor vehicles, and annexed the duties appertaining thereto to the office of the secretary of state, authorizing such secretary to employ the necessary clerks to aid him in the discharge of his new duties. St. 1909, p. 369, amended Pol. Code, § 415, to the effect that the secretary of state might appoint a superintendent and cashier of the motor vehicle department, and fixed such superintendent's salary at \$2,400 per year, payable monthly. St. 1911, p. 573, amended and repealed certain sections of the Political Code relating to the office of the secretary of state, and rendered the provisions of section 412, as to the office of superintendent and cashier of the motor vehicle department, practically identical with those of the statute of 1909. St. 1913, p. 639, revised and amended

the act of 1905, regulating motor vehicles, and transferred the motor vehicle department from the office of the secretary of state to the state department of engineering. Held, that since the act of 1913 was irreconcilably in conflict with the previous acts, they having established the office of superintendent and cashier of the motor vehicle department merely to facilitate the execution of the Motor Vehicle Act of 1905 by the secretary of state, such office of superintendent of the motor vehicle department was abolished by such act of 1913.

[Ed. Note.—For other cases, see States, Cent. Dig. § 49; Dec. Dig. ⇐44.]

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Mandamus by Joseph G. Mansfield against John S. Chambers, as Controller of the State. From a judgment for plaintiff, entered upon defendant's refusal to answer to petition after overruling of his general demurrer, defendant appeals. Reversed and remanded, with directions.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for appellant. Wm. E. Kleinsorge, Chas. A. Tuttle, and John C. March, all of Sacramento, for respondent.

PER CURIAM. This is a proceeding in mandamus, instituted by the plaintiff, to compel the defendant, as controller of the state of California, to draw and deliver to the said plaintiff a warrant on the state treasurer of the state of California for the sum of \$200, for services alleged to have been performed by the plaintiff during the month of January, 1914, as superintendent and cashier of the motor vehicle department of the office of secretary of state.

The petition alleges that Frank C. Jordan, secretary of state of the state of California, under and by virtue of the power and authority conferred upon him by law, appointed the petitioner as superintendent and cashier of the motor vehicle department of the office of secretary of state, at an annual salary of \$2,400, payable in monthly installments of \$200 out of the general fund of said state; that said appointment has never been revoked; and that plaintiff, during and for the entire month of January, 1914, performed the work of said office. It is averred that, upon the completion of the work as such superintendent and cashier, etc., for and during said month of January, 1914, the plaintiff demanded of the defendant, as controller of the state of California, that he draw his warrant in favor of the plaintiff for the sum to which he became entitled by reason of the services performed by him as such superintendent and cashier for the said month of January, and that the defendant then refused and has ever since refused to draw a warrant in favor of the plaintiff for the sum of \$200 in compensation for the services mentioned for the month referred to.

The court below overruled a general demurrer to the petition, and, the defendant refusing or failing to answer the petition,

thereupon rendered and caused judgment to be entered that a writ of mandate issue against the controller, compelling him to draw his warrant in favor of the petitioner agreeably to the prayer of the petition. This appeal is prosecuted by the defendant from said judgment.

The Legislature of 1905 passed an act entitled "An act to regulate the operation of motor vehicles on public highways, and making an appropriation for the purpose of carrying out the objects of this act." Stats. 1905, p. 816 et seq. By said act, a somewhat elaborate system of regulating the use and the manner of using motor vehicles in this state was established, and the duties appertaining thereto were annexed to and made a part of those of the office of secretary of state. It is not essential to the decision of the question submitted by this appeal to present here a detailed review of the provisions of said act. It is enough to say that the duties imposed upon the secretary of state by said act were such, in the legislative judgment, as to necessitate the employment of clerical assistance in that office in addition to that which was required before the act in question added the motor vehicle department thereto. The Legislature made provision for such additional assistance by section 8 of the act, whereby an appropriation of \$20,000 was made "for the purpose of carrying out the objects of this act, to be used by the secretary of state in the employment of the necessary clerk or clerks," etc.

In the year 1909 the Legislature so amended section 415 of the Political Code as that the secretary of state was authorized to appoint and employ, among other additional clerks allowed said officer by said section, a "superintendent and cashier of the motor vehicle department" of said office of secretary of state, and the salary for such superintendent, etc., was fixed at \$2,400 per year, payable to the incumbent thereof in equal monthly payments. Stats. 1909, p. 369.

In 1911 the Legislature of that year passed an act amending and repealing a number of the sections of the Political Code relating to the office of secretary of state and the duties thereof. Stats. 1911, p. 573 et seq. By that act section 412 of said Code was made to read, in part:

"The secretary of state, to assist him in the discharge of the duties of his office, may appoint the following officers: * * * One superintendent and cashier of the motor vehicle department."

By the same act section 413 of said Code was practically substituted for section 420 thereof, and, in the place of the latter section, fixes the salaries of the various clerks and officers employed in his office by the secretary of state, including the superintendent and cashier of the motor vehicle department, whose salary is thereby fixed at \$2,400 per annum.

The Legislature of 1913 passed an act whereby the act of 1905, regulating motor

vehicles, was revised and amended in many particulars, and whereby, furthermore, the motor vehicle department was transferred from the jurisdiction and control of the office of secretary of state and annexed to and made a part of the state department of engineering. Stats. 1913, p. 639 et seq. That act, which was approved on the 31st day of May, 1913, and which, by virtue of a provision contained therein, went into effect on the 31st day of December, 1913, does not expressly repeal the provision of section 415 of the Political Code, or said section as amended by the Legislature of 1911, creating the position of superintendent and cashier of the motor vehicle department as one of the clerical adjuncts of the office of secretary of state.

The Legislature of 1913 passed the customary general appropriation bill, providing for the support of the state government, and which was made a law on June 10, 1913, and in thus providing for the salaries of the secretary of state and subordinates in that office (all enumerated in said act) made no provision for a salary for a "superintendent and cashier of the motor vehicle department." Stats. 1913, p. 1334.

Obviously the Legislature, by the enactment of the statute of 1913, supra, intended to entirely disconnect the "motor vehicle department," as such department is defined or established by both the statutes of 1905 and 1913, from the office of secretary of state, and it is equally obvious that the effect of the latter act was to do so. The result is, quite clearly, that, since the date upon which the statute of 1913 became effective, all the duties pertaining to said department have not been among those with the performance of which that officer is charged by law. In other words, the transference of the motor vehicle department from the control of the secretary of state to that of the state department of engineering removed from the secretary of state all responsibility and every duty in connection with the motor vehicle department, which, prior to the enactment of the said statute of 1913, it was incumbent upon him to discharge by virtue of the act of 1905, supra. But, as stated, the statute of 1913 does not, by express language, repeal that part of section 415 (or 412) of the Political Code, providing for a superintendent and cashier of the motor vehicle department, and the petitioner vigorously contends that there exists no such repugnancy between the provisions of said statute and those of the act of 1905 as necessarily implies an intention in the Legislature to abolish said office by the former statute. Upon these propositions the petitioner undertakes to maintain that the office of superintendent and cashier of the motor vehicle department still exists, and that, being the incumbent thereof, his appointment thereto never having been revoked, he is entitled to the salary annexed to said office.

On the other hand, the defendant contends, and upon that proposition he grounds his refusal to draw his warrant in favor of the petitioner as prayed for in the petition, that the act of 1913, transferring the control of the motor vehicle department from the office of secretary of state to the state department of engineering, and authorizing the department of engineering to employ the necessary clerical help to carry out the provisions of said act, necessarily operated to repeal the provisions of the act of 1905, which authorized and empowered the secretary of state to employ such clerical help, including the superintendent and cashier of the motor vehicle department, as he might find necessary to perform the identical service now required of the department of engineering by the act of 1913, vesting in said department full and exclusive control of and over the motor vehicle department.

[1] It will not be disputed that:

"A public officer, at least one whose term and compensation are not prescribed by the Constitution, has no contract by which he can have or hold either his office or his salary against the legislative will." *Pennie v. Reis*, 80 Cal. 266, 269, 22 Pac. 176.

Or, as is said in *Miller v. Kister*, 68 Cal. 144, 8 Pac. 814:

"Salaried public offices created by the Legislature are not held by contract or grant. The Legislature has full control over them, unless restricted by the Constitution, and may abolish them altogether, or impose upon them new duties or reduce their salaries."

Under the well-settled rule as thus stated, it will not for an instant be questioned that it lies within the legitimate power of the Legislature to abolish at any time any public office created by it; there being no constitutional limitation upon the exercise of such power in the particular case by the Legislature.

The case of *Marquis v. City of Santa Ana*, 103 Cal. 661, 37 Pac. 650, cited by the petitioner, is not opposed to the views thus expressed. The decision in that case merely amounts to this: That a municipal office created by the Legislature cannot directly or indirectly be abolished by a municipal corporation organized as such under the municipal corporation act (St. 1883, p. 93), which is a general law of the state. Readily it will be observed that there is no analogy between that case and the one at bar. No one will undertake to support the proposition that a municipal corporation can, by ordinance or otherwise, either directly or indirectly, abolish a public office created by an act of the Legislature, which was, in effect, what the city of Santa Ana, as a municipal corporation, attempted to do in the case cited. Indeed, it is only the statement of a commonplace proposition to say that the legislative body of a municipal corporation cannot repeal any act or statute passed by the Legislature of the state. But we think no one will question the proposition that, had the office of city assessor of Santa Ana been solely the

creature of an ordinance passed by the governing body of that city in the exercise of corporate powers conferred upon it by the municipal corporation act, which placed no restriction upon the corporation in that respect, such governing body could at any time abolish said office by ordinance, thus exercising the identical power within the sphere of its corporate jurisdiction that rests in the Legislature with respect to offices created by it and as to the right to abolish which at any time no restriction or qualification is imposed by the Constitution.

In the case at bar, the office of superintendent and cashier of the motor vehicle department, as a branch of the office of secretary of state, being wholly of legislative creation, was subject to the control of the Legislature, and therefore to any regulation or disposition which that department of the government might elect to make concerning it. And, as seen, the question which is presented here is whether the Legislature, in the exercise of its well-defined power to do so, has abolished said office, or, in other words, whether the effect of the enactment of the statute of 1913, supra, was to abolish said office of "superintendent and cashier of the motor vehicle department" of the office of secretary of state.

[2] The courts are, with singular and obvious propriety, reluctant to declare that a legislative enactment has been repealed by implication. In other words, repeals by implication are not and have never been favored, and the courts will not so construe the effect of a subsequent statute upon a prior legislative enactment, where there is no express repeal of the prior statute by the later one, unless the two are, as to the vital matters to which they relate irreconcilably inconsistent with or repugnant to each other. But, e converso, where there is an irreconcilable repugnancy between the provisions of the two, then, obviously, an intention to repeal the prior statute is necessarily implied.

[3] It is as clear as any proposition can be that there exists an irreconcilable conflict between the law of 1913 relating to and regulating motor vehicles, and the law of 1905 relating to the same subject, in so far as the latter statute established the motor vehicle department as a department of the office of secretary of state and vested in the incumbent of that office the authority and power to employ such clerical assistance to carry out the provisions of that act as he might find requisite. It is therefore plainly manifest that the necessary effect of the act of 1913 was to abolish the office of superintendent and cashier of the motor vehicle department; said office, it being virtually conceded, having been created for no other purpose than to facilitate the execution of the provisions of the motor vehicle act of 1905 by the secretary of state. And it is a fact of more than ordinary significance, in connection with the consideration of what was the

legislative intent with respect to the office involved in this controversy, that the Legislature of 1913, as has been shown, made no special provision in the general appropriation act, as thus it had previously done since the creation of that office, for the payment of the salary of such officer. This fact undoubtedly supports the view that the intention was to abolish the office, for, most assuredly, it must be assumed, had the Legislature not so intended it would have specially provided, as it did for the deputy and other clerical help in the office of secretary of state, for the compensation of the incumbent of that office.

At any rate, we are unable to persuade ourselves, after a careful examination and comparison of the provisions of the two acts, and a consideration of the fact that it was the evident design of the Legislature to vest in the state department of engineering entire and exclusive control and administration of the duties of the motor vehicle department, that the Legislature did not intend to repeal so much of section 415 or 412 of the Political Code as purports to create the office of superintendent and cashier of the motor vehicle department, or that the necessary effect of the statute of 1913, relating to and regulating motor vehicles, was not to do so.

The judgment is reversed, and the cause remanded, with directions to the court below to sustain the demurrer to the petition.

26 Cal. App. 568

PEOPLE v. OKOMOTO. (Cr. 374.)

(District Court of Appeal, Second District, California. Feb. 16, 1915.)

1. FORGERY — 27 — INDICTMENT — REQUISITES — "WILLFULLY."

An information for forgery charging that defendant willfully and with intent to cheat and defraud made a check payable to himself and signed the name of another, well knowing that the name of such other was forged, and willfully and feloniously uttered the name as genuine, sufficiently stated that the name was forged knowingly. The statement in Pen. Code, § 7, subd. 1, that the word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, implies that the person doing the act knew what he was doing, and, while standing alone, it does not imply an intent to violate the law or to injure another, yet when used in a specific statement showing a purpose to injure another, it implies a criminal intent.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 62; Dec. Dig. — 27.]

For other definitions, see Words and Phrases, First and Second Series, Willful.]

2. FORGERY — 32 — INFORMATION — PASSING OR UTTERING.

An information charging that defendant forged a check purporting to be signed with a certain name, and willfully and feloniously did "pass the name of said T. Yoshimoto," sufficiently charged the passing of the check.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 64; Dec. Dig. — 32.]

3. FORGERY — 44 — PROSECUTION — SUFFICIENCY OF EVIDENCE.

In a prosecution for the forgery and uttering of a check, where the evidence for the prosecution made a prima facie case against the defendant, met only by his claim that he had signed the check under authority given by another of the same name as that of the purported maker, a conviction was authorized.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 117-121; Dec. Dig. — 44.]

4. CRIMINAL LAW — 951 — JUDGMENT AND SENTENCE — TIME — STATUTE.

Under Pen. Code, § 1191, providing that after a verdict of guilty the court must appoint a time for pronouncing judgment, which, with extensions, shall not be more than 25 days after the return of the verdict, and section 1202, providing that, if the judgment is not so rendered, the defendant shall be entitled to a new trial, a defendant who did not object to the pronouncing of judgment 27 days after verdict, or then move for a new trial, was not thereafter entitled to a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2349-2358; Dec. Dig. — 951.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

G. S. Okomoto was convicted of forgery, and he appeals. Affirmed.

Walton J. Wood, Public Defender, and David R. Faries, Deputy Public Defender, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe and Robert M. Clarke, Deputy Attys. Gen., for the People.

CONREY, P. J. The defendant, having been convicted of the crime of forgery, appeals from the judgment, and from an order denying his motion for a new trial.

[1, 2] After the verdict the defendant moved in arrest of judgment on the ground "that the facts stated in the action on file herein do not constitute a public offense." The information, which accuses the defendant of the crime of forgery, charges that he "did willfully, unlawfully, fraudulently, and feloniously, with intent then and there to cheat and defraud" certain persons, make and forge the name of T. Yoshimoto to and upon a certain instrument in writing for the payment of money, which said instrument, being a check for \$37.50, is set forth in full. It is in favor of G. S. Okomoto, with the signature "T. Yoshimoto," and is alleged to bear on the back thereof "G. S. Okomoto." It is further charged that the defendant "then and there well knowing that the name of said T. Yoshimoto was so falsely made and forged to and upon the said instrument in writing for the payment of money, as aforesaid, did then and there willfully, unlawfully, fraudulently, and feloniously utter, publish, and pass the name of the said T. Yoshimoto so falsely made and forged to and upon the said instrument in writing for the payment of money, with the name of said T. Yoshimoto so falsely made and forged to and upon the said instrument in writing, as aforesaid, as true and genuine,

with intent then and there to defraud, prejudice, and damage" the said persons.

As to the first count, it is objected that the information is improperly pleaded because it does not state in terms that the name was forged "knowingly," and does not state that it was done by the defendant knowing that he had no authority so to do. As to the second count, the objection is that the defendant is not charged with passing the written instrument, but only that he did "pass the name of said T. Yoshimoto." While the information is not a model of pleading with respect to the points suggested, we think that it is legally sufficient. The charge that the defendant, for the wrongful purposes stated, willfully made and forged the name upon the instrument described, necessarily carries with it the meaning that he knew that he had no authority so to do. It has been held that, where a defendant is charged with the commission of perjury, the use of the word "willfully" means that he made the statement with the consciousness that it was false, or with the consciousness that he did not know that it was true, and with the intent that it should be received as a statement of what was true in fact. *People v. Von Tiedeman*, 120 Cal. 128, 135, 52 Pac. 155. The statement in the Penal Code (section 7, subd. 1) that the word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, includes, rather than excludes, the idea that the person doing the act was fully conscious of, or, in other words, that he knew, what he was doing and all of the circumstances connected therewith which made the doing willful. The word "willfully" alone, as thus used, does not imply an intent to violate law or to injure another; but, when the word is used, as in this information, in connection with a specific statement showing a purpose to injure another, it implies a criminal intent, if the law makes the doing of that act with that purpose a criminal act.

"The word 'willfully,' in the ordinary sense in which it is used in statutes, means not merely 'voluntarily' but with a bad purpose." *Commonwealth v. Kneeland* (Mass.) 20 Pick, 220.

In *People v. King*, 125 Cal. 369, 58 Pac. 19, where the defendant was charged with having falsely forged and counterfeited the name of a certain person to a check, the charge was held to be sufficient, and the court said:

"There is not such defect in matter of form as would tend to the prejudice of a substantial right of defendant. An indictment or information is sufficient if it substantially conforms to the statute. *People v. Mahlman*, 82 Cal. 585, 23 Pac. 145. And no one could say that defendant, as a man of common understanding, was not fully informed as to the acts which he had committed so as to enable him fully to prepare his defense."

[3] At the trial of this action the prosecution introduced as a witness one T. Yoshimoto, a resident of the city of Los Angeles, who testified that the check in question,

which was drawn on a bank in Los Angeles, was not signed by him, and that he did not authorize the defendant or any one else to sign his name thereto. He further said that he knew the defendant by sight, but was not personally acquainted with him, and had not had any business or social relations with him. The defendant testified that he wrote the name pursuant to permission given him by another T. Yoshimoto, who was a resident of Burbank, in Los Angeles county, Cal. The defense produced in evidence two directories, one published in San Francisco, and one published in Los Angeles, in each of which was given the name T. Yoshimoto, with the residence assigned to Burbank. The evidence does not show whether these two men, or either of them, had an account in the bank. When the state's witness T. Yoshimoto was on the witness stand, he was asked whether at the time in question he had any deposit in that bank. The question was excluded, on objection by the defendant. It is now contended on behalf of defendant that the evidence does not sustain the verdict, because it was not sufficient to justify the jury in its implied finding that the witness T. Yoshimoto was the man whose name was forged. This contention cannot be sustained. The testimony of the witness T. Yoshimoto, taken in connection with other evidence produced by the prosecution, was sufficient to make a prima facie case for the state. The testimony produced by the defendant did no more than tend to raise a doubt. Taken as a whole, we cannot say that the facts and circumstances shown necessarily destroyed the effect of the evidence for the prosecution on the question of identity of the person whose name was signed to the check. The situation in law is the same as if the defendant had testified that some person having the name T. Yoshimoto, and residing at some more distant point, such as San Francisco, or some point without the state of California, had authorized him to sign this check. It was for the jury to say whether the bare statement of the defendant, without the production of the second Yoshimoto, or any other substantial corroboration, was sufficient to raise a reasonable doubt in their minds as against the evidence produced by the prosecution.

[4] The verdict of conviction in this case was returned on September 17, 1914, and Tuesday, September 22d, was fixed by the court for pronouncing judgment. On September 22d the court granted defendant leave to file an application for probation, which application and the pronouncing of judgment were continued to September 29th, and on the 29th, "by consent of the defendant," continued to September 30th. On September 30th the defendant filed his motion in arrest of judgment and his motion for a new trial, and the cause was continued to October 2d for argument on said motions and judgment. On October 2d, by order of court, the matters of motion

and sentence were continued to October 6th, and on October 6th, the said motions having been argued and submitted, the matters of probation and sentence were continued to October 14th. On October 14th the application for probation was denied, and judgment was pronounced as shown by the record. Defendant claims that he is entitled to a new trial because the judgment was not pronounced within the time provided by law.

Where there is a motion for new trial or in arrest of judgment, and also an application for probation, the court has the discretionary power to extend the time for 20 days beyond the original limit of 5 days. In the absence of any request from the defendant for a further extension (no question of present insanity being involved), the extreme limit provided in the Code for rendering judgment is a day not more than 25 days after the date of the return of the verdict. *Rankin v. Superior Court*, 157 Cal. 189, 106 Pac. 718; *Pen. Code*, §§ 1191, 1202. It will be noted that the judgment in this case was pronounced 27 days after the return of the verdict. The record does not show that the defendant made any objection to the pronouncing of judgment at that time or asked for a new trial, and the question therefore arises whether, under such circumstances, the judgment should be reversed on account of the delay stated. According to section 1202 of the Penal Code, if the judgment is not rendered or pronounced within the time fixed therefor by the court, or the time to which it is continued under the provisions of section 1191, "then the defendant shall be entitled to a new trial." Referring to these sections, the Supreme Court, in *Rankin v. Superior Court*, 157 Cal. 189, 192, 106 Pac. 718, 719, stated their effect as follows:

"If judgment was not pronounced within the time limited, a new trial was made imperative if the defendant so desired; he became 'entitled' to it. This does not indicate a legislative intent that the lapse of time and failure of the court to render the judgment within the time fixed should oust the court of further jurisdiction to proceed in the case and render a dismissal necessary. On the contrary, it necessarily implies that the jurisdiction shall continue, and that the court shall retain authority to order a new trial and proceed therewith to verdict and final judgment. If the court should refuse a new trial and render judgment against the defendant after the authorized time has passed, its action would be erroneous, and the judgment would be reversed on appeal, if an appeal should be taken."

Here it appears that the defendant was entitled to a new trial; but it further appears that a new trial was not refused, inasmuch as he did not ask for it. In reliance upon the above-quoted decision, it has been held by this court that, in the absence of any objection made by the defendant at the time of pronouncing judgment, and in the absence of any demand made by him for a new trial upon the ground that the legal time limit had expired, the court might rightfully enter the

judgment. *People v. Polich*, 143 Pac. 1065. A similar opinion was indicated by this court in the case of *In re Hemstreet*, 18 Cal. App. 639, 123 Pac. 984, where it was said that, under these sections of the Penal Code, the trial court should, "upon application therefor," grant defendant a new trial.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

26 Cal. App. 560

SMITH v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA.
(Civ. 1634.)

(District Court of Appeal, Second District, California. Feb. 16, 1915.)

1. MASTER AND SERVANT ⇨ 250¾, New, vol. 16 Key-No. Series—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW—FINDINGS OF FACT.

Under St. 1913, p. 318, § 84, providing that, on review of the proceedings before the state Industrial Commission to determine the compensation for injuries to a workman, it can be determined whether the findings of fact support the order, decision, or award under review, and that the commission's findings of fact shall be conclusive and final, and shall include ultimate facts, and findings and conclusions of the commission, the commission's findings of fact cannot be reviewed, if supported by any evidence, and its conclusions of fact, which are the conclusions referred to, drawn from the evidentiary facts, are also final.

2. MASTER AND SERVANT ⇨ 250¾, New, vol. 16 Key-No. Series—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS—MATTERS OF FACT.

Where the Industrial Accident Commission had found the facts relating to a workman's employment, and the circumstances attending the accident, a conclusion that he was engaged in interstate commerce at the time is a conclusion of law, not of fact, and may be reviewed.

3. COMMERCE ⇨ 8—REGULATION—CONFLICTING LAWS—EMPLOYER'S LIABILITY.

The federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8663]), fixing the responsibility of carriers engaged in interstate commerce for injuries to their employés while employed in such commerce, resulting from negligence of the carrier or its servants, governs the entire liability of the carrier for such injuries, and is exclusive of state legislation on that subject, so that an employé engaged in interstate commerce cannot recover under a state Workmen's Compensation Act for an injury received in his employment, but not caused by the negligence of the carrier or its employés.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. ⇨ 8.]

4. COMMERCE ⇨ 27 — EMPLOYER'S LIABILITY — EMPLOYED IN INTERSTATE COMMERCE."

A railroad special watchman, who removed trespassers from an interstate train and was injured just after he alighted from the train to drive the trespassers out of the railroad yard, was still employed in interstate commerce at the time he received his injury, and cannot recover under the state Workmen's Compensation Act.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 25; Dec. Dig. ⇨ 27.

For other definitions, see *Words and Phrases*, First and Second Series, Interstate Commerce.]

Certiorari by George W. Smith against the Industrial Accident Commission to review the findings and determination of the Commission denying relief to the petitioner. Order of the Commission affirmed.

George H. Johnson and Johnson & Phipps, all of San Bernardino, for petitioner. Christopher M. Bradley and H. C. Booth, both of San Francisco, for respondent.

JAMES, J. Proceedings in certiorari to review the findings and determination of the state Industrial Accident Commission whereby petitioner, who applied for compensation against the Southern Pacific Company under the provisions of the Workmen's Compensation Act of California, was denied relief, and his application dismissed.

Petitioner was a special officer or watchman employed by the Southern Pacific Company at its railroad yards in Colton, Cal. On the night of January 13, 1914, a through passenger train running from New Orleans to San Francisco, and carrying passengers, baggage, and express from points without the state destined for points within California, came into the yards. Acting within the line of his duty, petitioner boarded the tender of the locomotive attached to the train, as it got under way again, for the purpose of preventing trespassers from getting on the cars. As the train moved out three men attempted to board the "blind baggage"; that being the car nearest the engine, and having no door leading from the platform to the interior of the train. Petitioner shouted at the men, and they jumped from the platform, and petitioner left the engine tender and alighted on the ground. He started to pursue the three men in order to drive them from the company's property, and while doing this his revolver fell from its holster and a cartridge therein exploded, the bullet striking petitioner's left thigh, where it inflicted a flesh wound. For this accidental injury suffered while he was performing a service in the course of his employment petitioner claimed compensation.

The industrial commission made findings of fact, the substance of which has been narrated in the foregoing. A dismissal of petitioner's application was ordered because it appeared, in the opinion of the commission, that the employment in which the watchman was engaged at the moment of the accident had to do with interstate commerce, and therefore his claim for compensation did not fall within the jurisdiction of the state board.

Petitioner challenges these findings, and contends that he was not engaged in an employment connected with interstate commerce at the time he received his injury, and that, irrespective of that issue being found against him, his claim was one which it was within the jurisdiction of the state commission to allow.

[1] Before giving attention to the principal

questions thus presented, some notice should be taken of the proposition suggested as to how far in this proceeding a review may be had of the findings of the state industrial board. No appeal is provided to be taken from a decision of the commission, but it is provided in section 84 of the act (Stats. 1913, p. 318) that a proceeding of review may be taken in either the Supreme Court or the District Courts of Appeal. It is provided that this review may extend far enough to determine whether the findings of fact, when such are made, "support the order, decision, or award under review." In the subdivision immediately follow is contained this provision:

"The findings and conclusions of the commission on questions of fact shall be conclusive and final, and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission."

Some ambiguity is apparent in these provisions, but they can be given a reasonable interpretation which will make effectual the evident intent of the legislators. We apply this construction: The correctness of the findings of fact cannot be questioned where there has been presented to the commission any evidence to support them. The phrase "*such questions of fact*" shall include ultimate facts and the findings and conclusions of the commission" must relate wholly to conclusions of fact, for the clause expressly so declares in the part we have underscored. Ultimate facts are nothing more than conclusions of fact drawn from the probative or evidentiary facts; hence matters of fact stated in their ultimate form cannot differ from conclusions of fact, however characterized. The Industrial Accident Commission exercises judicial functions; it sits as a court to try the matters pertinent to issues within its jurisdiction. There is every reason for saying, therefore, that its findings should conform to, and be judged by, the same general rules as are applicable to findings made in courts of justice. It is a rule that findings of the ultimate facts alone are not only sufficient, but are the most proper to be made; and, while findings of evidentiary facts are permissible, these will always be controlled by findings of the ultimate facts where a conflict is presented between the two. *Corea v. Higuera*, 153 Cal. 451, 95 Pac. 882, 17 L. R. A. (N. S.) 1018; *People v. McCue*, 150 Cal. 195, 88 Pac. 899.

[2] The commission in the matter of this petitioner's application, after finding the facts as to his employment and those relating to the circumstances of the accident, added a finding to this effect:

"That the applicant, George W. Smith, was at the specific time of his injury employed in interstate commerce, and the particular service being rendered by him at the time of his injury was a service in such interstate commerce."

This finding, while in its analysis it may be said to cover a mixed question of law and fact, furnishes in the circumstances of this

case more particularly a conclusion of law which was not necessary to be made. No doubt, it was expressed more by way of pointing directly to the reasons for the opinion of the commissioners that there was no jurisdiction in the state to adjust the claim of petitioner. That conclusion, then, may be disregarded, as it is plainly the intent of the statute to allow a review of all questions of law arising upon the findings of fact.

We revert again to the two main propositions, to wit: (1) Was the State Industrial Accident Commission without jurisdiction to award petitioner compensation, assuming that the applicant was at the time of his injury engaged in work directly relating to interstate commerce? (2) Do the findings sufficiently show that, as a matter of fact, petitioner was engaged in an act affecting interstate commerce, rather than an act local in its relation to the business of the employer?

[3] The Congress of the United States, in April, 1908, passed what is known as the Employers' Liability Act (U. S. Comp. St. 1913, §§ 8657-8665), which fixes the responsibility of every common carrier towards its employes while engaged in commerce between the several states, where any such employes are injured through the negligence of the officers, agents, or other employes of the carrier. In the year 1913 the Legislature of California passed a measure, known as the Workmen's Compensation Insurance and Safety Act (Stats. 1913, p. 279), which provided for compensation to be awarded to employes injured while engaged in the work of their employer (except in certain employments not pertinent here), regardless of whether the accident occurred through the negligence of the employer, or his agents, servants, or other employes. It will be seen, then, that as applied to common carriers, the state act covers precisely the same field as does the national legislation, with the qualification that the state act obliges the employer to compensate employes for accidental injuries sustained without negligence on the part of his agents or employes, as well as those arising through the negligence of such persons.

The United States Congress is given power by the Constitution to regulate commerce among the several states. As to the application of local or state statutes made in the exercise of the police power affecting instrumentalities of interstate commerce, it is said that this subject belongs to the reserve power of the states; that is, the power may be exercised by the states in the absence of legislation covering the same subject by Congress. When the power of Congress, however, is exerted in the direction of covering the matter sought to be so regulated, and is comprehensive to that end, then the state regulation must give way before the superior law. The principle involved is elaborately stated by Mr. Justice Van Devanter in the leading case

of *Mondou v. New York, New Haven & Hartford R. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, wherein the writer of that decision quotes the words of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, as follows:

"If any one proposition could command the universal assent of mankind, we might expect it would be this: That the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason. The people have, in express terms, decided it, by saying, 'This Constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land,' and by requiring that the members of the state Legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding.'"

In *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 501, 34 Sup. Ct. 638, 58 L. Ed. 1068, the court says:

"* * * It is settled that, since Congress, by the act of 1908, took possession of the field of the employer's liability to employes in interstate transportation by rail, all state laws upon the subject are superseded. [And quoted from *Mondou v. New York, New Haven & Hartford R. R. Co.*, supra:] 'But, plainly, * * * it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employes for defects and insufficiencies not attributable to negligence.'"

See, also, *Taylor v. Taylor*, 232 U. S. 368, 34 Sup. Ct. 350, 58 L. Ed. 638.

Again, in *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176, this expression of the United States Supreme Court, written by Lurton, J., occurs, referring to the same law:

"By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employes injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states. * * * It * * * follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employes while engaged in interstate commerce this act is paramount and exclusive."

In point as to the exclusive nature of similar acts of Congress are the cases of *Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elev. Co.*, 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203; *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323; *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151; *Erie R. Co. v. New York*, 233 U. S. 671, 34 Sup. Ct. 756, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266.

The express declaration in the decision that the federal statute has taken hold of the entire subject of the liability of a common carrier engaged in interstate business to its employes for accidental injuries suffered by the latter while performing their duties makes it unnecessary to digest those decisions approving the operation of the state statutes where the national legislation is not of such a character as to indicate that Congress intended to cover the whole field. There are such decisions, and they give expression to the general rule that a state statute enacted under the right of the reserve power is not to be set aside or overridden by the law of Congress, unless there is an actual repugnance. But these decisions recognize the alternative condition, that such state statutes will be thus overridden where Congress has manifested a purpose to exercise its paramount authority over the subject. There may be cited *Sinnot v. Davenport*, 22 How. 227, 16 L. Ed. 243; *Missouri, K. & T. Ry. Co. v. Harris*, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. Ed. 1377; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508, also cited in *Atlantic Coast R. R. Co. v. Georgia*, 234 U. S. 280, 34 Sup. Ct. 829, 58 L. Ed. 1312.

[4] Touching the claim of petitioner that, whatever character his act may have had as being connected with the operation of an interstate train up to the moment that he had driven the intruders therefrom and had himself alighted on the ground, his further act in attempting to drive the men away was one not connected with the first duty, and was of a local nature only, it appears that the act was a continuous one without a break or stop. The watchman caused the men who sought to trespass on the interstate train to leave it and then, in the words of the finding made by the commission, he "was following them to drive them off the company's property when he stumbled and his revolver fell from the holster and was discharged." It would be to mark a very fine line of distinction to say that from the moment the watchman and the intruders stepped from the interstate train the acts of the former changed from being in aid of interstate commerce and his further motions in pursuit of these same intruders became colored with conditions of a purely local employment. The federal courts have not indulged such close distinctions in applying the statutes. The facts of one case may be referred to: A fireman at Selma, N. C., had prepared an engine which he was to accompany on an intrastate trip, but which was to pull in part cars brought in by an interstate train to their destination. The time not having arrived for the departure of the train, the fireman left the engine and went to his boarding house on personal business. While crossing over the tracks of the company he was struck by an engine and killed. The federal court held that the fireman was

at the time of his death engaged in work connected with interstate commerce, saying:

"Assuming that the evidence fairly tended to indicate the boarding house as his (the fireman's) destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer." *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159.

So here, the findings support the view that the petitioner, when he started to drive the trespassers from the company's property, was performing an act consistent with his entire duty of ridding the interstate train of persons who sought to intrude thereon without leave or right.

The conclusions herein expressed on the several contentions advanced by petitioner are, therefore, favorable to the determination as made by the Industrial Accident Commission, which declined jurisdiction of petitioner's application and dismissed his claim.

The proceeding and order brought under review are affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 554

FERGUSON v. SUPERIOR COURT IN AND FOR KERN COUNTY et al.
(Civ. 1639.)

(District Court of Appeal, Second District, California. Feb. 16, 1915.)

1. PROHIBITION — 3 — REMOVAL OF OFFICER — STATUTE.

No appeal lying from a decree of the superior court, depriving any officer within its jurisdiction of his office for misconduct, under Pen. Code, § 772, providing that any such officer may be so removed, the accused may have the benefit of the writ of prohibition in a proper case.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. — 3.]

2. SHERIFFS AND CONSTABLES — 77 — DUTY OF CONSTABLE — PROSECUTIONS FOR MISDEMEANORS.

Where a constable failed to cause the prosecution of certain persons for the commission of misdemeanors not committed in his presence, he was guilty of no neglect of official duty, since the duty of such an officer to initiate such prosecutions by complaint is no greater than that of a private citizen.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 100, 108, 110, 112, 115, 116; Dec. Dig. — 77.]

3. ARREST — 63 — ARREST WITHOUT WARRANT — MISDEMEANORS.

Under Pen. Code, § 836, providing that a peace officer may make an arrest without warrant for a public offense committed or attempted in his presence, etc., a constable has no authority to arrest without a warrant for a misdemeanor, except where the offense is committed in his presence.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145-156; Dec. Dig. — 63.]

4. SHERIFFS AND CONSTABLES 102—ARREST WITHOUT WARRANT—MISDEMEANORS—STATUTE.

Pen. Code, § 315, provides that whoever keeps a bawdyhouse, or willfully resides in such house, is guilty of a misdemeanor. On prosecution of a constable for failure to arrest certain persons so living it was not alleged, in the language of the statute, that they willfully resided therein. *Held*, that such constable was not charged with knowledge of the commission of the offense so as to render a neglect of his official duty any failure to arrest such persons as for a misdemeanor committed in his presence.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 179; Dec. Dig. 102.]

5. PROSTITUTION 1—DEFINITION.

"Prostitution" means the common and indiscriminate engaging in sexual intercourse by a woman with all persons who offer for hire or the equivalent.

[Ed. Note.—For other cases, see *Prostitution*, Cent. Dig. §§ 1, 2; Dec. Dig. 1.

For other definitions, see *Words and Phrases*, First and Second Series, *Prostitution*.]

6. SHERIFFS AND CONSTABLES 102—ARREST WITHOUT WARRANT—MISDEMEANOR—PERSONS LIVING IN BAWDYHOUSE—STATUTE.

Under Pen. Code, § 315, providing that in prosecutions for keeping a bawdyhouse, common repute may be received as competent evidence of the character of the house, the failure of a constable to act on such common repute in arresting the keeper or inmates of such houses, as for a misdemeanor committed in his presence, though it might excuse him if he did so arrest, is not a neglect of his official duties, since discretion must be vested in a peace officer in making an arrest without warrant.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 179; Dec. Dig. 102.]

7. SHERIFFS AND CONSTABLES 13—NEGLECT OF OFFICIAL DUTY—REMOVAL—STATUTE.

The failure of a constable without process to arrest or to swear out a complaint when acquainted with facts naturally implying that such offenses as prostitution are being committed, is not such neglect of his official duty as subjects him to removal from office and a penalty of \$500 under Pen. Code, § 772, providing that the superior court may so decree when any officer within its jurisdiction has neglected or refused to perform his official duties, since such construction of the act would strip the officer of all discretion in the making of such arrest, for such misdemeanors as vagrancy and the keeping of gaming houses and houses of ill fame.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 28, 29; Dec. Dig. 13.]

Application for writ of prohibition by Samuel T. Ferguson against the Superior Court of the State of California in and for the County of Kern, and the Honorable Howard A. Peairs. Peremptory writ issued.

Borton & Theile, of Bakersfield, for petitioner. Kaye & Siemon, of Bakersfield, for respondents. James F. Farraher, amicus curiae.

SHAW, J. While petitioner held the office of constable of the Sixteenth township of the county of Kern, an accusation was filed against him in the superior court of that county by J. C. Barrett under the provisions

of section 772 of the Penal Code, purporting to charge him with neglect in the performance of the official duties pertaining to his office, and praying for his removal as such officer, and that he be adjudged to pay the relator the sum of \$500 as in said section provided. The accusation at length is as follows:

"That at and in said Sixteenth township of the county of Kern there is now and has been for more than two years last past a certain place known as Boust City, which has been and is now inhabited by a large number of women and girls who have been and now are living in houses of prostitution or cribs and maintaining and keeping said places as disorderly houses or houses of ill fame; that such houses have been resorted to by divers and sundry persons for the purpose of prostitution and lewdness; that such places have been conducted openly and notoriously, and within the knowledge and in open view of a large number of persons residing in the city of Taft and in said township; that public dance halls are maintained and kept at such places by numerous persons, which said dance halls are kept and maintained as an adjunct to and in connection with the said houses of prostitution; that said dance halls have been carried on and conducted in a noisy, offensive, and indecent manner, so that the music and the hallooing and yelling which has from time to time emitted or arisen from such places has been heard a long distance therefrom, and that said dance halls and houses of prostitution have been conducted in such a manner that the peace and quiet of the neighborhood has been and is constantly disturbed thereby; that said houses of prostitution consist of small buildings commonly known as cribs, and have been built and erected for the purpose of prostitution and lewdness; that the women and girls who inhabit the same and reside therein conduct themselves in a vile and indecent manner, by using vile, profane, and indecent language, and by dressing and clothing themselves in vile, suggestive, and lewd clothing, and by indulging in the excessive use of intoxicating drinks; that a number of saloons are conducted and maintained by divers persons in said Boust City, and that said saloons are frequented and resorted to by female prostitutes and by the hangers-on of said Boust City, and the partners and accomplices of the said women and girls so living and residing in said houses of prostitution; that the said cribs have been erected and leased, and are now being leased, by one E. J. Boust, for the purpose and with the intent that the same shall be occupied as houses of prostitution.

"That the defendant has now, and has at all times within two years last past had knowledge of all the facts in the paragraph last above alleged, and has on divers and sundry occasions been present at said Boust City, and has seen women and girls living and residing in houses of prostitution, and has seen the said dance halls conducted and carried on in the manner last above alleged, and has, at all time, had knowledge of said condition of affairs, but he has at all times failed, refused, and neglected, and still fails, refuses, and neglects, to cause the prosecution or the arrest of any of the persons letting said cribs for the purpose of prostitution, or any of the persons residing therein."

Respondent, who is petitioner here, interposed a demurrer upon the ground, among others, that said accusation failed to state facts sufficient to constitute a ground for removal from office under section 772 of the Penal Code. This demurrer was overruled, whereupon the respondent filed an answer

and the court proceeded with the trial of the case. After the evidence had been introduced, and before the making of findings and the rendition of any decree or judgment therein, the respondent applied to this court for a writ of prohibition to be directed to the superior court of Kern county and Hon. Howard A. Peairs, judge of said court, prohibiting him from any further proceeding in said matter.

[1] The theory upon which petitioner insists upon the issuance of the writ is that, notwithstanding the fact that the accusation fails to allege any neglect of official duty pertaining to the office, without which it is claimed the court has no jurisdiction to entertain the proceeding, the court threatens to, and will, unless prohibited from so doing, render a decree removing him from office, and enter a judgment against him for \$500 in favor of said J. C. Barrett, as informer. That no appeal lies from a decree and judgment in such a proceeding is directly adjudicated in the case of *In re Curtis*, 108 Cal. 661, 41 Pac. 793; and that an accused may have the benefit of the writ of prohibition in a proper case is determined in the cases of *Siebe v. Superior Court*, 114 Cal. 551, 46 Pac. 456, and *Glide v. Superior Court*, 147 Cal. 21, 81 Pac. 225.

[2-4] While the accusation proceeds at length in setting forth a deplorable condition as to vice and depravity existing in "Boust City," the only specific charges of neglect on the part of petitioner to perform his official duty, as set forth in the accusation, are: First, his failure "to cause the prosecution or the arrest of any persons letting said cribs for the purpose of prostitution"; and, second, his failure to cause the prosecution or arrest of "any of the persons residing therein." Section 316 of the Penal Code provides that:

"Every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor."

And section 315, Penal Code, provides that:

"Every person who keeps a house of ill fame in this state, resorted to for the purposes of prostitution, * * * or who willfully resides in such house, is guilty of a misdemeanor."

We are not directed to any provision of law which imposes upon a constable the duty of instituting proceedings for the prosecution of public offenders committing misdemeanors. Such proceedings are instituted by the filing of verified complaints with a magistrate, and no greater duty in this regard devolves upon a constable as such than upon a private citizen, unless where an offense is attempted or committed in his presence. Hence his failure to cause the prosecution of these persons who were guilty, according to the accusation, of a misdemeanor, constituted no neglect of his official duty.

A constable is a peace officer and as to public offenses of the degree of misdemeanors he has no authority to make arrests unless

armed with a warrant, save and except in those cases where the offense is committed in his presence. Pen. Code, § 836. It is not alleged that the women residing in said houses of prostitution were, in the language of the statute, "willfully residing therein." On the contrary, from aught that appears, their presence there may have been due to duress or other causes showing an entire absence of the element of willfulness necessary to constitute the offense, and which might excuse such residence. Conceding that such fact might constitute some other and more serious offense, petitioner is not charged with a knowledge of the commission of said offense.

[5, 6] Prostitution means common, indiscriminate, illicit intercourse for hire. It is the practice by a female in offering her body to an indiscriminate intercourse with men for money or its equivalent. While the statute (section 315, supra) provides that in prosecutions for keeping a house of prostitution, common repute may be received as competent evidence of the character of the house and the women resorting to it, nevertheless the failure of a constable to act upon such common repute in arresting the keeper or inmates thereof would not constitute a neglect of his official duties, although it might excuse such action if he did arrest them. Necessarily a large discretion must be vested in a peace officer in making an arrest without a warrant. Having the power to disperse mobs and otherwise preserve the peace, it follows that he may enforce his orders by making arrests as a necessary means of performing such duty, but it is improbable that two officers would exercise equal leniency or manifest the same degree of patience or discretion before making arrests in enforcing their orders.

Respondents cite the case of *People v. Craig*, 152 Cal. 42, 91 Pac. 997, wherein the Supreme Court justified the act of an officer without a warrant in making an arrest of a vagrant who resisted to the extent of committing a grievous assault upon the officer; it being there held that:

"If, * * * he [the officer] could testify from actual knowledge to every element of the offense, the offense must have been committed in his presence."

It does not follow that because an officer may without process be justified or excused by reason of information upon which he acts in making arrests for misdemeanors, such as vagrancy, prostitution, and the letting of houses for prostitution, a failure to act upon the same information would constitute a misdemeanor on the part of the officer for neglect of official duty. We cannot believe that the Supreme Court in the *Craig Case* would, under the circumstances there existing, have upheld a decree of ouster had the officer neglected to make the arrest for vagrancy.

Such offenses as vagrancy, prostitution and (usually) the letting of houses for prostitution, depend for their criminal character, not upon a single act, but upon a series of acts

extending over a considerable period of time, and are criminal offenses because of their continuance and repetition. From the very nature of the offense of letting a house for prostitution and the conducting of prostitution therein, such offenses are rarely, if ever, committed in the presence of the officer; and while he may have had, as a result of information obtained from various sources an acquaintance with the fact, and hence in a limited sense, knowledge, of the commission of such offenses, nevertheless the act which would require, as a positive official duty, the making of an arrest without a warrant was not committed in his presence. While an officer may be justified, or at least excused, for making a raid and arresting the inmates of a reputed house of prostitution, nevertheless he does so at his own risk. "Making, as we are disposed to make, all proper allowance for zeal of police officers [or other officers] in dealing with persons who are supposed to be bad members of society, it is the duty of all courts to prevent good or bad citizens from being unlawfully molested. Official illegality is quite as reprehensible as private violations of law. The law of the land must be accepted by every one as the only rule which can be allowed to govern the liberties of citizens, whatever may be their ill desert." *Sarah Way's Case*, 41 Mich. 299, 1 N. W. 1021.

[7] In this case respondents have presented the written opinion of the trial court wherein much of the evidence upon which its conclusion was based is set forth, and it is apparent that the court acted, not upon the theory that the misdemeanors had been committed in the presence of the officer, but that he was acquainted with facts from which the natural inference to be drawn was that the offenses were being committed, and that knowledge of such facts required him to arrest or cause the prosecution of the inmates.

We cannot subscribe to the proposition that the failure of an officer without process to make an arrest under such circumstances, or to swear to a complaint and cause the prosecution of the offenders, constitutes a misdemeanor, to wit, neglect of official duties, for which he may be removed from office. Under such circumstances, to subject him to a prosecution under the provisions of section 772, Penal Code, at the relation of one seeking to recover the \$500 penalty provided therein, would not only impose unnecessary and intolerable burdens, but strip him of all discretion in the making of arrests for misdemeanors, and require him at his peril to make arrests of vagrants, prostitutes and inmates of houses of prostitution upon common repute or information. We are not disposed to criticize officers for their zeal in dealing with persons who are bad members of society; on the contrary, they are to be commended for such zeal. On the other hand, where such offenders may be dealt with under process

issued by the court upon a complaint presented by any citizen having regard for the welfare of the community, the action of the officer in making an arrest for such offenses without a warrant must be left largely to his discretion.

It is ordered that the peremptory writ issue as prayed for.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 629

COOPER et al. v. SUPERIOR COURT OF SAN JOAQUIN COUNTY. (Civ. 1380.)

(District Court of Appeal, Third District, California. Feb. 23, 1915. Rehearing Denied by Supreme Court April 19, 1915.)

1. PROCESS $\hookrightarrow$ 137—SUMMONS—SUFFICIENCY. A service of summons by one whose affidavit of service failed to show that he was over the age of 18 years was insufficient.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 177-180; Dec. Dig. $\hookrightarrow$ 137.]

2. CERTIORARI $\hookrightarrow$ 42—PROCEEDINGS—TIME.

The remedy by certiorari to review and set aside a judgment is barred by the lapse of time within which an appeal from the judgment may be taken, unless circumstances of an extraordinary character are shown to have intervened; but petitioners, seeking to set aside a judgment foreclosing a mortgage, should seek relief by some appropriate proceeding in which the purchaser at the foreclosure sale, if any, or other persons in interest, may have an opportunity to be heard; and, where 18 years had elapsed since the judgment, the mere statement that petitioners were not in fact served with summons and had no knowledge of the pendency of the action would not justify the issuance of the writ.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 64-73, 75-79, 81-84, 87; Dec. Dig. $\hookrightarrow$ 42.]

Petition by William E. Cooper and another for writ of review against the Superior Court of San Joaquin County. Writ denied.

A. H. Carpenter, of Stockton, for petitioners.

PER CURIAM. Petition for writ of review. It is alleged that in February, 1897, an action was commenced in the superior court of San Joaquin county by N. Arata, plaintiff, against William E. Cooper and Annie Cooper, defendants, for the foreclosure of a mortgage; that return of service of summons was made by one J. L. Nye, whose affidavit of service failed to show that he was over the age of 18 years; that said summons was never in fact served upon the defendants in the action; that the default of defendants to answer was entered and decree of foreclosure thereafter made and entered on February 23, 1897; that defendants had no notice or knowledge of the pendency of said action or of the judgment entered therein until the 21st day of October, 1914. Petitioners pray that defendant be called upon to show cause why said judgment should not be set aside and annulled.

[1] The service of summons was insufficient (*Lyons v. Cunningham*, 66 Cal. 43, 4 Pac. 938), but we do not think the judgment, after so great a lapse of time, should be set aside in this somewhat summary manner.

[2] Petitioners should seek relief by some appropriate proceeding in which the purchaser at the foreclosure sale, if there was such sale, or other persons having an interest in the property arising out of such foreclosure proceedings, may have an opportunity to be heard.

It has been held that the remedy by certiorari is barred by the lapse of time within which an appeal from the judgment may be taken, unless circumstances of an extraordinary character be shown to have intervened. *Keys v. Marin County*, 42 Cal. 256; *Reynolds v. Superior Court*, 64 Cal. 372, 28 Pac. 121; *Smith v. Superior Court*, 97 Cal. 348, 32 Pac. 322. Eighteen years have passed since the judgment was entered. We think the mere statement that petitioners were not in fact served with summons and had no knowledge of the pendency of the action is not enough to justify the issuing of the writ. Some facts or circumstances explaining why they had no knowledge or the means of knowledge of so important a matter affecting their title to the property should appear. The writ is denied.

26 Cal. App. 589

ALEXANDER v. BOSWORTH et al.
(Civ. 1307.)

(District Court of Appeal, Third District, California. Feb. 18, 1915.)

1. HUSBAND AND WIFE ⇨262—CONVEYANCE TO WIFE BY HUSBAND—PRESUMPTION.

Where property is purchased by a husband with community funds and thereafter conveyed to the wife, the presumption is that a gift was intended.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 913, 914; Dec. Dig. ⇨262.]

2. HUSBAND AND WIFE ⇨49½—CONVEYANCE TO WIFE BY HUSBAND—INTENTION OF HUSBAND—QUESTION FOR COURT.

In case of a conveyance by husband to wife, it is for the court to determine from his acts, declarations, and conduct at the time whether he intended a gift.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 249-255; Dec. Dig. ⇨49½.]

3. CORPORATIONS ⇨120—SALE OF STOCK—AGREEMENT TO REPURCHASE—TENDER.

Where plaintiff, who had an option to return stock to defendant, who had sold it to him, if it was not worth a certain price on a certain date, did not so make an absolute offer of return, but merely suggested that the defendant perform his agreement, accepting in lieu thereof, from the defendant, an indefinite extension of the time during which such agreement should remain good, there was no waiver by the defendant of the tender back of stock necessary to charge him on the original contract, since to raise an implied waiver, there must be a distinct and absolute refusal to perform a promise,

which must be treated as such by the adverse party.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 495, 504; Dec. Dig. ⇨120.]

4. HUSBAND AND WIFE ⇨171—WIFE'S ESTATE—STATUS AS "SURETY"—HYPOTHECATION OF PROPERTY.

Where a wife joined her husband in the execution of a trust deed to her land to secure performance by him of a contract to repurchase stock sold by him if it did not reach a certain price, such wife became surety for her husband under Civ. Code, § 2831, providing that a surety is one who, at the request of another, to secure him a benefit, hypothecates property as security for the performance of an act in favor of a third person.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 671-683, 721, 950, 951; Dec. Dig. ⇨171.]

5. PRINCIPAL AND SURETY ⇨66—MEASURE OF SURETY'S LIABILITY.

The measure of a surety's liability is strictly limited by that of his principal, since a surety is bound only to answer for the principal's default.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 108-110, 112; Dec. Dig. ⇨66.]

6. MORTGAGES ⇨5—DEED OF TRUST—PERFORMANCE OF CONTRACT.

Where a wife executed a trust deed to a third person to secure her husband's performance of his contract to repurchase stock if it did not reach a certain price within a specified time, such deed of trust operated as a mortgage, a "mortgage" being a pledge of security for a deed whether the instrument is a simple mortgage deed in form, a mortgage with power of sale, a deed in trust, or a deed absolute on its face, accompanied by agreement to reconvey, courts of equity regarding the substance of a transaction, not the form, and it being immaterial that the conveyance is to a third person and not to the creditor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 4; Dec. Dig. ⇨5.]

For other definitions, see *Words and Phrases*, First and Second Series, Mortgage.]

7. CORPORATIONS ⇨120—SALE OF STOCK—OFFER AND ACCEPTANCE—OPTIONS.

All offers, such as an option to return stock to the seller at a specified price if it is not worth such price on a certain date, must be accepted in the terms in which made to ripen into a contract, alteration of the terms of the offer, or the addition of any condition, being tantamount to a rejection.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 495, 504; Dec. Dig. ⇨120.]

8. CORPORATIONS ⇨120—PURCHASE OF STOCK—OPTION TO RETURN—PERFORMANCE OF CONDITIONS.

Where defendant contracted to buy back stock, which he had sold, at a certain price if it did not reach such price within a specified time, an absolute offer to return and demand by the buyer was necessary to the rise of a right of action in him, since all acts in their nature conditions precedent to the exercise of an option must be performed to obligate the promisor.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 495, 504; Dec. Dig. ⇨120.]

9. CORPORATIONS ⇨121—PURCHASE OF STOCK—OPTION TO RETURN—EXERCISE—SUFFICIENCY OF EVIDENCE.

In an action by a buyer of stock to enforce his security for performance by the seller of a contract to repurchase such stock at a certain price if it did not reach such price within a

specified time, evidence held insufficient to support finding that plaintiff buyer made absolute a tender back of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. ¶121.]

10. HUSBAND AND WIFE ¶138—HUSBAND'S AGENCY FOR WIFE—AUTHORITY—SUFFICIENCY OF EVIDENCE.

In an action against husband and wife to enforce security given by the wife as surety for performance of the husband's contract, evidence held insufficient to warrant finding that the wife authorized her husband to extend the duration of his liability under the contract which she had secured.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 524-537; Dec. Dig. ¶138.]

11. PRINCIPAL AND SURETY ¶66—LIABILITY OF SURETY—UNAUTHORIZED EXTENSION.

The liability of a surety cannot be extended, without his consent, beyond the precise terms of his contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 108-110, 112; Dec. Dig. ¶66.]

12. PRINCIPAL AND SURETY ¶159—LIABILITY OF SURETY—EXTENSION—BURDEN OF PROOF.

In an action against principal and surety to enforce the liability of both, the burden of proof is on the plaintiff to show that the surety consented to any extension of the original liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 428-435; Dec. Dig. ¶159.]

13. PRINCIPAL AND SURETY ¶97—LIABILITY OF SURETY—UNAUTHORIZED EXTENSION—EFFECT.

The attempted unauthorized extension of a surety's liability by act of his principal discharges him, relieving his property of any lien with which it was charged to secure the obligation.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146-168; Dec. Dig. ¶97.]

14. HUSBAND AND WIFE ¶133—CONVEYANCE TO WIFE BY HUSBAND—INTEREST OF HUSBAND IN PROPERTY—SUFFICIENCY OF EVIDENCE.

In an action against a wife, as surety for her husband, to enforce a trust deed to her property, given to secure his obligation, evidence held sufficient to show that such husband never had any interest in such property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 487-494; Dec. Dig. ¶133.]

15. MORTGAGES ¶209—DEED OF TRUST TO SECURE CONTRACT—RECONVEYANCE BY TRUSTEE—LIABILITY.

The vendor of stock guaranteed to repurchase it at a certain price if it did not reach such price within a specified time, he and his wife executing a trust deed to a third party to secure the performance of the contract. According to the terms of the trust the trustee was to reconvey the property if there was no default of the husband on or before the time specified for the return at the option of the buyer. Being informed that the buyer was satisfied, and having no knowledge to the contrary of any fact that made it his duty to inquire further, the trustee reconveyed to his grantors after such date. Held, that, since if the buyer of the stock desired the trustee to hold the property, he should have informed him of any extension of

time for the return of the stock granted by the seller, such trustee was not liable to such buyer for his conveyance back to the trustors.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 466-468; Dec. Dig. ¶209.]

16. MORTGAGES ¶209—DEED OF TRUST TO SECURE CONTRACT—RECONVEYANCE BY TRUSTEE—LIABILITY.

Held, also, that the buyer of stock had no recovery against the trustee, since he had suffered no detriment through the reconveyance; the land in the hands of the grantors being subject to the same burden as though it were held by the trustee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 466-468; Dec. Dig. ¶209.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by Paul C. Alexander against P. H. Bosworth and others. Judgment for plaintiff, and defendants appeal. Reversed on rehearing.

W. T. Kearney, of San Francisco, for appellants. Finch & Melsted, of San Francisco, for respondent.

BURNETT, J. A rehearing was granted in this case, and counsel for both parties have spared no efforts further to enlighten the court in reference to the vital questions involved herein. The character of the property, whether community or separate, has received special consideration, and in the briefs the various decisions of the appellate courts of this state have been carefully analyzed and distinguished. We deem it necessary, however, to call specific attention to only two or three of these, as there can be little question about the law, although, admittedly, some inaccurate expressions are employed in a few of the opinions.

In *Hamilton v. Hubbard*, 134 Cal. 605, 65 Pac. 322, it is said:

"A deed of conveyance is not merely evidence of a gift or other grant. It is the gift or grant itself, and ipso facto operates to transfer or convey the title of the property described to the grantee. Civ. Code, §§ 1053, 1146; *Shanahan v. Crampton*, 92 Cal. 11, 13, 28 Pac. 50. * * * Under our law, a husband may make a deed—whether of his own or community property—to his wife, and in such case it is well settled that, in the absence of evidence of a contrary intent, the deed will vest in her the land conveyed as her separate property" (citing cases).

In *Alferitz v. Arrivillaga*, 143 Cal. 649, 77 Pac. 658, it is declared:

"The same principle applies where the deed is made by a third party to the wife at the husband's request. * * * Here all presumptions are in favor of the conveyances to the wife. They are presumed to have been made for a consideration paid by the wife, or, if we concede that the consideration was paid by the husband, it will be presumed that the property was intended as a gift to the wife as her separate property. * * * Facts must be proven from which it is clearly made to appear that the property, in such case, is community property, or the deed will be given effect according to its terms."

In *Fanning v. Green*, 156 Cal. 283, 104 Pac. 311, it is said:

"The well-settled rule is, as stated in *Nilson v. Sarmiento*, 153 Cal. 524, 96 Pac. 315, 126 Am. St. Rep. 91, 'where a husband purchases property with community funds, and directs the conveyance to be made to his wife, with the intent to make it her separate property, the deed will operate to vest the property in her as her separate estate.' The 'intent' to make it *hers*, her separate property, is a material factor in such a case; and, while such intent may, and possibly must, be inferred where there is no other evidence than that showing the mere direction by the husband, it may also be shown not to have existed by any competent evidence."

Without quotation, we may refer also, for an interesting discussion of the question, to *Carle v. Heller*, 18 Cal. App. 577, 123 Pac. 815.

[1, 2] Applying to the facts here the foregoing enunciated principles, it seems impossible to avoid the conclusion that the realty in controversy was the separate property of the wife. It was deeded to her on March 7, 1905. Since her husband attended to the transfer, he knew, of course, that she was the grantee named in the deed. He must be presumed to have intended the natural consequence of such conveyance. Granting that it was purchased with community funds, we must assume that the husband intended to make a gift of it to his wife. There is not a syllable of evidence that his intention was otherwise. There is no showing that either was not acting in the utmost good faith. There is not a suspicious circumstance connected with the transaction. There is no evidence even that he was in debt at the time, or that he had in view any possible creditors, or that his motive in having the property conveyed to his wife was to prejudice any one whatsoever. It is for the court to determine his intention from his acts, declarations, and conduct at the time. *Killian v. Killian*, 10 Cal. App. 318, 101 Pac. 806; *Woods v. Whitney*, 42 Cal. 358. It must be remembered that this conveyance to the wife was executed more than three years before the execution of the guaranty in question. If these instruments had been coincident or nearly so in their origin, some suspicion might thereby be cast upon said deed, but no such condition exists. The only circumstance relied upon by respondent is the fact that the husband continued in the management of the property. This, however, is equally consistent with separate ownership in the wife as in the community. Most wives prefer to have their husbands attend to all business matters in relation to the property of either or both. We may take it for granted that this is the ordinary and natural condition, and in this case it is quite evident from the record that Mrs. Bosworth desired her husband to assume all the responsibility of that character.

We may say, then, that, independent of the legal presumptions, no evidence of the intention that moved Mr. Bosworth in hav-

ing the deed executed to his wife is inconsistent with the terms of the deed itself. In fact, we may go further and say that what there is—slight as it may be—strengthens the presumption that it was intended to be her separate property. For Mrs. Bosworth testified that "Paul Bosworth never had any interest in the property," and, on cross-examination he testified that he claimed "to have no interest in the property."

[3] It seems equally clear that plaintiff did not exercise his option to sell the stock. Instead of making a tender he submitted an alternative proposition to Bosworth, and the latter accepted the agreement to extend the time. It cannot be said that there was any waiver of the tender. The rule as to that is:

"In order to constitute an implied waiver of an offer or tender by refusal of the other party to perform his promise, there must be a distinct and unequivocally absolute refusal to perform the promise, which must be treated and acted upon as such by the party to whom the promise was made." *Hanson v. Slaven*, 98 Cal. 377, 33 Pac. 266.

Respondent relies upon section 1440 of the Civil Code to excuse his failure to make tender, but that can afford him no comfort. Mr. Bosworth did not give notice to Mr. Alexander before the latter was in default that he, the former, would not perform his promise. Mr. Alexander submitted the new proposition before anything was said about Bosworth's ability to pay the money. As far as the original contract is concerned, therefore, Alexander was first in default, and, besides, it does not appear that Bosworth could and would not have secured the money for the repurchase by the 1st of July if Alexander had insisted upon it. Assuredly there is no evidence to support the allegation of the complaint "that prior to the 1st day of July, A. D. 1909, plaintiff herein demanded that said P. H. Bosworth *should repurchase* said shares of stock, and *tendered* said stock to said P. H. Bosworth."

After further consideration we adhere to our former opinion, which is as follows:

"The amended complaint alleges that the defendant P. H. Bosworth, on October 14, 1908, executed a contract wherein he guaranteed that a certain 1,000 shares of the capital stock of the San Francisco Concrete Building Construction Company, sold to plaintiff by said Bosworth, would be worth \$1 per share on July 1, 1909, and that the plaintiff, Alexander, should have the option of retransferring said stock to said defendant, on July 1, 1909, provided said Alexander made a tender and demand under said option on or before said last-named date; that the performance of said guaranty and agreement was secured by a certain deed of trust of certain improved real property in San Francisco, said deed of trust being executed by defendant P. H. Bosworth and his wife, said defendant Agnes C. Bosworth, to P. C. Huntington; 'that prior to the 1st day of July, A. D. 1909, at the city and county of San Francisco, state of California, plaintiff herein demanded that said P. H. Bosworth should repurchase said shares of stock, and tendered said stock to said P. H. Bosworth; that then and there said P. H. Bosworth requested said plaintiff herein to retain said shares of stock temporarily and waive in writing the right of said

plaintiff herein to demand the retransfer of said stock, and said defendant P. H. Bosworth did then and there agree with said plaintiff herein that said deed of trust should continue as security for said sum of \$1,000 indefinitely until the said property had been sold, and said P. H. Bosworth did then and there indorse in writing upon said guaranty the words appearing upon the top of said guaranty, and reading as follows, to wit: "This guaranty is good indefinitely until property is sold." Then follow allegations of the transfer of said property by said Huntington on July 13, 1910 (1909?) to said P. H. Bosworth, and by the latter, on October 2, 1909, to Virginia Bosworth, without the knowledge or consent of plaintiff, and that each of said transfers was made without any consideration whatever, and with the intent to defraud plaintiff, and for the purpose of destroying his security and of defeating his right to secure said sum of \$1,000 from said defendant P. H. Bosworth. The prayer was for annulment of these deeds, and that Virginia Bosworth be compelled to execute to a trustee to be appointed by the court a trust deed in conformity with the terms of said guaranty and that said trustee be authorized and directed to sell said property and from the proceeds thereof to pay to plaintiff herein said sum of \$1,000 and interest.

"The answer of Agnes C. Bosworth tendered an issue as to each of the material allegations of the complaint, except as to the execution of said deed of trust, and averred that 'she never had any notice or knowledge of said indorsement, and never consented to the making of the same, and the same, if made, was entirely without consideration,' that said property was, at all times mentioned in the complaint, her sole and separate property, and 'that all the said conveyances and deeds mentioned in said complaint were duly recorded more than one year before the commencement of this action, and that said plaintiff had actual and full knowledge of the same for more than one year before the beginning of this action.' It was further averred that Huntington had no notice or knowledge of said indorsement upon said guaranty, that he never consented to the making of the same, and that said conveyances were all openly and fairly made for a good and valuable consideration, and without any fraudulent intent or purpose to defeat any right of plaintiff.

"The findings were in favor of plaintiff, and he was awarded judgment against P. H. Bosworth, Agnes C. Bosworth, and P. C. Huntington for the sum of \$1,000, with interest from October 15, 1908, and it was decreed that plaintiff holds a lien on said real property, that said conveyances thereof are, and each of them is, null and void and of no effect, and that said property be sold to satisfy said claim of plaintiff.

"The said trust deed, as recited therein, was 'for the purpose of securing the due and full performance of the obligations that may arise by reason of the sale of 8,000 shares of the stock or part thereof, and by reason of the making in connection with said sale or sales of said guaranty and agreement on the part of P. H. Bosworth,' and it was expressly provided therein: 'First. If on the 1st day of July, 1909, the said P. H. Bosworth shall fail or neglect to pay the sum of one dollar per share, for each and every share offered to be resold to said P. H. Bosworth by any purchaser who shall have bought from said P. H. Bosworth, any part of the aforesaid eight thousand shares under the aforesaid offer of sale and who shall before the said first day of July, 1909, exercise the option of reselling the said shares to said P. H. Bosworth, as provided for in and by the guaranty and agreement aforesaid, then and in that event and on application of any purchaser who has properly exercised his option and from whom said P. H. Bosworth has failed or neglected to buy back said shares or any part thereof as

agreed, the said party of the second part shall sell the above granted premises in the manner hereinafter set forth and shall, on behalf of said P. H. Bosworth, with the proceeds of said sale, repurchase said shares in the manner hereinafter set forth. Secondly. In case said P. H. Bosworth shall well and truly perform his obligations arising under and by virtue of the guaranty and agreement aforesaid, and shall buy back at one dollar per share any and all of said eight thousand shares that shall be offered to said P. H. Bosworth in the proper exercise of the option aforesaid, then the said party of the second part and his heirs shall reconvey all the estate in the premises aforesaid to the parties of the first part, or to either of said parties of the first part upon the request of and as requested by said parties of the first part.' It was further provided that: 'If the option aforesaid is not exercised on or before July 1st, 1909, the purchaser will be deemed to have elected to keep the shares of stock.'

[4, 5] "The nature of P. H. Bosworth's original obligation is not the subject of controversy. His promise, as seen, was to repurchase the stock at \$1 per share, provided that the purchaser from him exercised his option to sell on or before July 1, 1909. Of course, if said option was not exercised within said period of time, Bosworth would be released from any obligation or duty in the premises. Agnes C. Bosworth did not sign this conditional contract of repurchase but, as we have seen, she joined in the execution of said trust deed, and thereby she became a guarantor or surety for the faithful performance of P. H. Bosworth's obligation, and she subjected her interest in said property to a charge or lien to answer for the default of her husband. It is probably not important whether we consider her contract technically a guaranty or suretyship, as the measure of her obligation is not thereby affected. She certainly promised 'to answer for the debt, default or miscarriage' of said P. H. Bosworth, and therefore her contract is within the Code definition of guaranty. Section 2787, Civ. Code. Her relation to the transaction is, however, more strictly expressed in the language of section 2831 of said Code as follows: 'A surety is one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor.' She became responsible for the performance of said act on the part of P. H. Bosworth in favor of the purchasers of said stock, and she hypothecated her property as security for the performance of said act. The measure of her obligation could not, of course, exceed that of her principal. She was required to answer only for his default, and that was conditional, as we have seen, upon a demand for the repurchase of the stock.

[6] "The position of Huntington was that of a trustee charged with the duty of disposing of said property so as to satisfy the demand of the purchaser of stock in case of the default of said P. H. Bosworth, and in the event that there was no default on July 1, 1909, he was to reconvey the property to the Bosworths, or to either, as directed. This deed of trust operated, in other words, as a mortgage of said property as security for the performance of said obligation of P. H. Bosworth. 'A mortgage is a pledge or security for a debt, whatever may be the form which the transaction takes, whether a simple mortgage deed in form, or a mortgage with a power of sale, or a deed in trust, or a deed absolute on its face, accompanied by an agreement in writing to reconvey, or to sell, or to do any other thing upon the payment of a certain sum of money; courts of equity look upon it as a mortgage and deal with it as such. And it is immaterial that the conveyance is made to a third person, and not to the creditor himself.' Perry on Trusts, § 609d. 'Such deeds

may be executed for the payment of debts or for the performance of any kind of a legal obligation, whether of the grantor or of a third person,' *Id.* § 602f.

[7-9] "What, then, was the situation of the parties at the beginning of this action? Had P. H. Bosworth suffered default on July 1, 1909, within the contemplation of said contract of guaranty? The answer to this question depends, manifestly, upon the consideration whether plaintiff had exercised his said option to sell his stock. In other words, did he make a tender of it and demand the repurchase by P. H. Bosworth? The latter testified positively to the negative, but it is claimed by respondent that a contrary view is supported by his own testimony. This, in full, was as follows: 'I had a conversation with Mr. Bosworth in regard to this stock at my office a number of days prior to July 1, 1909, at which Mr. Bosworth and myself, and no one else, was present. I was, of course, anxious about my money that was tied up in this proposition, and had him come to my office and told him that I wanted either my money or a further guaranty. He told me he was not in a position to pay me the money at the time, but was willing to extend the guaranty of stock, which he did. He wrote a further guaranty on the original guaranty as follows: "This guaranty is good indefinitely, until property is sold. P. H. Bosworth." This extension of the guaranty was written at the top of the original guaranty by Mr. Bosworth, in my office at the time he called there, which was several days before July 1, 1909. I did not ask anybody besides Mr. Bosworth to give me back this money. I never asked Mr. Huntington to give me this money, nor did I ask Mrs. Agnes Coryell Bosworth for the money; I never served any notice, or made any demand upon Mr. Huntington to hold this property. I presume that I merely relied upon the extension of the guaranty written by Mr. Bosworth upon the original guaranty. I never attempted to sell the stock to anybody, and I am morally certain that it was worthless.'

"It is a well-settled principle, applicable to options as to other contracts, that the offer must be accepted in the terms in which it is made, and the alteration of such terms, or the addition of any condition or limitation, is tantamount to a rejection of the original offer and the making of a counter offer; and, furthermore, where the exercise of an option depends upon the performance of acts which are in their nature or by express agreement made conditions precedent to such exercise, all such acts must be strictly performed. *Am. & Eng. Ency. of Law*, vol. 21, p. 930.

"Thus, where one has the option to return certain stock purchased and to receive a specified price therefor, he must actually return it, and it is not sufficient to deposit it in a bank and notify the vendor of the fact. *Orvis v. Waite*, 58 Ill. App. 504.

"We think it is very clear that there was, in the instant case, no such exercise of plaintiff's option as the law exacts. There was no tender of the stock, and there was no demand for the payment of the money. Indeed, a counter offer was submitted, which was accepted by Bosworth, and thereby a new contract was created. The evidence, viewed most favorably for respondent, shows that he did not stand upon his original contract, but was entirely willing to have it supplanted by a totally different guaranty, and he did not take the step that was necessary to convert Bosworth's conditional contract into one fixed and absolute.

"As plaintiff did not exercise his option to buy within the time specified, the evidence does not support the finding of the court 'that prior to the first day of July A. D. 1909, at the city and county of San Francisco, plaintiff herein demanded that said P. H. Bosworth should repurchase said shares of stock, and tendered said stock to said P. H. Bosworth,' and he acquired

no right under the original contract to bring an action against any of the parties defendant. It may be observed, also, that if plaintiff intended to count upon the first contract of warranty he should not have waited for nearly two years before instituting the action. *Sayre v. Gas, Light & Heat Co.*, 69 Cal. 207, 7 Pac. 437, 10 Pac. 408; *Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896. The fact is, however, that he relied and still relies upon the second contract whereby the time for the repurchase of the stock was indefinitely extended.

[10] "Nothing is alleged against the validity of this agreement, and we may assume that it was binding upon P. H. Bosworth, but we can find no warrant for holding that Mrs. Bosworth was or is subject to its operation. There is not a particle of evidence that she consented to it or had any knowledge or information concerning it. Nor was it shown that P. H. Bosworth was authorized to represent her in the transaction. She was not made liable either by her acts or by her conduct. It surely cannot be maintained that Bosworth was her agent for this purpose by virtue of the fact that he was her husband, or for the reason that she intrusted him with the management of other business matters. The only shadow of reason for respondent's contention is furnished by her testimony as follows: 'My cousin has never been fully paid back the amount which we borrowed from him with which to buy the lot. I do not know how much we still owe him. I don't know whether my husband would know how much we owe him or not. We never talk those things over. My husband attends to all of those matters, and I don't attend to any business affairs at all, and I don't know whether the mortgages to the Hibernia Bank have been paid off or not. I took no part in the business affairs of the San Francisco Concrete Building Construction Company. I had nothing to do with it at all. I did not want to turn the property over to Mr. Huntington, but my husband talked me into it. He almost forced me to do it. He asked me to turn the property over to Mr. Huntington, and I did so. I had nothing whatever to do with the business and my husband attended to all that so far as the Bosworth family was concerned.' The foregoing does not justify the inference that he was authorized to extend the guaranty. On the contrary, she was reluctant to execute it in the first instance and, furthermore, she testified: 'The proposition of my making the deed to Mr. Huntington, as I thought, was that it should be in trust for a certain time.'

[11] "Of course, a party cannot be bound by a contract that he has not made or authorized, and the principle is well settled that the liability of a surety is not to be extended, without his consent, beyond the precise terms of his contract. *Section 2819, Civ. Code*; *Pierce v. Whitney*, 63 Cal. 543.

[12] "It is also true that the burden of proof was upon plaintiff to show that Agnes C. Bosworth consented to the extension of the original obligation. *Tuohy v. Woods*, 122 Cal. 665, 55 Pac. 682. In this he failed, although his attention was called to the consideration by express averments in the answer.

"The two cases cited by respondent do not support his contention. The important question in *Tuohy v. Woods*, supra, was as to the burden of proof in reference to the consent of the surety where there was an extension of time for payment, and the Supreme Court said: 'When a surety has shown that the contract as to which he became surety has been changed, he has then shown that there has been an attempt to make him liable on a new and different contract; and the burden is then upon the other party to show that the surety has consented to the new contract.'

"In *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298; 60 Pac. 974, 66 Pac. 982, there was

positive evidence that the husband was authorized to act for the wife in the very transaction.

[13, 14] "Agnes C. Bosworth having been exonerated from liability by the execution of another guaranty to which she was not a party, her property was relieved of the lien with which it was charged to secure her obligation. It may be conceded that any interest in said property held by P. H. Bosworth would still be subject to the burden; but, under the evidence as disclosed by the record, it must be held that it was the separate property of his wife. The deed was made to her alone, and therefore the presumption follows that it was her separate property. Section 164, Civ. Code. The evidence that the property was purchased partly by money borrowed on mortgage security thereon would strengthen the presumption. *Dymont v. Nelson*, 166 Cal. 38, 134 Pac. 988. Besides, she testified positively that 'Paul Bosworth never had any interest in the property.' There was no evidence to the contrary.

[15, 16] "We think also that there is no warrant for the judgment for \$1,000 against Huntington. It is not doubted that a trustee is held to a strict accountability for his stewardship. He acted, however, in the utmost good faith, and the court so found. According to the terms of the trust he was to convey to the trustees if there was no delict of P. H. Bosworth on or before July 1, 1909. He was informed that the purchasers were satisfied, and he had no knowledge to the contrary or of any fact that would make it his duty to make further inquiry. It could not be expected that he would consult the books of the corporation to ascertain the names of all the stockholders and then seek of them information as to whether there had been any default. If plaintiff desired the trustee to still hold the property he should have informed him of the extension of the guaranty by P. H. Bosworth.

"Aside from the foregoing, it is apparent that plaintiff suffered no detriment from the conveyance executed by Huntington. The title having become reinvested in Agnes C. Bosworth, the land was subject to the same burden as though it were still held by Huntington for the purpose of the trust, and the remedy of plaintiff or the availability of his security was not affected in the least by said action of the trustee. Moreover, if it be true, as we have stated, that the liability of Agnes C. Bosworth terminated, the trust thereby became extinguished, and Huntington was justified in conveying the land as he was directed."

We think the judgment and the order should be reversed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

In Bank. Application for writ of supersedeas by William V. Bryan against the Superior Court of the State of California in and for the City and County of San Francisco and another to stay execution on a judgment against him. Petition dismissed.

Walter H. Linforth, of San Francisco, for petitioner. P. L. Benjamin, of Oakland, for respondents.

MELVIN, J. William V. Bryan has petitioned for supersedeas to stay execution on the judgment against him in *Levey et al. v. Hockwald et al.*, pending his appeal from an order denying his motion to set aside the said judgment. In his petition he alleges that he was one of the defendants in that certain action mentioned above, which was commenced in July, 1906, for the purpose of having a certain indenture of lease to property in San Francisco declared forfeited, and for the purpose also of obtaining possession of said premises, and of securing judgment for rent and for damages. He avers that in May, 1913, judgment in said action was entered against him for \$3,500; that without his knowledge, permission, or consent, an attorney at law Edwin L. Forster by name, had assumed to represent him in said litigation; and that petitioner had no notice of the setting of the cause for trial, or the trial thereof or the entry of judgment therein until June, 1913. The petition recites his application within six months after entry of judgment to have said judgment set aside, the denial of his motion, and his appeal from the order refusing to grant the relief sought. That appeal is still pending (S. F. No. 7228), and, although appellant in that case (petitioner here) has filed that which is in form a stay bond, he seeks to have the judgment stayed by the court on the ground that the said bond will not operate on the judgment itself and that the issuance of execution, which is threatened, will deprive him of the fruits of victory if he shall be successful in his appeal from the order refusing to set aside the judgment. This court, upon reading the petition, issued an order to show cause and stayed proceedings upon the judgment until the hearing and determination of said order.

[1] It seems to be agreed by petitioner and respondents that the judgment is not stayed by the appeal from the order refusing to set aside the judgment. Indeed, this court has declared that, except on an appeal from an order refusing a new trial, the judgment is not stayed by an appeal from an order made after judgment and by the filing of a bond. *Carit v. Williams*, 67 Cal. 580, 8 Pac. 93; *Credits Commutation Co. v. Superior Court*, 140 Cal. 82 73 Pac. 1009; *Weldon v. Rogers*, 154 Cal. 634, 98 Pac. 1070. In the case last cited the court reviews the authorities holding that a bond on an appeal from an order denying a motion for a new trial does oper-

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BRYAN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 7210.)

(Supreme Court of California. April 1, 1915.)

1. APPEAL AND ERROR ↪460—REFUSAL TO SET ASIDE JUDGMENT—EFFECT OF APPEAL.

A judgment is not stayed by an appeal from an order refusing to set it aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2217-2226, 2245, 2246; Dec. Dig. ↪460.]

2. APPEAL AND ERROR ↪479—JUDGMENT—SUPERSEDEAS—JURISDICTION OF SUPREME COURT.

The Supreme Court, though authorized to issue in a proper case supersedeas to stay execution on a judgment, will not issue the writ on the application of a defendant appealing from an order refusing to set aside the judgment, where it appears that defendant was duly served with summons, but made no arrangement for representation by counsel, though an attorney without authority to act for him appeared at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2251-2256; Dec. Dig. ↪479.]

ate to stay the enforcement of the judgment, and it is there held that "this is the sole exception to the rule."

[2] Petitioner therefore bases his request for a writ of supersedeas upon the alleged inherent power of this court to make his appeal effectual by supersedeas, after requiring a sufficient bond. In *Carit v. Williams*, supra, it was intimated that the court had such power, and in *Weldon v. Rogers*, supra, the court expressed no doubt regarding the proposition, but found that an authoritative decision upon the subject was not called for. In the later case of *Rogers v. Superior Court*, 158 Cal. 468, 111 Pac. 357, this court issued a writ of supersedeas staying proceedings on an order evidently improperly made, directing the sale of alleged perishable property, pending an appeal from said order. It was there held that such a writ may issue under proper circumstances, and that the court has inherent power in the premises.

But we do not think this a proper occasion for the exercise of the discretion of this court in petitioner's behalf, even granting that upon proper showing we would issue the writ. While he alleges that the attorney who appeared for him was not authorized so to do and that the trial of the action and the entry of judgment were had without his knowledge, Mr. Bryan does not deny that he was duly served with summons nor assert that he made any arrangement for representation by other counsel. In order that he might show to this court that he suffered under peculiar hardship, it would be necessary for him, at the very least, to allege some facts which would excuse his failure to appear at all in the case. If in fact he was served with summons and made no appearance, the plaintiffs would have been entitled to a judgment by default and he could not complain of the result obtained after he had been represented by an attorney who acted without authorization. *Pacific Paving Co. v. Vizelech*, 141 Cal. 8, 74 Pac. 352; *Fitzgerald v. Fernandez*, 71 Cal. 509, 12 Pac. 562; *Hunter v. Bryant*, 98 Cal. 251, 33 Pac. 55.

The petition of William V. Bryan for a writ of supersedeas, therefore, is denied, and the order to show cause is dismissed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.; SHAW, J.

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EMERSON v. KENNEDY MIN. & MILL. CO.
et al. (Sac. 2117.)

(Supreme Court of California. March 30, 1915.)

PUBLIC LANDS 39—TOWN-SITE PATENT—MINERAL RIGHTS—LACHES.

A town-site patent, issued under Rev. St. U. S. §§ 2387-2394 (U. S. Comp. St. 1913, §§ 4791-4793, 4797, 4798, 4800, 4801), embraced territory consisting of mining claims previously located and worked under the mining laws and

known to be valuable. The locators applied to the county judge for a conveyance thereof and in pursuance of the application, the judge executed a conveyance to the claimants as tenants in common. Thereafter neither the grantees nor their successors did any work necessary to hold their rights to the property as a mining claim. Forty years after the county judge's entry of the land as a town site, plaintiff located the property as mining claims and brought suit to quiet title. Held, that since the town-site patent was not absolutely void as to the known mineral lands within its territory or as to mines actually at that time located, occupied, and worked, notwithstanding section 2392, providing that no title shall be acquired to any mine or any valuable mining claim or possession under existing laws, plaintiff's claim was barred by lapse of time.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 83-90, 92-99; Dec. Dig. 39.]

In Bank. Appeal from Superior Court, Amador County; Fred V. Wood, Judge.

Action by Henry D. Emerson against the Kennedy Mining & Milling Company and others. From a judgment for defendants, rendered on sustaining a demurrer to the second amended complaint, plaintiff appeals. Affirmed.

Spagnoli & Spagnoli, of Jackson, for appellant. Curtis H. Lindley and Wm. E. Colby, both of San Francisco, for respondents.

SHAW, J. The court below sustained a demurrer to the second amended complaint and thereupon gave the judgment in favor of the defendants, from which the plaintiff appeals.

The action concerns the title to a parcel of land described as lot 19, block 11, of the town site of Jackson, in Amador county. The object of the action is to declare the defendant's claim of title and the instrument under which it claims invalid and to quiet the title of the plaintiff to said land. The defense offered by the defendants is that the plaintiff's action is barred by laches, and that his claim is a stale claim which will not be entertained or enforced by a court of equity. The basis of this defense will appear from the following statement of facts taken from the allegations of the complaint:

In the year 1870 the county judge of Amador county made entry of some 600 acres of land as a town site under the act of March 2, 1867, afterwards codified as sections 2387 to 2394 of the Revised Statutes of the United States, said entry being made for the use and benefit of the occupants of the several parcels of land embraced within the said territory, among which was the aforesaid lot 19, block 11. Afterwards, in pursuance of said entry, a United States patent to said lands was issued to said county judge for the benefit of the said inhabitants and occupants of the respective parcels, which patent was duly recorded in the recorder's office of the county. At the time of the said entry by the county judge and of the issuance of said patent to him of said town site, the territory embraced in lot 19 aforesaid consisted of two mining

claims, known, respectively, as the Austrian quartz mine and the Steckler quartz mine, both of which had been previously located, possessed, and worked under the mining laws of the United States and were then and there valuable gold mines and known to be such. They had been regularly located as mining claims by Charles Steckler, who located the Steckler quartz mine, and by George White, who located Austrian quartz mine. After the entry of the town site, and before the issuance of the patent, Steckler and White made application to the county judge claiming possession of said mining claims, which had been previously surveyed under the town-site act as lot No. 19 aforesaid, and asking for a conveyance thereof, in pursuance of which, on January 6, 1872, the said county judge executed a conveyance to the said parties as tenants in common of said land. In 1889, White conveyed his interest in the property to Sultana J. White. In 1902 Sultana J. White recovered judgment against Dora Steckler and others, said to be the heirs of Charles Steckler, declaring said Sultana J. White to be the owner of all of the said property, and that said defendants had no title thereto. About the same time Dora Steckler and others conveyed their interest therein to Sultana J. White. Afterwards, in April, 1902, Sultana J. White conveyed the property to Samuel W. Bright. Bright died seised of whatever interest he thereby acquired in said property, and after due proceedings in the administration of the estate the said lot was sold and conveyed by the administrator on April 25, 1910, to Robert I. Kerr. Kerr, on April 26, 1910, conveyed the same to the defendant Kennedy Mining & Milling Company. It appears that after acquiring title from the county judge under the town-site law Steckler and White ceased to perform the assessment work necessary to hold their rights to property as a mining claim, under the laws of the United States for the perpetuation of the miner's location thereto, and that none of their several successors in interest ever performed such assessment work. The plaintiff, Emerson, learning of this condition of the property, on April 5, 1910, located the said property as mining claims, asserting the right to do so under the aforesaid mining laws of the United States, designating the same, respectively, as the North Jackson Gate quartz claim and the South Jackson Gate quartz claim. Claiming to be the owner by virtue of these locations he brought this action basing his ownership solely on his right under the said mining locations.

The claim of the plaintiff is that inasmuch as the property was mineral in character, was known to be valuable for gold at the time of the town-site entry, and was at that time actually located and worked as a mine under the mining laws, no title was acquired thereto by virtue of the United States patent

or the subsequent deed of the county judge. This claim is based on the provisions of section 2392 of the United States Revised Statutes, providing that:

"No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper; or to any valid mining claim or possession held under existing laws."

If the plaintiff's mining location had been made within a reasonable time after the town-site patent and the conveyance thereunder and the forfeiture of the property as a mining claim by reason of the failure to do the requisite assessment work, there can be no doubt that the plaintiff should prevail, unless it should be held that Steckler and White, by applying for their conveyance under the town-site law and obtaining the same, had merged the mining claim into a claim under the town-site law and had accepted the patent under that law as a sufficient conveyance of their mining right, so that no further confirmation of title from the United States would be necessary. This proposition, however, we do not find it necessary to determine, for we are of the opinion that whatever the right of a claimant who had located his claim, under the mining laws, within a reasonable time, might be, the claim of the plaintiff under his location of April, 1910, is barred as a stale claim.

The plaintiff's theory is that the patent under the town-site law, so far as this land was concerned, was absolutely void by reason of the fact that said land at that time was a known gold mine and a valid mining location under the mining law, and, consequently, that no rights could be acquired under the town-site deed, either against the United States or against any subsequent location of a mining right under the United States. It is not correct to say that a town-site patent is absolutely void, with regard to known mineral lands embraced within the territory, or with regard to mines actually at that time located, occupied, and worked. The Supreme Court of the United States upon this subject holds that:

"A patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were nonmineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and, as we have already said, in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title." *Barden v. Northern Pacific Railroad*, 154 U. S. 331, 14 Sup. Ct. 1059, 38 L. Ed. 992.

The "judgment" there said to be conclusive was, of course, the mere ex parte decision of the officers of the Land Department. The case of *Moran v. Horsky*, 178 U. S. 205, 20 Sup. Ct. 856, 44 L. Ed. 1038, is to the same effect.

In a case of this character where a patent has been regularly issued by the United States for land, some of which is mineral

in character, the title to which would not pass if its mineral character were ascertained and declared, and a location under the mining laws is made after the lapse of many years, the courts of the United States have declared that the claim should be considered as stale and the action barred. In *United States v. Beebe* (C. C.) 17 Fed. 39, speaking of a case where the patents attacked by the United States had been issued some 43 years before the filing of the bill, the court said:

"The authorities support the proposition that lapse of time may be a good defense in equity, independently of any statute of limitations, and they show that the doctrine rests not alone upon laches; it is often put upon one or all of the following grounds, namely: First, that courts of equity must, for the peace of society and upon grounds of public policy, discourage stale demands by refusing to entertain them; second, that lapse of time will, if long enough, be regarded as evidence against the stale claim equal to that of credible witnesses, and which, being disregarded, would, in a majority of cases, lead to unjust judgments; third, that, after the witnesses who had personal knowledge of the facts have all passed away, it is impossible to ascertain the facts, and courts of equity will, on this ground, refuse to undertake such a task."

Accordingly, the court held that the United States and all its citizens claiming under the mining laws were alike barred from the assertion of such a claim. This decision was affirmed by the United States Supreme Court in *United States v. Beebe*, 127 U. S. 338, page 347, 8 Sup. Ct. 1083, page 1088 (32 L. Ed. 121). The court there said:

"We are of the opinion that when the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party, nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants."

There are many cases of similar character. *Moran v. Horsky*, supra, was very like the case at bar. The court there said, 178 U. S. page 213, 20 Sup. Ct. page 859, 44 L. Ed. 1038:

"It is well settled that when the government proceeds to set aside its patent, not for the sake of establishing its own right to the property, but in the interest of some person who has an equitable claim thereto, or to whom the government owes the duty of protecting his interests, it is subjected to the same defenses of laches, limitation, and want of equity that would attach to a like suit by an individual."

Under these authorities the United States itself could not maintain the action which the plaintiff is here prosecuting. A fortiori, the plaintiff cannot be allowed to do so.

The rule has been applied in cases where the lapse of time has been much less than 40 years, in some cases not exceeding 14 years. *St. Paul, etc., v. Sage*, 49 Fed. 315, 1 C. C. A. 256; *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134. See, also, *Kleinclaus v. Dutard*, 147 Cal. 249, 81 Pac. 516.

Applying these principles to the case at bar, it is clear that the plaintiff is barred. The court will conclusively presume, in aid of the defendants and those under whom they claim, who have so long relied on the validity of the town-site patent, that the mining locations, by virtue of which it is claimed the patent failed to convey title, had been abandoned, or that the mineral therein had all been extracted long before the plaintiff initiated his location, and the plaintiff's claim will be held to be stale and not enforceable in a court of equity.

The plaintiff relies on the decision of this court in *Callahan v. James*, 141 Cal. 291, 74 Pac. 853. The facts in that case, however, were practically the reverse of the facts here appearing. There the claimant of the mining right had remained in possession under his mining location, occupying and working the mining claim under the mining law and doing the necessary assessment work from the year 1854 until the year 1879, when the patentee of the town site conveyed to defendant's predecessors. The mining claimant had not abandoned his claim, but had remained in possession and was continuing to work the mine at the time the defendant acquired his supposed title under the town-site law. The mining right had never been forfeited and, under the provisions of section 2392 aforesaid, the title thereto, as against him, never passed to the grantee under the town-site law.

For these reasons we are of the opinion that the court below decided correctly in sustaining the demurrer.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LAWLOR, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

169 Cal. 708

In re McCARTY'S ESTATE. (L. A. 3923.)

(Supreme Court of California. March 30, 1915.
Rehearing Denied April 29, 1915.)

APPEAL AND ERROR $\Leftrightarrow$ 115—ORDERS APPEALABLE—ORDER OF SALE.

Under Code Civ. Proc. § 963, subd. 3, providing that an appeal may be taken from a judgment or order against or in favor of directing the sale of real property, an order denying the motion of the purchaser to set aside a sale ordered, and confirmed by the probate court is not appealable..

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 786-800; Dec. Dig. $\Leftrightarrow$ 115.]

Department 2. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

In the matter of the estate of Anna E. McCarty, deceased. From an order denying his motion to set aside an order of sale, P. L. Wilson appeals. Affirmed.

Frank Karr, A. W. Ashburn, Jr., and W. R. Millar, all of Los Angeles, for appellant. Allison & Dickson, of San Bernardino, and Edwin A. Meserve and Paul H. McPherrin, both of Los Angeles, for respondent.

MELVIN, J. This is in form an appeal by one P. L. Wilson from an order denying his motion to set aside an order of sale in the estate of Anna E. McCarty, deceased. The only connection of appellant with said estate is that of purchaser of the real property thereof, sold and confirmed to him by the probate court under and by virtue of the order of sale and subsequent proceedings which he attacked in his motion. On February 8, 1913, the court made an order authorizing the executor of the estate to sell the real property, and on December 6, 1913, an order was made confirming the sale of certain of the lands of the estate to the appellant herein. On May 2, 1914, appellant served and filed notice of motion to vacate and set aside the order of February 8, 1913, and all subsequent proceedings pertaining to the sale of the property, on the ground that the court was without jurisdiction to make the order and to entertain the other proceedings involved. On May 9, 1914, the motion was denied after argument. It will thus be seen that no appeal from the order authorizing the sale of the property of the estate, or from the order confirming the sale, is here involved, but that many months elapsed subsequent to such orders before appellant sought relief by his motion.

Respondent insists that the order attacked is not appealable. If any authority for such an appeal exists, it must be found in subdivision 3 of section 963, Code of Civil Procedure. Estate of Calahan, 60 Cal. 233; In re Seymour, 15 Cal. App. 290, 114 Pac. 1023. That subdivision provides that an appeal may be taken from a judgment or order "against or in favor of directing the partition, sale or conveyance of real property."

In Estate of Smith, 51 Cal. 565, it was held that under section 969, Code of Civil Procedure (which was the same as the third subdivision of the present section 963), an order refusing to set aside an order of sale previously made is not appealable.

In Estate of Martin, 56 Cal. 208, it was held that an order directing an executor to proceed with a sale previously ordered is not appealable, and in Lutz v. Christy, 67 Cal. 457, 8 Pac. 39, the court ruled that orders refusing respectively to set aside an order of distribution and an order settling a final ac-

count were not appealable. Without further citation it may be said that the decisions have rather strictly followed the letter of the statute.

But appellant cites with apparent confidence the recent case of Estate of West, 162 Cal. 352, 122 Pac. 953, in which it was held that an order setting aside an order, previously made, confirming the sale of land of an estate of a deceased person, was appealable because it was in legal effect an order against directing the sale of real property. It does not follow, however, that an order *refusing* to set aside an order of sale is appealable. The basic principle underlying the decision in the matter of the Estate of West was that the order set aside by the court below gave to appellant rights which, if properly conferred, were absolute. It followed logically that an order distributing those rights—and particularly the right to a consummation of the sale—was an order against directing a conveyance. But the order which appellant here seeks to have reviewed on appeal is neither in favor of nor against the making of a conveyance. The order which was made, denying Mr. Wilson's petition, was one which neither added to nor took any force from the orders previously entered. By the order of sale certain rights were created in favor of the purchaser on the one hand and the estate on the other, if the order was not erroneously made. If error existed any interested party who felt aggrieved had a right to an appeal from that order. But an unsuccessful attack upon such an order by motion to set it aside does not create a new right of appeal involving the very questions which might have been presented on an appeal from the order of sale itself or the order of confirmation. By such an order no rights are granted or taken, no obligations are imposed or removed, and no new directions for or against the sale or conveyance are given. The order refusing to set aside the orders theretofore made, therefore, is not appealable.

It follows that the order must be and it is hereby affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

169 Cal. 728

EARHART et al. v. CHURCHILL CO. et al.
(Sac. 2173.)

(Supreme Court of California. March 31, 1915.)

1. PLEADING — 34 — CONSTRUCTION AGAINST PLEADER—STATUTE OF LIMITATIONS.

Where the complaint did not allege when plaintiffs reached their majority, it will be presumed that each was sui juris long enough prior to the filing of the pleading to allow the statute of limitations to operate.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. — 34.]

2. LIMITATION OF ACTIONS ⇨179—PLEADING—DEMURRER.

When a complaint fails to state the time of the discovery of a fraud committed more than three years before commencement of the action, a demurrer based on the statute of limitations will lie.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 668, 669; Dec. Dig. ⇨179.]

3. GUARDIAN AND WARD ⇨105 — SALE OF WARD'S PROPERTY—PURCHASE BY GUARDIAN—SETTING ASIDE—LACHES.

The fact of a guardianship will not warrant wards in delaying many years after reaching their majority in instituting their suit to set aside a purchase of their property by their guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 383-389; Dec. Dig. ⇨105.]

4. LIMITATION OF ACTIONS ⇨103—COMPUTATION OF PERIOD—CONSTRUCTIVE TRUST.

A guardian of infant wards acquired property of such wards. The wards, after reaching their majority and discovering the acts of the guardian, delayed many years to attack the sale. Held, that even if the guardian was guilty of fraud so that a constructive trust was raised, no repudiation of such a trust by him was necessary to start the running of limitations, and hence the action was barred by the three and five year periods prescribed by Code Civ. Proc. §§ 318, 336 (subs. 1, 2), 338 (subd. 4), and 1573.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 500, 506-510; Dec. Dig. ⇨103.]

Department 2. Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by Alice Amelia Earhart and others against the Churchill Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Jacob F. Wetzel, of Yreka (W. H. Carlin, of Marysville, of counsel), for appellants. James R. Tapscott and James F. Farragher, both of Yreka, for respondents.

MELVIN, J. On May 29, 1909, a complaint was filed in which the plaintiffs attempted to allege two causes of action, one to quiet title to certain property in Siskiyou county, and the other based upon the asserted fraud of one Jerome Churchill as one of the administrators of the estate of Charles B. Boyes, deceased, in conducting a sale of the property involved to one Renner, who by a previous arrangement with said Churchill conveyed the land to him and to the Siskiyou County Bank. The sale was made after order of court in that behalf, and the amount obtained was the exact sum necessary to cancel a mortgage on the property, in which Jerome Churchill and the Siskiyou County Bank were the mortgagees. The date of said sale was December 21, 1895. It was alleged that before the death of said Churchill in 1908 he acquired the bank's title to the property and conveyed it to the Churchill Company, a family corporation of which he was a member. A demurrer to the second

cause of action was sustained September 21, 1912, and on October 7th of that year a "first amended complaint" was filed, seeking to set up a cause of action based upon the alleged fraud. A demurrer to this complaint was sustained, and, plaintiffs failing to amend their pleading, judgment was entered against them.

It was alleged in the first amended complaint that Jerome Churchill was, at the time of his death in 1908, an administrator of the estate of Charles B. Boyes, deceased, and that he had never been discharged from the office of guardian of the minor heirs of said Boyes, to which he had been regularly appointed. It was also averred that no final accounting had ever been made in either the guardianship proceeding or the estate of Charles B. Boyes. The probate sale was made at public auction, and was confirmed by the court on January 11, 1896. The alleged fraud of Churchill was "that for the purpose of shutting out competition in bidding at said sale, and for the purpose of preventing other bids being made at said sale, other than his own," he caused the sale to be called at "about the hour of 9 o'clock" of December 21, 1895. It had been advertised to take place at 10 o'clock, and "by reason of no competitive bids the sum for which said premises were bid in was far below the real and true value thereof." It thus appears that the sale took place more than 14 years prior to the commencement of the action and more than 16 years before the filing of the first amended complaint. On the confirmation of said sale Jerome Churchill, administrator, and Margaret Jane Boyes, widow of Charles B. Boyes, and administratrix of his estate, executed to the purchaser a deed, which was recorded January 17, 1896. Thereafter the purchaser gave his deed to the property to Churchill and the Siskiyou County Bank, which was also recorded on January 17, 1896, more than 13 years prior to the commencement of the action, and said deed had been of record more than 12 years before Churchill's death. Margaret Jane Boyes continued the administration of the estate of her deceased husband until April 21, 1910, when she resigned. It is to be noted that Margaret Jane Boyes is not a party to the action in any capacity, and that since its commencement and before the filing of the first amended complaint she joined with six of her children in a deed granting to the defendants all interest in the property involved. Respondents call our attention to the further fact that the other children, appellants herein, have been of the age of majority at least since a time prior to November 27, 1903. Estate of Boyes, 151 Cal. 145, 90 Pac. 454. But we need not refer to the opinion in that case, in which, by the way, Mr. Churchill's conduct in the very transaction here attacked as fraudulent, is highly commended.

[1-3] Upon the face of the complaint itself the court was bound to sustain the demurrer. As we are not informed in the first amended complaint when John Ethan Boyes and Fannie Jane Pope or either of them reached majority, we are bound to assume, under familiar principles of pleading, that each was sui juris at a time long enough prior to the filing of the first amended complaint to allow the statute of limitations to operate if it be applicable at all. When a complaint fails to state the time of the discovery of a fraud committed more than three years before the commencement of the action, a demurrer based upon the statute of limitations will lie. *Sublette v. Tinney*, 9 Cal. 425. From the complaint itself it appears that record evidence of Mr. Churchill's purchase of this property has been in existence for many years, and there is no allegation that appellants were not, at all times, fully aware of the facts. Merely because he had been their guardian they were not entitled, after coming of age, to shut their eyes to the fraud, if any had been committed. Equity will not countenance stale claims, and after the lapse of so much time will strictly scrutinize such bills as this, and will send applicants for relief out of court unless they make a most meritorious showing of their right to the assistance for which they pray. *Burke v. Maguire*, 154 Cal. 465, 98 Pac. 21; *Robertson v. Burrell*, 110 Cal. 578, 42 Pac. 1086.

[4] But appellants contend that by his fraud Mr. Churchill became their trustee, that his possession was their own, and that consequently the statute could not run against their rights. The rule which they invoke and the authorities which they cite are applicable to express trusts—not to involuntary trusts. A trustee of such a trust need not repudiate it in order that the statute should begin to run. *Hecht v. Slaney*, 72 Cal. 366, 14 Pac. 88; *County of Los Angeles v. Winans*, 13 Cal. App. 261, 109 Pac. 650; *Broder v. Conklin*, 121 Cal. 288, 53 Pac. 699; *Nougues v. Newlands*, 118 Cal. 106, 50 Pac. 386. Section 338, subdivision 4, Code of Civil Procedure, was therefore applicable and was properly held by the lower court to be a bar to the action. *Unkel v. Robinson*, 163 Cal. 651, 126 Pac. 485. The demurrer also specified sections 318, 336 (subdivisions 1 and 2), 343, and 1573, Code of Civil Procedure, so that in any view of the pleading the action was barred and the bar of the statute properly brought to the attention of the court.

All that has been written above has assumed that the fraud was sufficiently alleged. Respondents contend with much force that the complaint failed to aver fraud with that particularity and clearness required in all bills of equity seeking such relief as is here prayed for. But we need not go into that question, as the cause of action, even if suf-

ficiently set forth, is very clearly barred by the statute of limitations.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

169 Cal. 697

CATES et al. v. McNEIL et al. (L. A. 3451.)

(Supreme Court of California. March 30, 1915.)

1. LANDLORD AND TENANT ⇨92—OPTION TO PURCHASE—CONSTRUCTION—"THEN."

An option to purchase contained in a lease for ten years, stipulating that, in case the lessee shall not exercise his option to purchase within two years from the date of the lease, "then" the right to purchase shall absolutely determine, except that he, after having paid the rent for the term, shall "then" have the right and option to purchase for a specified price, need not be exercised at the time of the last payment of rent, but may be exercised at the expiration of the term; for the word "then" is used in the sense of "in the event of," or "in such case."

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 290-294; Dec. Dig. ⇨92.

For other definitions, see *Words and Phrases*, First and Second Series, *Then*.]

2. LANDLORD AND TENANT ⇨92—OPTION TO PURCHASE—CONSIDERATION.

An option to purchase contained in a lease for a term which stipulates that the lessee on payment of rent for the term may purchase the premises at a specified sum is not a mere offer, without consideration, of the privilege of purchasing within a specified time, which may be withdrawn before acceptance, but payment of the rent for the full term is a consideration for the irrevocable right to purchase on the lessee electing to do so.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 290-294; Dec. Dig. ⇨92.]

3. LANDLORD AND TENANT ⇨92—OPTION TO PURCHASE—ACCEPTANCE.

A notice by a lessee having the right to purchase the premises within a specified time for a specific price, which recites that the lessee exercises his option to purchase, and is ready and willing to pay the specified price, evidences an absolute and unqualified election to purchase, though it demands the lessor to produce a certificate of good title, and that on completion of the sale he shall convey the land free from incumbrance, and that, on notice of the deposit in a bank of certificate of title and deed, the lessee will deposit the price; for the reference to the furnishing of a certificate of title and the execution of a deed is not a condition to the acceptance of the option to purchase, but relates to the matters of carrying out the contract created by the acceptance.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 290-294; Dec. Dig. ⇨92.]

4. LANDLORD AND TENANT ⇨92—OPTION TO PURCHASE—ACCEPTANCE—CONDITIONS.

An option to purchase contained in a lease stipulating that at the end of the term the lessee, on payment of full rent, may purchase the premises for a specified sum, does not require the lessee to pay or tender payment of the price at the time of giving notice of acceptance, though payment will be essential before he is entitled to a conveyance.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 290-294; Dec. Dig. ⇨92.]

5. VENDOR AND PURCHASER ⇨57—OPTION TO PURCHASE—NOTICE OF ACCEPTANCE—OBLIGATION OF PARTIES.

In the absence of anything in the contract giving an option to purchase, the obligation of the parties in the performance of the contract on exercising the option is governed by the law governing contracts for the purchase and sale of property under which the agreement of the vendor to convey and the purchaser to pay the price are mutual and dependent covenants to be performed contemporaneously, and each party must perform his part within a reasonable time, and the payment of the price and the delivery of the deed are concurrent acts.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 87; Dec. Dig. ⇨57.]

6. SPECIFIC PERFORMANCE ⇨97—RIGHT TO RELIEF—PERFORMANCE OF CONTRACT.

A purchaser seeking the specific performance of a contract for the sale of real estate must perform or offer to perform his part of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. ⇨97.]

7. SPECIFIC PERFORMANCE ⇨97—OPTION TO PURCHASE—NOTICE OF ACCEPTANCE—PERFORMANCE OF CONDITIONS.

Where a lessee having an option to purchase the premises for a specified sum exercised the option, and offered to pay the price on the lessor producing a certificate of good title and depositing in escrow a deed conveying good title, and the lessor made no objection to the conditions accompanying the offer of payment, any objections were waived, and the offer of payment was sufficient to authorize specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. ⇨97.]

Department 2. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Charles B. Cates and another against J. A. McNeil and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Alton M. Cates and Stewart & Stewart, all of Los Angeles, for appellants. J. W. Ballard and Frank James, both of Los Angeles, for respondents.

LORIGAN, J. This action for unlawful detainer was brought by plaintiffs to recover possession of a tract of land in Los Angeles county under a claim that the defendants were unlawfully holding over after the expiration of their term of lease. Defendants denied such unlawful holding, and by cross-complaint sought specific performance under a provision of their lease giving them an option to purchase the leased premises.

It appears that on May 26, 1902, C. B. Van Every, the predecessor in interest of the plaintiffs in the fee of the land herein involved, executed a written lease of said premises, described therein as containing four acres more or less, to the predecessors of defendants for a term of ten years, at the monthly rent of \$10 per month, payable in advance on the 1st day of each month of the term, and also by the terms of said lease,

and in consideration thereof, granted to said lessees an option to purchase the said premises on certain terms if exercised by them at certain specified early periods during the leasehold term, and further provided for the exercise by them of a final option right (being the fourth option clause in the lease) as follows:

"And in case the party of the second part shall not exercise its right and option to purchase said land within two years from date hereof, then and in that event such right and option to purchase shall absolutely determine and be null and void, except that the party of the second part, after having paid the rent on said property for the term of ten years, shall then have the right and option to purchase said property for the price of \$600 per acre."

The lease was forthwith duly recorded. On January 3, 1903, the original lessees assigned and transferred said lease and the right to purchase the said leased premises under and by virtue of the option agreements therein contained to the defendants and cross-complainants. The lessor, C. B. Van Every, died on October 27, 1908, and, by due proceedings in the matter of his estate, plaintiffs became the owners of the fee of said leased premises.

The court found these facts, and, in addition, made a finding, No. 9:

"That the time to exercise the right or privilege to purchase said premises granted to cross-complainants by the fourth option clause of said lease at the price of \$600 per acre, by the terms of said lease and option, expired on the 27th day of May, 1912, the 26th of May, 1912, being Sunday; that on the 25th day of May, 1912, * * * the said cross-complainants elected to purchase the said leased premises under and by virtue of the right and privilege so to do granted by said fourth option of said lease at the price of \$600 per acre, and thereupon on said day and place duly and personally notified said Charles B. Cates thereof by serving upon him personally at said time and place a written notice thereof and tender of said price, and also on the 27th day of May, 1912, * * * duly and personally notified said * * * Ellen M. Brown thereof by serving upon her at that time and place a written notice thereof and tender of the said price, and then and there demanded from said plaintiffs their deed of conveyance conveying said premises to cross-complainants."

In connection with this finding the court set forth as part of it the said notice, tender, and demand just referred to in full, and we quote here only the material part, which is as follows:

"This is to notify you and each of you that we, the undersigned owners of the said indenture of lease and in possession thereunder of said lands and premises therein described, hereby exercise their option to purchase and are ready and willing to purchase the land in said lease described at the said price of six hundred (\$600.00) dollars per acre as in said lease stipulated.

"And we hereby demand that at as early day as possible you cause a certificate of title to said land described in said indenture of lease to be prepared, showing title in you free from all incumbrance, and that upon the completion of the same that you convey said land to us, free from all incumbrance, by a good and sufficient deed of conveyance, and deposit said certificate and deed in escrow with any bank, title

company, or individual you may select for that purpose, with instructions to deliver the same to us upon payment of the amount of purchase price. Upon notice of such selection for such escrow we will at once deposit therewith the full amount of such purchase price, with the instructions to deliver the same to you upon the delivery to us of said certificate of title and said deed of conveyance."

Proceeding, the court found that at the time of serving said written notice of election neither of the plaintiffs so served at that time made any objection to said notice or tender or to any matter, form, or provision therein, nor to the said notice or tender, or as to the mode of performance on the part of cross-complainants, though each had ample opportunity to do so; that plaintiffs failed and refused to execute said conveyance to respondents, and on January 20, 1912, while cross-complainants were still in possession of the premises, plaintiffs demanded of them a surrender of the possession by them to plaintiffs, which being refused, plaintiffs thereupon commenced this action in unlawful detainer; that cross-complainants, as lessees, had during the term of the lease erected on the premises a plant for refining crude petroleum, and made improvements and additions to their plant of the value of \$30,000; that at the time of the making and execution of the lease the fair market value of the leased land did not exceed \$400 an acre; that cross-complainants in their cross-complaint had made tender to plaintiffs of said option price of \$600 an acre, and in open court at the opening of the trial of this action had further tendered to plaintiffs said price, and then and there offered the same to plaintiffs upon receiving their deed of conveyance of said land.

As conclusions of law the court found that the respondents were entitled to have their option agreement specifically performed by the execution of a deed to them by plaintiffs on payment to the latter of \$2,262, with interest.

Judgment was entered accordingly, from which plaintiffs appeal, accompanying their appeal by a duly certified transcript of the evidence given on the trial.

[1] The sole contention of appellants is that the evidence does not support finding No. 9, which we have quoted, in which the court finds that on May 25-27, 1912, respondents had elected to purchase the leased property by virtue of the right and privilege so to do granted by the option, or that on those dates they had tendered the plaintiffs the purchase price provided to be paid in exercise of the option. In this behalf they assert that, under the terms of the option, the time to exercise it was on the date for the payment of the last rent—April 26, 1912—and that an election to do so subsequent to that date, but within the terms of the lease, was too late, relying in this contention on the word "then," found in the last clause of the option right, which declares that the "party of the second part, after having paid the rent

on said premises for the term of ten years, shall *then* have the right and option to purchase said property at the price of \$600 per acre." They insist that by the use of the word "then" a definite time was fixed for the exercise of the option; that the privilege of purchasing the premises arose at the time for payment of the last rent on April 26, 1912, and was "then" to be exercised by acceptance if they should elect to avail themselves of the right, and, as it was not exercised then, it expired. But what was meant by the use of the word "then" in the sentence is a matter of interpretation. It will be observed that there is nothing in the terms of the option provision expressly making time of the essence of the exercise of the option right. Nor do we think that it must be held that the word "then" was intended to fix with certainty the time for such exercise as of the date of payment of the last monthly rental. It will be noted that the word "then" is used twice in the fourth option provision here under consideration—first in referring to the two-year option; and next as applying to this particular option clause. While the word "then" may be used as an adverb of time, and in a chronological sense fix a time limit, so also it may be used in a sequential sense meaning "in that event" or "in such case." The latter is obviously the sense in which it was used in referring to the two-year option, and we think such was the sense in which it was used respecting the final option. By the provision of the lease that option right was not available to respondent lessees until "after having paid" the rent for the full term of ten years. Payment for this full term was a condition precedent to the exercise of this right of option at all, and it was the fulfillment of this condition precedent to which the word "then" had relation, and was used in the sense of "in the event of" or "in such case" of payment of rent for the term of ten years the lessees "shall then have the right and option to purchase said property." This construction is, in our opinion, strengthened by a consideration of the lease. After the payment of the last installment of rent the relation of landlord and tenant was still to continue for a month. It is hardly to be assumed that it was the intention of the parties to the option right that it should be exercised while the relation of landlord and tenant existed. On the contrary, the reasonable interpretation would be that, while the right of option was to arise for the benefit of the lessees only on payment of rent for the full term, the lessees were not required to exercise that right until the expiration of the lease.

[2, 3] It is next insisted by appellants that the respondents did not on May 25-27th elect to purchase the leased premises under the right granted by the option. The claim is that the notice of acceptance of the option right was not absolute and unqualified, but was accompanied by conditions not embraced

in the terms of the option offer and which rendered its acceptance conditional; hence it is claimed there was no good or valid acceptance.

It is to be observed that the option right involved here is not a mere offer without consideration of the privilege of purchasing the property within a specific time which might have been withdrawn at any time before acceptance by the lessor. Here there was a valuable consideration moving from the lessees to the lessor; the payment by the lessees of rent for the full term was the consideration for their irrevocable right to purchase the leased premises at the specified price if they should elect to do so. *Hall v. Center*, 40 Cal. 63.

Having purchased this right to have a conveyance of the property made to them after the payment of rent for a definite term if they should elect to exercise the right according to the terms in which it was offered, all that was necessary on their part to do was to give notice in due time of their acceptance of the terms. When this was done what was before an option right became an executory contract for the sale and purchase of the property. There can be no question but that the respondents served upon the appellants a notice of their acceptance of the option offer and in the exact terms set forth in the option clause. This is apparent from the opening sentence of that notice as quoted in the finding. But it is insisted by appellants that, while respondents gave notice of their exercise of the option right and their readiness and willingness to purchase the land at the price stipulated in the lease, this attempted acceptance was accompanied by conditions—that a certificate of title and a deed to the premises should be deposited in escrow with some bank—that these conditions were not required or provided for in the option contract to be done by the lessor or the appellants as successors in interest, and that a demand for their performance accompanying the notice of acceptance as part thereof rendered the acceptance ineffectual. It is true that the option contract does not call for the production of any certificate of title or deed to be deposited in escrow, and the demand of the respondents in this respect was unwarranted. But these matters had reference solely to the performance of the contract; the manner in which it should be carried out after it was created by the acceptance which was made. The opening paragraph of the notice to appellants was an absolute and unqualified acceptance of the right of option according to its terms. The subsequent paragraph referring to furnishing a certificate of title and the matter of the escrow contains no language imposing the doing of these things as a condition to the acceptance. It is a paragraph wholly disconnected with the previous paragraph declaring an acceptance in clear and unqualified language,

and does not in terms or by necessary intent impose any conditions as to the acceptance of the option. It does not say that the option is accepted "on condition" or "provided" these things shall be done. It has reference to something that is to be done and necessarily would have to be done after the acceptance in the previous paragraph is declared made; things that are to be done "at as early a date as possible" after the acceptance. The acceptance by respondents unconditionally made in the first paragraph of the notice having converted the option right into an executory contract of sale and purchase of the leased premises, the second paragraph was not intended to have any relation to such acceptance nor to render such acceptance in any particular conditional or qualified. It related merely to the suggestion of a convenient mode or manner of closing up the transaction—the performance of the executory contract of sale created by the acceptance. Of course, as we have said, the contract did not provide for the doing of these things even as a mode of performance, and the court in its decree for specific performance did not so require. What we are holding, however, is that these matters complained of as embraced in the notice were not intended to have anything to do with the acceptance of the option right which was unqualifiedly accepted by the respondents according to its terms "as in said lease specified," but related solely to the matter of carrying out the contract by such acceptance. Similar conditions accompanying acceptance have been similarly construed. *Turner v. McCormick*, 56 W. Va. 161, 49 S. E. 28, 67 L. R. A. 853, 107 Am. St. Rep. 904; *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887; *Long v. Needham*, 37 Mont. 408, 96 Pac. 731; *Rankin v. Rankin*, 216 Ill. 132, 74 N. E. 763.

[4] It is further contended by appellants that, under the terms of the option clause in the lease, payment of the purchase price at the time when the option right might be exercised was essential to constitute acceptance; that there was no tender of the purchase price made to the appellants when the respondents served their notice of the exercise of their right to purchase; and hence there was no valid acceptance. In support of this contention they insist that the payment of the money which respondents offered to make was a payment to be made after appellants had complied with the unwarranted conditions as to a certificate of title and the preparation and deposit of a deed in escrow; that this was an offer to pay money, not only on such unwarranted conditions, but in the future, while, in order to constitute a valid exercise of the right of option to purchase the property and create a binding contract, it was essential that payment of the purchase price be tendered at the time when the right was exercised; and that payment of such purchase price was the

only thing required by the option in order to constitute acceptance. We do not deem it necessary here to discuss the terms of the notice served on appellants as to whether it constituted a tender of the purchase price at that time or not. The option clause gave the respondents a right to purchase the leased premises for the price of \$600 an acre. There is nothing in the option clause which requires payment of the price of the land to be made or tendered when the option right is exercised in order to constitute an acceptance. Payment may or may not be made an essential condition to the exercise of such a right, just as the parties see fit to provide for in the option agreement. But nothing is said about payment in the option clause here. It is not even mentioned. What the respondents acquired under the option clause was an irrevocable right of option to purchase the property at a specified price if they should at the end of ten years elect to do so, and all that was necessary on their part to do, as far as the terms of the option are concerned, in order to constitute a binding contract for the sale and purchase of the premises, was to give notice of their acceptance of the right. This they did. Payment of the purchase price at that time was not a condition required by the option, and it is not for the court to incorporate terms in it which the parties to it did not incorporate or even mention. Of course, payment would be essential before respondents would be entitled to a conveyance of the land, but that is a matter pertaining to the performance of the contract of purchase and sale which had been created by the acceptance.

[5] In the absence of anything in the contract itself, the obligation of the parties in the performance of the contract is governed by the law applying generally to bilateral contracts for the purchase and sale of property under which the agreement or covenant of the vendor to convey and the vendee to pay the purchase price are considered mutual and dependent covenants, and are to be performed contemporaneously by the respective parties. Each party must perform his part in carrying out the contract, and do so within a reasonable time after the contract is created. The payment of the purchase price and the delivery of the deed are to be done concurrently, and, as the option clause here did not provide otherwise, respondents were not bound to make payment of the purchase price until appellants were prepared to make them a deed conveying to them a good title to the premises.

[6] Of course, before the right to specific performance may be asserted, the party invoking it must have performed or offered to perform on his part.

[7] But, as to the payment for the land, the respondents offered to make it before the suit and on delivery of a deed to them by

appellants. It is true that this offer was accompanied by conditions—the production of a certificate of title and deposit of the deed in escrow—which were not provided for in the option, and which respondents had no right to exact. But, as found by the court, no objection was made to these conditions accompanying the offer of payment, although appellants had ample opportunity to do so; and hence, under the rule laid down in *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115, they were waived, and the offer of payment as made was good. Appellants declined to do anything on their part towards performance of the contract, but shortly after the notice of acceptance and the offer of payment accompanying it, and though respondents were not in default, repudiated their right to have the purchase consummated by bringing an action to oust them from the possession of the property. In their cross-complaint in this action respondents tendered the purchase price of the property to the appellants, and offered to pay it into court for them. Under these circumstances they did all they were required to do, and were entitled to the decree of specific performance rendered in their favor. The judgment appealed from is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(169 Cal. 710)

MURPHY et al. v. MAGEE. (Sac. 2052.)

(Supreme Court of California. March 30, 1915.)

1. NEW TRIAL ⇐128—MOTION—SPECIFICATION OF INSUFFICIENT EVIDENCE.

The specification, on motion for new trial, in an action to establish a partnership and for an accounting, that the evidence is insufficient to sustain the finding that a certain sum is due from defendant, or to sustain one that any sum is due from him, the statement on the motion containing all the evidence, is sufficient to inform the court and opposing counsel of the ground of the motion, and so is adequate, and justifies the granting of the motion because it appeared that there had not been an accounting, which was necessary.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257-262; Dec. Dig. ⇐128.]

2. NEW TRIAL ⇐128—MOTION—ATTACKING FINDINGS.

Even if the setting forth in the trial court's findings of fact of a certain amount as being "due" from defendant be a conclusion of law, rather than a finding of fact, it may, on motion for new trial, be attacked as a finding, by a specification of insufficiency of evidence to sustain it.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257-262; Dec. Dig. ⇐128.]

Department 2. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Ellen Magee Murphy and another against James Magee, Jr. From an order granting defendant's motion for new trial, plaintiffs appeal. Affirmed.

T. T. C. Gregory, of San Francisco, Theodore W. Chester, of Sacramento, and C. J. Goodell, of San Francisco, for appellants. Bell, York & Bell, of Napa, and Theodore A. Bell, of San Francisco, for respondent.

MELVIN, J. Plaintiffs sued as successors of Michael Magee, deceased, seeking a judgment that James Magee, Jr., and Michael Magee were partners in business at the time of the latter's death; that plaintiffs were entitled to half of the earnings of the partnership since the demise of said Michael; and for an accounting. The court found the existence of the partnership as alleged, and that defendant had taken into his possession \$7,293 belonging to said partnership, all of which he had appropriated to his own use except \$75. It was also found that plaintiffs owned a half interest in the lot on which the partnership business was conducted; that the reasonable rental value of the premises was \$65 per month; that the accounts between the parties to the action had been closed and settled; and that plaintiffs owned a half interest in the partnership. After motion for a new trial the court granted the motion as to part of the judgment only. The order recites that, it appearing that a partnership existed as alleged in the complaint, but it also appearing that no accounting had taken place, the court approved the finding and judgment that a partnership existed, ordered an accounting, and set aside that part of the judgment fixing defendant's liability at \$4,877.82.

[1] Appellants' sole point is that the specification of insufficiency of evidence was not in form to bring the matter of lack of accounting to the notice of the court—in other words that there was, in legal effect, no specification at all. The specification attacked is as follows:

"The evidence is insufficient to sustain the finding of the court that there is, or was due, from the defendant, James Magee, Jr., to said copartnership the sum of \$9,755.64, or to sustain the finding and decision of the court that any sum whatsoever was or is due from the defendant, James Magee, Jr., to said copartnership, or to the plaintiffs."

The statement on motion for a new trial contained all of the testimony and exhibits offered or produced by either party, and we think that the specification was sufficient to inform the court and the opposing counsel of one of the grounds upon which the motion was to be made. It is therefore adequate under the rule declared in *American Type Founders' Co. v. Packer*, 130 Cal. 461, 62 Pac. 744, and supported by the decisions of this court in *Pendola v. Ramm*, 138 Cal. 521, 71 Pac. 624, *Drathman v. Cohen*, 139 Cal. 313, 73 Pac. 181, *Gwin v. Calegaris*, 139 Cal. 391, 73 Pac. 851, *Di Nola v. Allison*, 143 Cal. 115, 76 Pac. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84, and *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 124, 64 Pac. 113.

[2] Appellants seem to rely upon the circumstances that the setting forth of a certain amount as "due" was really a conclusion of law, although it appeared also in the "findings of fact," and that the specification of its insufficiency was not in any proper sense an attack upon a "finding." The rules with reference to specifications are much broader and more liberal than those relating to pleading, and therefore we must hold that defendant's counsel in the specifications called attention of court and opposing counsel to the very matters against which their attack was to be directed. They were not to blame if the court included in the findings of fact that which was more properly a conclusion of law. Indeed, if we were to adopt the theory of plaintiffs that the finding is unassailable as such, because it is really a conclusion of law, then we would be forced to the position that there is no finding at all to support the formal conclusion of law and the judgment in the important matter of the amount of money adjudged to be due. The finding (so-called) implied an accounting and a computation of a specific amount. The specification sufficiently directed attention to the parts of the record, if any, which would support these implications.

The order is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

169 Cal. 713

CARTY v. BLAUTH. (Sac. 2138.)

(Supreme Court of California. March 30, 1915.)

1. LANDLORD AND TENANT $\S$ 152—FALL OF BUILDING—LESSOR'S LIABILITY.

Absent requirement in a lease that the landlord make repairs and keep the premises in a habitable condition, he is not liable for injuries to the tenant from fall of the building, on the adjoining owner making excavations, though notified, pursuant to Civ. Code, $\S$ 832, of the intended work, and taking no steps to prevent the fall; the statute not changing the common-law rule as to duty of the landlord to the tenant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. $\S\S$ 152, 538-543, 545-549, 551-557; Dec. Dig. $\S$ 152.]

2. LANDLORD AND TENANT $\S$ 170—FALL OF BUILDING—LESSOR'S LIABILITY.

There is no liability on the ground of maintaining a nuisance of a landlord to a tenant because of fall of the building, on the adjoining owner making excavations, though the landlord is notified of the intended work, and takes no steps to prevent the fall.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. $\S\S$ 685-690; Dec. Dig. $\S$ 170.]

3. LANDLORD AND TENANT $\S$ 130 — COVENANT OF QUIET POSSESSION—BREACH.

The implied covenant of a lessor for quiet possession is measured by the lessor's obligation to the tenant under the lease, so that, he not being compelled thereby to protect the building against fall from excavation by the adjoining owner, the covenant is not breached by such

fall and failure of the lessor to do anything to prevent it.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 470-481; Dec. Dig. ☞130.]

Department 2. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Elizabeth R. Carty against Theobald Blauth. Judgment for defendant, and plaintiff appeals. Affirmed.

W. A. Gett, of Sacramento, for appellant. Philip S. Driver and C. E. McLaughlin, both of Sacramento, for respondent.

MELVIN, J. Plaintiff appeals from a judgment entered after the sustaining of a demurrer to his complaint.

The complaint was in three counts. Briefly stated, the facts alleged were as follows:

Plaintiff was the tenant from month to month of two floors of a building situated in the city of Sacramento and belonging to defendant. Plaintiff had been for two years conducting successfully a lodging house in the part of the building so occupied. The owner of the adjacent property, the Folsom Investment Company, began excavating on its land, and, finding it necessary to dig lower than the foundations of defendant's building, gave written notice to defendant of the general nature of the excavations, but defendant failed to do anything by way of providing lateral support for his building. Despite the exercise of reasonable care by the owner of the adjoining land in making the excavation, and without negligence or fault on plaintiff's part, the building collapsed, thereby seriously injuring plaintiff, destroying the furniture in her lodging house, causing her in her flight to leave behind \$100 worth of other personal property, and breaking up her business. The facts pleaded and the relief asked are the same in each count. The first count is upon defendant's alleged negligence in failing to shore up or otherwise protect his building; in the second it is alleged that by such failure he created and maintained a nuisance; and in the third it is averred that by reason of defendant's negligence plaintiff was deprived of the possession and enjoyment of the premises which had been leased to her. Plaintiff's counsel in his brief insists that the landlord is liable to his tenant under the circumstances alleged: (1) For disturbing the tenant's rights in violation of the implied covenant for quiet enjoyment; (2) for permitting a nuisance on the premises; (3) for breach of his general duty to the public to refrain from negligent conduct; and (4) for violation of his special duty not to injure any one properly on his real property.

[1] Appellant's counsel concedes that the case of *Brewster v. De Fremery*, 33 Cal. 344, is directly adverse to his views, but seeks to differentiate that case from this one because

the former was decided before the Code prescribed notice by the owner of adjacent property of his intention to excavate, and because, as he insists, the opinion in that case was not devoted to a consideration of the duty of a landlord to refrain from disturbing the tenant's quiet enjoyment of the premises, or to other duties of such landlord as an owner of real property or as a member of the community in general. *Brewster v. De Fremery* was in all of its essentials exactly like the case at bar. The plaintiff's decedent had been killed by the collapse of a building of which he was tenant from month to month. No covenants to keep the premises in repair or in habitable condition were averred, and for the purposes of the decision the court assumed that there were none. The house fell because of an excavation on the adjacent land. Defendants had timely notice of the excavation, which they ignored. A demurrer to a complaint which pleaded these facts was sustained. The court said in the course of the opinion:

"The house did not fall in consequence of any act of the owners, but in consequence of the acts of parties owning the adjoining lot, in excavating it for purposes of their own, after the deceased entered into the possession of the demised premises under the lease. There was no covenant on the part of the lessors, the defendants, to uphold or keep the premises in repair, or in a habitable condition. Without an express covenant to that effect, they were not bound to repair, or to keep the premises in a habitable condition. We think the rule correctly stated in *Howard v. Doolittle*, 10 N. Y. Super. Ct. 464. In that case it was held that a landlord is in no case bound to repair, unless by force of an express covenant or contract, and that, even when a building is let for a special purpose, and its use and occupation for any other is, in terms, prohibited, there is no implied contract or warranty on the part of the landlord that the building shall be or continue, fit for the purpose for which it is demised. * * * Aside from the relation of landlord and tenant, there is no ground, under the circumstances alleged, for holding defendants responsible. The injuries resulted from the occupancy of the premises by the deceased as a tenant. The landlord was under no obligation to uphold or repair, and there was no breach of duty on his part. The cases cited in relation to nuisances have no application."

We see no reason for departing from the doctrine of *Brewster v. De Fremery*, unless the duty of the landlord has been changed by section 832 of the Civil Code, which was adopted after the decision of that case. That authority has been cited with approval, particularly on the ruling that the only consequence of a breach of a landlord's obligation to repair is that the tenant may either vacate the premises or expend one month's rent towards repairs after ineffectual notice to the lessor to make such repairs. *Sieber v. Blanc*, 76 Cal. 174, 18 Pac. 260; *Gately v. Campbell*, 124 Cal. 523, 57 Pac. 567. And the same principle has been announced in such cases as *Maroney v. Hellings*, 110 Cal. 220, 42 Pac. 560; *Van Every v. Ogg*, 59 Cal. 565; *Green v. Redding*, 92 Cal. 550, 28 Pac. 599; *Calla-*

han v. Loughran, 102 Cal. 480, 36 Pac. 835. And it has been held that, in the absence from the lease of a covenant obliging the landlord to make repairs and keep the premises in habitable condition, he is not liable for injuries to the tenant or others resulting from defects in the leased property. *Willson v. Treadwell*, 81 Cal. 58, 22 Pac. 304; *Daley v. Quick*, 99 Cal. 180, 33 Pac. 859.

Appellant, while admitting the force of these decisions, insists that since the adoption of section 832, Civil Code, the notice prescribed by that section creates a duty upon the part of the landlord to safeguard his building from possible collapse, and that he owes such duty, if not to the owner of the adjacent land, at least to others. But since the adoption of that section the rights and duties of proprietors of adjoining property are substantially the same as they were before. *Aston v. Nolan*, 63 Cal. 274. In *First National Bank v. Villegra*, 92 Cal. 98, 28 Pac. 97, it was held that the excavating owner, after giving notice, could not collect any compensation for protecting his neighbor's property. It was there held that the purpose of section 832, in its broadest scope, was to enable the excavator to relieve himself from liability; not to create any liability in his favor against his neighbor. In *Conboy v. Dickinson*, 92 Cal. 604, 28 Pac. 809, the court quoted from the opinion in *Aston v. Nolan*, supra, to the effect that section 832, Civil Code, had not materially changed the common-law rule. See, also, *Sullivan v. Zeiner*, 98 Cal. 348, 33 Pac. 209, 20 L. R. A. 730. There is nothing in the section considered which casts any duty upon the owner of a building with reference to his tenants, when the proprietor of adjoining property begins to excavate for building purposes. If the tenant, seeing the imminent danger from the excavation, decided to remain and run the risk of injury, just as the landlord decided to run the risk of destruction to his property, he may not complain, under the circumstances here disclosed, because the owner of the building failed to do something which he was not required to do either by the statute or by his contract with his tenant.

[2] Plaintiff's contention that defendant was liable for the maintenance of a nuisance is also fully answered by *Brewster v. De Fremery*. The same point was made in that case and decided adversely to the appellant there. Indeed, as all of the obligations between the parties arose from the relation of landlord and tenant, there is no force in any of appellant's contentions with reference to the defendant's alleged breach of duty to the general public or to one properly on his premises.

[3] The implied covenant for quiet possession is measured by the obligation of the

landlord towards the tenant under the lease. If not compelled by the lease or the statute to reinforce the wall of his building, no implied covenant for quiet enjoyment could compel him to do so, any more than he could be compelled to sue to enforce the removal of a powder factory which might be established near the property. In this behalf appellant says that the landlord owes to his tenant a duty beyond and in addition to the duty of repairing dilapidations—a duty which arises out of the implied covenant for quiet enjoyment. He asserts that the landlord, for example, could not be held guiltless if he should deliberately throw rocks at his tenants, or should negligently allow rocks to be rolled down upon them. The illustration is not apt. The injury of which this tenant complains was not due to any act on the part of the landlord, but was due entirely to the excavation on the adjoining property. Appellant cites *Jessen v. Sweigert*, 66 Cal. 182, 4 Pac. 1188, in support of his theory. In that case a person passing on the street was injured by the falling of an awning which the owner of the property had suspended over the sidewalk by license from the city expressed in an ordinance allowing such awnings so to be located if securely placed and maintained. It was held that the landlord's duty to the public was not altered by the fact that a tenant was in possession of the premises under a lease. There was no question of quiet enjoyment by a tenant in that case at all, nor, indeed, anything involving a dispute between lessor and lessee. Another inapt citation is *Milheim v. Baxter*, 46 Colo. 157, 103 Pac. 376, 133 Am. St. Rep. 50, a case in which a landlord was held guilty of disturbing his tenant's quiet possession by renting for immoral purposes premises owned by him adjacent to those occupied by the complaining tenant. Obviously that authority can have no application to the case at bar. Blauth had no control over the premises adjoining the land on which his building stood. He was not guilty of creating the peril to his own property. It is a general rule that an express or implied covenant for quiet possession secures the lessee against acts or hindrances of the lessor and persons deriving their title through him, or from a paramount title, but not from the acts of strangers. 24 Cyc. 1059; *Branger v. Manciet*, 30 Cal. 627; *Playter v. Cunningham*, 21 Cal. 233; *McCormick v. Marcy*, 165 Cal. 389, 132 Pac. 449.

It follows from the foregoing discussion that the complaint does not state a cause of action, and that the demurrer was properly sustained.

The judgment is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

169 Cal. 667

GODFREY v. WISNER et al. (Sac. 2169.)
(Supreme Court of California. March 25,
1915.)

1. ESTOPPEL ⇐78—GROUNDS—CONTRACT IN
—WRITING.

Defendant, a broker, entered into an oral agreement with plaintiff, another broker, by which defendant agreed to pay plaintiff a specified commission for assistance in the sale of land belonging to third persons. Plaintiff assisted in the sale of a tract of land which defendant had conveyed to a third person by an absolute conveyance as security for a debt. Plaintiff had no knowledge that the deed was in fact a mortgage. *Held* that, in view of Code Civ. Proc. § 1962, providing that one who has deliberately led another to believe that a particular thing is true cannot be permitted to falsify it, defendant was precluded from asserting that the agreement for payment of compensation as to such tract of land was within the statute of frauds.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204-210; Dec. Dig. ⇐78.]

2. FRAUDS, STATUTE OF ⇐158—EVIDENCE—
SUFFICIENCY.

In such case, evidence *held* to show that plaintiff did not know that the land belonged to defendant.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 373-376; Dec. Dig. ⇐158.]

3. BROKERS ⇐48—COMPENSATION—COMMISSIONS.

Where defendant agreed to pay plaintiff a stipulated commission for his aid in selling land, and plaintiff at defendant's direction assisted in making a sale, he is entitled to his commission regardless of the value of his service.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 65; Dec. Dig. ⇐48.]

Department 2. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by W. R. Godfrey against C. B. Wisner and another. From a judgment for plaintiff, and an order denying new trial, the named defendant appeals. Affirmed.

Thomas C. Job and Irving M. Walker, both of Los Angeles, for appellant. Henry Brickley and J. J. Griffin, both of Merced, for respondent.

HENSHAW, J. By his action plaintiff sought to recover from defendant Wisner compensation by way of commissions for his services in the matter of the selling of certain lands. The appeal is from the judgment and from the order denying defendant's motion for a new trial. The principal argument goes to the asserted insufficiency of the evidence to sustain the decision. The complaint charged that defendant was engaged in the business of buying and selling land belonging to persons other than defendant on a commission basis; that plaintiff was employed to act for and as the agent of defendant, and that under such contract of employment defendant was to pay plaintiff for all sales made through plaintiff or with his aid and assistance a compensation equal to 2½ per cent. of the price of the land sold; that in March, 1913,

plaintiff aided and assisted defendant in the sale of 4,200 acres of land at \$20 an acre; and that defendant thereby became indebted to plaintiff in the sum of \$2,100. Plaintiff's testimony was to the effect that in October, 1911, his business relationship with defendant began. Defendant had conveyed a tract of land known as "the East Side Tract" to a corporation known as the "Figmond Company," in which corporation defendant was a stockholder, and was actually or apparently the selling agent of the Figmond Company for these lands. Defendant's place of business was in Los Angeles. This land was situated near Merced. The contract between plaintiff and defendant was oral, defendant agreeing to pay plaintiff 10 per cent. commission upon any sale of land which was effectuated solely through his own endeavors. In other words, upon any sale of land in which plaintiff secured the purchaser and brought about the sale; that in all other sales of land in which he aided or assisted defendant he was to receive 2½ per cent. commission upon the selling price. This relationship continued, defendant and the Figmond Company in which he was interested, either or both, establishing plaintiff in a real estate office in Merced, plaintiff receiving no salary, but defendant paying him a commission upon the sales of land in which he assisted. Subsequently it appears that defendant Wisner bought another tract of land known as "the West Side Land." It is over the sale of this land that the controversy has arisen. The facts appear to be that the acquisition of this land was a private venture of defendant; that he had an option to purchase it, or an executory contract to purchase it; that he did purchase it, and thereafter, needing money, mortgaged it to one Howard C. Bonsall. Substantially all of the argument upon this appeal is directed to the proposition that defendant was the real owner of the property, that Bonsall was but the mortgagee of it, that plaintiff knew these facts, and that plaintiff's employment therefore by defendant to aid the defendant—the owner—in selling his own real estate was a contract within the statute of frauds, and resting in parol, as admittedly the contract between these parties does, was void and unenforceable. But, as against this, plaintiff successfully established before the jury that the deed to Bonsall was in form a deed absolute, conveying no notice that Bonsall was but a mortgagee; that he did not in fact know that Bonsall was but a mortgagee; that he had aided in the selling of certain small pieces from this large tract while title so stood in Bonsall, and had received his commissions from defendant therefor; and that at the time the sale of the whole tract was effected title still stood in Bonsall and he (plaintiff) aided in the sale at the direct and written request of defendant. It is un-

necessary to review in detail the evidence in support of the statements above given. Upon certain matters there was, in truth, a conflict. Thus, defendant insists that Godfrey was present at the negotiations with Bonsall and others leading up to the execution of the mortgage in the form of a deed and knew the fact that it was but a mortgage and that Wisner remained the real owner of the property. Plaintiff denies this and asserts—his statements being corroborated—that he went out to inspect the land with all the parties to this negotiation, but that when he came back, after they had dined together, he went to his home—the others saying that they desired to continue their negotiations in privacy; that he was not present, therefore, when the determination was reached; and that he was never thereafter informed that Bonsall's deed was but a mortgage.

[1] Plaintiff's rights herein are not governed by the fact that defendant was the real owner. They are governed by the knowledge which plaintiff had or with which he was chargeable. Plaintiff's testimony is that he did not know, and was not advised, that defendant was the actual owner. Upon the record, Bonsall was the owner. Defendant, under familiar principles of estoppel in pais, may not avail himself of his own deliberate omission, or even his unintentional neglect, to advise plaintiff of a fact vital to the legality of the contract into which they had entered. Code Civ. Proc. § 1962, subd. 3.

[2, 3] Furthermore, the evidence abundantly establishes that the relationship and contract between the parties was as plaintiff testified, and while it is true that at the time of this oral employment only the East Side lands were in direct contemplation of the parties, since they were the only lands in which defendant was at that time interested, no doubt can be entertained, but that after the acquisition of the West Side lands the relationship of the parties continued under the same understanding. Plaintiff, as has been said, was paid a commission by defendant for the sale of certain of these lands, and defendant freely made demand upon plaintiff's time in the matter of negotiations and prospective sales of such land. Thus, he wrote to plaintiff touching a visit to be made to the lands by "one Hart and his friends," who subsequently did purchase them, telling him to be on the look-out for them; to post himself concerning the lands, and "do your best to show that land up in as favorable a light as possible." All this plaintiff did, conducting the party to the lands, digging holes in the soil to show its depth and the absence of hardpan, and doing everything that a real estate broker usually does to interest a prospective purchaser. Aside from the legal proposi-

tion involved in the question of the applicability of the statute of fraud to the contract between the parties, the real reason of defendant's disinclination to pay the commissions seems to have arisen, by his own testimony, from the fact that he thought the plaintiff did not do anything, or at least enough, to justify his demand for a commission. This proposition also is argued upon the theory that plaintiff was entitled to commissions only when he produced the purchaser and effectuated the sale. Such is not the nature of the contract testified to by plaintiff which, from their verdict, was accepted by the jury. When he did this, he was to receive 10 per cent. commission. When, however, he only assisted to the best of his ability, he was to receive 2½ per cent. commission. The materiality of his assistance, therefore, becomes of no moment, provided he fairly and faithfully did that which he was called upon to do.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

169 Cal. 677

BOOTH v. MOTT et al. (S. F. 7356.)

(Supreme Court of California. March 26, 1915.)

ELECTIONS ⇨47—ELECTION OFFICERS — APPOINTMENT.

In view of the provisions made by Pol. Code, §§ 1044, 1151, for the appointment of the board of elections, section 1142, as amended June 14, 1913 (St. 1913, p. 1165), requiring that the board be appointed, one-half from each of the two leading political parties, was inapplicable to a municipal election to be held on April 20, 1915.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 41; Dec. Dig. ⇨47.]

In Bank. Application for writ of mandamus by Thomas Booth against Frank K. Mott and others. Application denied.

Austin Lewis, of San Francisco, and R. M. Royce, and V. W. Lathrop, both of Oakland, for petitioner.

ANGELLOTTI, J. Application for a writ of mandate to compel respondents in appointing election officers for the municipal election to be held in the city of Oakland on April 20, 1915, to make such appointments in accord with the provisions of section 1142 of the Political Code, as amended June 14, 1913.

We are satisfied that, in so far as the matters referred to in the petition are concerned, section 1142, Political Code, is not applicable to such municipal election, in view of the provisions of sections 1044 and 1151 of the Political Code. In Vincent v. Mott, 163 Cal. 342, 125 Pac. 346, relied on by petitioner, the application for a writ of mandate

was denied without notice of the application to the respondents, on the ground that the petition did not sufficiently show that the election commissioners threatened to disobey the provision of the law claimed to be applicable. What is said in the opinion filed in denying the application, in relation to the application of section 1142, Political Code, to recall elections in the city of Oakland, is purely obiter dicta, and was induced by the fact that the provisions of sections 1044 and 1151 of the Political Code were not brought to the attention of the court, and that the real question presented and decided was whether the Political Code provisions relative to elections generally were applicable to recall elections in that city, as distinguished from other elections.

The application for a writ of mandate is denied.

We concur: SHAW, J.; LAWLOR, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

169 Cal. 683

CHAMPAGNE v. A. HAMBURGER & SONS, Inc. (L. A. 3455.)

(Supreme Court of California. March 29, 1915.)

1. PLEADING ⚡8—FACTS—NEGLIGENCE.

A complaint for injury to an elevator passenger, which alleged that defendant was negligent in failing to properly operate the elevator, is sufficient, since the general rule that the particular acts of negligence need not be alleged applies with special force where an accident occurs to a passenger in the operation of the conveyance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. ⚡8.]

2. CARRIERS ⚡318—INJURIES TO PASSENGER—SUFFICIENCY OF EVIDENCE—CAUSE OF INJURY.

In an action for injuries to an elevator passenger, evidence held to show that the injuries were caused by the fall of the elevator, and not by the acts of fellow passengers in seeking to escape after the elevator had struck.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. ⚡318.]

3. CARRIERS ⚡315—INJURIES TO PASSENGER—COMPLAINT—NEGLIGENCE.

A complaint for injury to an elevator passenger, which alleged that the defendant was negligent in failing to properly operate the elevator, is sufficient to support a recovery for negligence in permitting the elevator to be overcrowded.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1281, 1282; Dec. Dig. ⚡315.]

4. CARRIERS ⚡305—INJURIES TO PASSENGER—"PROXIMATE CAUSE"—ACTS OF FELLOW PASSENGER.

Negligence of an elevator operator in allowing overcrowding, which caused the fall of the elevator, is the proximate cause of injury to a passenger therein, resulting from acts of her fellow passengers in attempting to escape after it had struck, since such acts might be reasonably anticipated, and "proximate cause" is that which

led to what might naturally and probably be expected to produce the result.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1132, 1136-1139, 1245, 1246; Dec. Dig. ⚡305.]

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

5. CARRIERS ⚡235 — CARRIAGE OF PASSENGERS—DEGREE OF CARE—ELEVATOR—"COMMON CARRIER."

The owner of a passenger elevator is a "common carrier" of passengers who must exercise the utmost care and diligence to avoid accident.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 966, 967; Dec. Dig. ⚡235.]

For other definitions, see Words and Phrases, First and Second Series, Common Carrier.]

6. CARRIERS ⚡280 — CARRIAGE OF PASSENGERS—DEGREE OF CARE—STATUTE.

The owner of a department store, who operates an elevator therein for the use of customers, receives compensation in the sales he makes, and is not relieved from the duty to exercise the highest degree of care exacted from a common carrier by Civ. Code, § 2096, providing that a carrier of persons without reward must use ordinary diligence for their safe carriage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1103, 1105, 1106, 1109, 1117; Dec. Dig. ⚡280.]

7. NEW TRIAL ⚡102 — NEWLY DISCOVERED EVIDENCE—DILIGENCE.

A new trial need not be granted for newly discovered evidence concerning which the party had information sufficient to enable it to obtain the evidence before trial, and had full information concerning the evidence before the close of the trial, but did not request a continuance to procure the testimony.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210-214; Dec. Dig. ⚡102.]

Department 2. Appeal from Superior Court, Los Angeles County; H. C. Gesford, Judge.

Action by Graziella M. Champagne against A. Hamburger & Sons, Incorporated. Judgment for the plaintiff, and defendant appeals. Affirmed.

John Murray Marshall and Gurney E. Newlin, both of Los Angeles (Roy V. Reppy, of Los Angeles, of counsel), for appellant. E. B. Drake, of Los Angeles, for respondent.

LORIGAN, J. This action was brought to recover damages for personal injuries sustained by plaintiff in an elevator accident which occurred in the department store of the defendant in the city of Los Angeles. The elevator was operated by the defendant to convey passengers to and from the various floors of its department store. On April 6, 1912, plaintiff entered the elevator on the fifth floor to go to the third floor for the purpose of purchasing some curtains. A number of passengers were already in the elevator when plaintiff and others entered at the fifth floor so that the car, when it commenced its descent, was in a packed or crowded condition. The car moved downward normally until it was approaching towards the third floor, when it was suddenly

precipitated from said floor into the basement, and the injuries suffered by plaintiff are claimed to have resulted through such fall. The jury returned a verdict in favor of the plaintiff for \$4,500 damages, and, from the judgment in her favor so rendered, defendant appeals, and appeals also from an order denying its motion for a new trial.

While defendant denied the alleged negligence which occasioned the accident, it is not claimed on this appeal but that the evidence fully sustained the fact that the accident was due to its negligence.

The points made for a reversal by appellant are that the court erred in not sustaining its special demurrer to the complaint; that the evidence is insufficient to support the verdict in that it does not appear therefrom that the injuries sustained by plaintiff were occasioned by the fall of the elevator; that the court erred in giving certain instructions to the jury and in refusing to give certain other instructions tendered by appellant, and further abused its discretion in refusing a new trial to appellant based on newly discovered evidence.

[1] As to the ruling on the demurrer. The complaint among other allegations, including one that the plaintiff was a passenger on the elevator, alleged as to the accident:

"That it was caused alone by the negligence of the defendant in failing to properly operate said elevator and in negligently failing to have proper clamps and appliances therefor for the purpose of catching said elevator if it started to drop, and in negligently failing to have said elevator properly supported by sound wire cables, and by reason of said negligence said elevator fell as aforesaid."

The claim of the appellant is that, as far as the allegations charged negligence in a failure to properly operate said elevator, the particulars in which there was a failure to do so should have been alleged. But this is not the rule in this state where, as it is said in *Smith v. Buttner*, 90 Cal. 99, 27 Pac. 29:

"It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury."

Here the plaintiff alleged that, while she was a passenger in an elevator operated by the defendant, it fell, several stories to the bottom of the elevator shaft; that such fall was occasioned through the negligence, among other things, of the defendant in failing to properly operate it and consequent injury to her therefrom. This statement of negligence in operation made in general terms was all that was required. It was not necessary to set forth the particular acts or omissions which constituted negligence. While the rule in this respect is general, it has particular application in a case such as is presented here, where the injuries arose while the relation of passenger and common carrier existed, and the liability of the de-

fendant is measured by the duties and responsibilities that arise from such relation. The wisdom of the rule requiring only an allegation of negligence in general terms, where an accident occurs to a passenger in the operation of the instrumentalities provided for his carriage, will be found considered and its application in such cases sustained in *Stephenson v. Southern Pac. Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407, and no further discussion of the matter is necessary.

[2] As to the claim of the insufficiency of the evidence to sustain the verdict. This is addressed solely to the subject of the injuries sustained by plaintiff. Appellant insists that it does not appear from the evidence that these injuries were caused solely by the fall or jar of the elevator, but, on the contrary, were in all probability caused by the action of fellow passengers in trampling upon plaintiff in escaping from the elevator after it had fallen and while she was lying on its floor. The evidence shows that plaintiff was standing near the door of the elevator when it struck the basement, and that the elevator was crowded with passengers. Immediately after the car fell the crowd, panic-stricken, pressed toward the door of the elevator, pushed aside the operator, opened it, and rushed out. Although plaintiff, when the elevator fell, testified that she was hurt by its jar, she did not then realize the extent of her injuries. She did not immediately fall down, being, as she testified, held up by the crowded condition of the elevator. When that condition relaxed as the crowd rushed out, she did fall, being unable, on account of injuries to her legs, to support herself. When she fell she commenced to crawl out of the elevator, and while doing so she testified that some of the crowd, in rushing out, stepped on and ran over her, and that there was an abrasion of the skin on the lower part of her left leg occasioned, she thought, by some one of them stepping on it. Upon this testimony as to what occurred to plaintiff in the rush of the crowd, the appellant bases its claim of the insufficiency of the evidence to sustain the verdict. The reasoning of its counsel in that connection is that as the plaintiff in her complaint based her right of recovery solely on the ground that her injuries were occasioned by the fall of the elevator, due to its negligent operation or negligent construction or maintenance with respect to broken and insufficient cables, she could only recover where a clear preponderance of the evidence showed that her injuries proceeded from either of such causes alone; that plaintiff was not entitled to recover if in fact her injuries were the result of being trampled on by the outrush of the passengers, because he contends that such injuries would not have proceeded from the fall of the elevator but from the negligence of the defendant in operating the elevator in a crowded condition, a ground of negligence which was not alleged

in the complaint. Appellant does not question but that, if the injuries sustained by plaintiff through the acts of her fellow passengers in rushing out of the elevator were the proximate result of the negligent operation of the elevator, the defendant would be liable, but only that there is no allegation in the complaint on that subject or charging negligence on that ground.

But, without discussing just now the accuracy of the legal proposition advanced, it is to be said that the plaintiff did not claim, nor does the evidence show, that she received any injuries (save in one trifling particular presently to be mentioned) from the action of her fellow passengers. She testified that the pains she felt immediately after the accident were in her right arm, in her legs, and in her abdominal region. The injuries to her arm and right leg, which consisted simply of strains, were only temporary, and she had readily and fully recovered therefrom long before the trial commenced. The injuries of which she made complaint on the trial were a permanent injury to her left knee, proceeding from a tearing or overstretching of the ligamentum patella, rendering that knee unable to sustain the superincumbent weight of the body upon it, also a permanent displacement or retroversion of the womb, and the pain and suffering endured by plaintiff while confined to her bed under medical treatment as a result of such injuries. The physicians examined on behalf of defendant testified that these injuries could be and were usually produced from a fall or jar as plaintiff had sustained them from the fall or jar of the elevator. There was no evidence produced in the case that an examination by physicians immediately after the accident or at any other time disclosed any wounds, or bruises upon her knee or abdomen. Nor is there a particle of evidence in the case produced on the part either of plaintiff or defendant that stepping on the plaintiff by her fellow passengers could cause a permanent wrench or strain of the ligamentum patella or a retroversion of the uterus. The testimony of the plaintiff that some of the other passengers stepped on her in their struggle to get out is the only testimony on the subject given in the case, and it is quite evident that this matter was mentioned by her simply in her narrative of all that occurred at the time of the accident. She did not claim that she suffered any injury thereby nor base any right to damages therefrom. There is nothing in the testimony introduced by defendant suggesting that the injuries to plaintiff might have been occasioned through the conduct of her fellow passengers. In fact, the position of the defendant was that there was no injury at all to the left knee of plaintiff, and as to the retroversion of the womb that this was a condition common to women of the age of the plaintiff who have, as she had, borne several children and would be

come cured in the course of time. It is true that plaintiff testified that among other results of the accident was a slight wound on the lower part of her left leg which she thought was received by some one stepping on it. But this was a mere superficial bruise which had doubtless healed long prior to the trial, and which, when received, amounted to nothing. A physician called for defendant, who examined the plaintiff immediately after the accident, testified that he saw this bruise and put a dressing on it; that this injury was so slight that there was nothing to it, and he had dismissed it from his mind.

[3, 4] But assuming that the testimony of the plaintiff showed that the pains and suffering she underwent for a long period after the accident in a measure proceeded from injuries sustained through the action of her fellow passengers, or that even all her injuries might be attributable to that cause, still we think plaintiff was entitled to recover therefor under her complaint. While she charged negligence on the part of the defendant in failing to properly operate the elevator, and also in failing to provide proper appliances to control it, the evidence warranted the jury in finding that the fall of the elevator was occasioned solely through overweight arising from its crowded condition; that its fall proceeded from negligence of the operator in attempting to operate it in that condition. This being true, if the jury were warranted in a further finding that the injuries sustained by plaintiff, though occasioned through the action of fellow passengers in rushing out of the elevator, were the proximate result of the negligent operation of the elevator in such overcrowded condition, causing its fall, then appellant was responsible therefor. It is of no moment that plaintiff did not particularly charge in her complaint that her injuries were sustained as a result of the operation of the elevator in its crowded condition. Not being required to charge the particular act constituting negligence in the operation of the elevator, she could rely on any act which in fact constituted it, and from which her injuries proceeded as a proximate result. The proximate cause, as defined generally, is the cause which led to what might naturally and probably be expected to produce the result. Here, of course, the contention of appellant is that the injuries of the plaintiff were not caused by the fall of the elevator but by the intervening act of the crowd in rushing over her. But the intervening act of the crowd would not break the casual connection between the negligent act of operating the elevator in a crowded condition and the injuries sustained by plaintiff, if such intervening act was one which might have been foreseen as likely or probable to occur as the result of the original negligence. If it was, the casual connection was not broken, and the appellant would be responsible for the consequences of the

intervening act as the proximate result of the original negligence. It needs no discussion to point out that, where there is a sudden fall several stories to the bottom of its shaft of a crowded elevator, the natural and probable result would be that its occupants would be overcome with sudden fear and fright; that there would be immediately created a condition of panic under which the natural tendency of the crowd would be to rush and struggle to get out; and that some, more particularly the weaker, might fall or be thrown down and involuntarily injured in the struggle. This might be expected as a natural consequence.

It may be mentioned here that defendant tendered instructions on the theory that the injuries arose solely from the conduct of plaintiff's fellow passengers, and to the effect that, if the jury so found, they should return a verdict for the appellant. The court refused to so instruct, but, on the contrary, instructed the jury that, if they found from the evidence that such injuries were the proximate result of the fall of the elevator, plaintiff might recover therefor. Error is assigned on both the refusal of the court to give the instructions tendered by the appellant and in giving those as to proximate cause, but for the reasons we have given we are satisfied the action of the court was correct in both particulars.

[5] It is next insisted that the court erred in its instructions to the jury as to the duties and responsibilities of persons or corporations operating passenger elevators. The court instructed the jury that such persons or corporations are to be treated as common carriers of passengers, and that the same duties and responsibilities rest on them as to care and diligence as on the carriers of passengers by stage coach or railway; that, though not insurers of the absolute safety of passengers, they "are bound to the utmost care and diligence of very cautious persons as far as human care and foresight can go, and are responsible for injuries occasioned by the slightest neglect against which human care and foresight might have guarded." It is not questioned but that this instruction correctly announces the doctrine as to the responsibility of a common carrier of passengers. The claim only is that this rule does not apply to the operation of passenger elevators. But it was expressly held by this court in *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, that, as to a passenger elevator operated and used just as the one here was for the benefit of customers of a store, the same rule of responsibility attaches as applies to common carriers of persons. It is not necessary to further refer to that case, save to say that it fully discusses the matter and clearly points out the reason the same rule of responsibility should govern as to passenger elevators which applies to carriers of

persons by stage coach or railway and sustains the correctness of the instruction, as given in the case at bar. It is true, as pointed out by counsel for appellant, that a different rule is announced in a few other jurisdictions. *Griffen v. Manice*, 106 N. Y. 197, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; *Edwards v. Manufacturing Co.*, 27 R. I. 248, 61 Atl. 646, 2 L. R. A. (N. S.) 744, 114 Am. St. Rep. 37, 8 Ann. Cas. 974; *McCracken v. Meyers*, 75 N. J. Law, 935, 68 Atl. 805, 16 L. R. A. (N. S.) 290; *Burgess v. Stowe*, 134 Mich. 204, 96 N. W. 29. In those cases it is held that the same measure of responsibility as is imposed on stage coaches or railway companies does not apply to the owners of passenger elevators; that as to the owners of such elevators they are only required to exercise ordinary care for the safety of their passengers. The New York case is the leading case holding to this doctrine and is quoted as authority for the similar conclusions reached by the other courts referred to. They concede that a different rule—the rule of *Treadwell v. Whittier*—prevails, not only here, but in other jurisdictions. It is not necessary to do more than refer to those cases relied on by appellant and say that they all lay down a radically different rule than what prevails in this state as announced in the *Treadwell Case*. But, while the courts in these particular jurisdictions have not agreed with the rule laid down in *Treadwell v. Whittier*, it does not disturb us in our belief that that case lays down the correct doctrine as to responsibility. This *Treadwell Case* appears to be the principal and leading case which fully considers, discusses, and determines the degree of care exacted of owners of passenger elevators, and declares it to be the same as that which applies to common carriers. This case has been followed in a majority of the jurisdictions where the direct question has arisen as to the degree of care exacted of owners of passenger elevators, and the rule announced in it is generally accepted as sustained by the weight of authority. *Shearman & Redfield on Negligence* (2d Ed.) vol. 3, § 319a; *Hutchinson on Carriers*, vol. 1 (3d Ed.) § 100; *Thompson, Commentaries on the Law of Negligence*, vol. 1, § 1078; *Ray on Negligence of Imposed Duties*, p. 308; *Fetter, Carriage of Passengers*, vol. 1, p. 550; *Am. & Eng. Ency. of Law*, vol. 10 (2d Ed.) p. 946; *Cyc.* vol. 6, p. 596.

[6] Appellant contends, however, that the doctrine of *Treadwell v. Whittier* cannot apply in the case at bar, because, as claimed, the carriage of passengers in the elevator of appellant was without reward, and it is declared by section 2096 of the Civil Code that "a carrier of persons without reward must use ordinary care and diligence for their safe carriage." Hence, in the present case, it is asserted that the appellant was not bound by the same rule of responsibility

as carriers of persons for reward or hire. But if the appellant, in the operation of its passenger elevator, was a carrier of persons without reward, so was the appellant in the Treadwell Case, as the respondent there, as here, was a customer riding in it when it fell. It is true, as claimed by counsel here, that this section 2096 is not discussed in that case. But the principal point considered there was the rule of responsibility, and it is hardly to be conceived, considering the ability of counsel who represented appellant in the Treadwell Case, that if they thought there was any merit in this present point as applying in that case, where it would have applied as pertinently as here, they would not have made it. We do not think, however, the point has any merit, because in our judgment the appellant was not operating its elevator as a carrier of persons without reward. Reward does not necessarily import that there must be a fare paid for carriage in a passenger elevator in order to constitute the owner thereof a carrier of persons for hire. The rule is laid down that an elevator which is operated for the use of the tenants of an office building and their visitors is a carrier of persons for hire; the rental paid by the tenants being a compensation or reward for which the owner undertakes to carry them and their visitors by elevators. And the same rule applies with reference to elevators operated in hotels or apartment houses. Am. & Eng. Ency. of Law, vol. 10 (2d Ed.) p. 946. In this age of lofty buildings, erected at vast expense for office purposes or devoted to hotel or apartment houses, the owners would be unable to rent or use them for those purposes, unless elevators were operated therein. The benefits or advantages which the owners of office buildings with elevator service derive through rental from their tenants or the proprietors of hotels or apartment houses derive from their guests or occupants through such installed service is a sufficient compensation or reward to constitute them carriers of passengers for hire as to such tenants, guests, occupants, or their visitors for whose benefit the elevator is operated. We perceive no reason why this should not equally apply to the proprietor of a department store operating an elevator to carry customers or prospective customers from one floor of the store to another for the purposes of trade. In no sense is the elevator carriage which he provides for that purpose a service without reward—gratuitous service. A department store covering seven floors, as it appears from the evidence that of appellant does, could not expect the patronage which an enterprise of that extent must receive in order to be profitable, without providing an elevator service, giving ready access to customers to its various floors. The reward of the appellant was the benefit, advantage, and profit to it in trade derived

from purchasers or prospective purchasers using the elevator in dealing with it. Naturally this facility of transportation would increase its patronage and necessarily its profits in business. In fixing the price at which its goods and merchandise must be sold so as to return a profit, necessarily the operating expenses of the establishment, including this elevator service, must be taken into consideration and provided for. The prices charged and paid by customers for goods would include a reimbursement to appellant for its expenses entailed in the operation of the elevator for its patrons, and hence would constitute a sufficient reward for their carriage, so as to bring appellant within the category of a carrier of passengers for hire and subject to the same duties and responsibilities.

[7] Complaint is made by appellant of the refusal of the court to grant a new trial, based on alleged newly discovered evidence, consisting of testimony which it was claimed would be given by two physicians who had treated plaintiff in the city of Portland some three years before the accident, while she resided there. The ruling of the court was correct. Aside from other reasons which justified it, it appears that appellant was in possession of information long prior to the trial, whereby, in the exercise of ordinary diligence, it could have obtained the testimony of these witnesses. Aside from this, however, the appellant had actually obtained from these physicians full information, as to the matters it expected they would testify to, several days before the trial was finished, and, if it deemed their testimony important, should have applied for a continuance (which it did not) until it could be procured. *Berry v. Metzler*, 7 Cal. 418; *Klockenbaum v. Pierson*, 22 Cal. 160; *Scanlan v. San Francisco, etc., Ry. Co.*, 128 Cal. 586, 61 Pac. 271.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

169 Cal. 678

ROWLEY v. DAVIS et al.

BAUR et al. v. SAME.

(Sac. 2159, 2160.)

(Supreme Court of California. March 29, 1915.)

MORTGAGES ~~§~~486—FORECLOSURE—INTEREST OF THIRD PARTIES—JUDGMENT.

In foreclosure suits by two mortgagees against the same mortgagor, in which a party defendant filed an affirmative answer and cross-complaint, and another party intervened, both claiming attachment liens subject to the mortgages, and asking that certain transfers between the mortgagors and a party defendant alleged to have been in fraud of creditors be set aside, and the land subjected to their attachment and liens, it was within the court's discretion to render judgment for the plaintiffs, and postpone the determination of the other controversies

which did not affect their rights or the mortgagor's right to redeem.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1404-1411, 1470; Dec. Dig. 686.]

Department 1. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Separate actions by Clarence F. Rowley and E. C. Baur and others against J. O. Davis and others to foreclose mortgages, in which defendant Nichols filed a cross-complaint, and the First National Bank of Berkeley intervened, each asking certain relief. Judgment for plaintiffs, new trial denied, and defendants J. O. Davis, Rozina P. Davis, and E. F. Davis appeal. Affirmed.

Pemberton & Pemberton and J. O. Davis, all of San Francisco, for appellants. Arthur C. Huston, of Woodland, and J. A. Elston, of Berkeley, for respondents. Black & Clark, of San Francisco, for cross-complainant and intervener.

SHAW, J. The two cases above entitled present the same questions upon facts identical in effect. A decision in one will determine both. In each case the appeals are from the judgment and from an order denying a new trial. We will state in detail the facts involved in case No. 2159.

Rowley's complaint stated a cause of action to foreclose a mortgage on a tract of land in Yolo county, executed by J. O. Davis and Rozina P. Davis, his wife, on March 9, 1910, to secure their note for \$10,000. It contained the usual allegations, and, with respect to all the defendants, except the said mortgagors, it merely alleged that they had, or claimed to have, some interest or claim on the premises, and that said interests or claims were subsequent to and subject to the lien of plaintiff's mortgage. The mortgage provided for the payment of reasonable fees for plaintiff's attorneys, and the complaint alleged that \$750 was such reasonable fee.

The defendants J. O. Davis, Rozina P. Davis, and E. F. Davis, appellants herein, filed an answer admitting all the allegations of the complaint, except as to the attorneys' fee, and alleged that \$100 was a sufficient fee. Defendant Nichols filed an affirmative answer and cross-complaint, claiming therein certain attachment liens on the land under writs issued in actions begun in Alameda county for debts of Davis and wife, subject to plaintiff's mortgage, and alleged that certain deeds whereby the mortgaged land had been transferred from J. O. Davis and wife, through mesne conveyances, to E. F. Davis, prior to the levies of the attachments, were made with intent to defraud Nichols and other creditors of Davis and wife, and asking that said deeds be set aside and the land subjected to his attachments. The First National Bank of Berkeley, by leave of court,

filed a complaint in intervention, alleged a judgment lien on the land, subordinate to plaintiff's mortgage, and likewise attacking the aforesaid transfers to E. F. Davis, and asking that they be adjudged fraudulent and void. The plaintiff answered the pleadings of the said defendants, denying the allegations of each of them. The appealing defendants demurred to the pleadings of said codefendants and intervener, but they have not filed answers thereto, and no ruling has been made on the demurrers. In this condition of the pleadings the court, on motion of the plaintiff, and over the objection of the appellants, proceeded to try the issues arising upon the plaintiff's complaint and the answers thereto, without at the same time trying the issues upon the cross-complaint aforesaid; its announced intention being to reserve said controversies between the defendants for future determination in the cause. It thereupon made findings that \$500 was a reasonable fee for the plaintiff's attorneys, which finding is not attacked, and declaring that no determination was made of the issues upon the other pleadings aforesaid. A decree foreclosing the plaintiff's mortgage and for the sale of the land was thereupon made expressly saving the rights of the defendants and the intervener, or either of them, to any surplus remaining of the proceeds after satisfying the plaintiff's debt and costs, and providing that such surplus, if any, should be paid into court to be distributed to the respective defendants as their interests might subsequently be made to appear and as the court should subsequently determine.

The sole point presented in support of these appeals is that the court erred in proceeding to trial, determination, and adjudication of the case, upon the plaintiff's complaint, and in entering judgment thereon, without at the same time trying and adjudicating the respective rights of Nichols and the bank to their asserted liens on the land and their cross-actions to set aside said conveyances.

The appellants rely on the cases of *Dou-dell v. Shoo*, 159 Cal. 454, 114 Pac. 579, *Stockton, etc., Works v. Insurance Co.*, 98 Cal. 577, 33 Pac. 633, *Hibernia, etc., Soc. v. London, etc., Co.*, 138 Cal. 260, 71 Pac. 334, and *Fox v. Hale, etc., Co.*, 112 Cal. 571, 41 Pac. 1022, wherein certain statements are made to the effect that there should be but one final judgment in an action. The statement was made in *Doudell v. Shoo*, in answer to the claim that the judgment therein referred to was not interlocutory in character. In *Stockton v. Insurance Co.*, the point decided was that an order in the form of a judgment, and merely purporting to dispose of one of the defenses to the action, was not appealable as a final judgment. In *Hibernia v. London*, the decision was that a junior

lienholder was a proper party defendant to a foreclosure suit, and that, this being so, the court had power therein to adjudge the validity of his lien. In the Fox Case the court merely interpreted its own judgment upon a previous appeal, saying that it required a retrial of the other issues before final judgment, although its previous judgment had directed a particular judgment below upon one of such issues. These cases were all doubtless properly decided, but they cannot be regarded as decisive of, or applicable to, the question presented in the present case.

We think it is within the sound discretion of the trial court in a foreclosure suit to give the plaintiff judgment for the relief asked and postpone the determination of conflicting claims between the defendants in which the plaintiff is not interested, and which do not affect the relief which he asks. *Stockton, etc., Soc. v. Harrold*, 127 Cal. 620, 60 Pac. 165. The practice has been approved and the power of the court in that respect declared in other jurisdictions. *Kenney v. Apgar*, 93 N. Y. 546; *Jackson v. Dutton*, 46 Fla. 517, 35 South. 74; *Alabama, etc., Co. v. Robinson*, 72 Fed. 708, 19 C. C. A. 152; *First Natl. Bank v. Shedd*, 121 U. S. 74, 7 Sup. Ct. 807, 30 L. Ed. 877; *Wheeler v. Van Kuren*, 1 Barb. Ch. (N. Y.) 490; *Renwick v. Maccomb*, *Hopkins Ch. (N. Y.)* 277. In *McClain v. Hutton*, 131 Cal. 145, 61 Pac. 273, 63 Pac. 182, 622, this court itself, on appeal, directed the entry below of a judgment similar in this respect to the one given in this case. We are of the opinion that the court has power, in an appropriate action, and in furtherance of justice, to postpone the disposition of conflicting claims of the defendant in a foreclosure suit, when they do not affect the plaintiff's rights.

The facts appearing in this case fully justify the course pursued. There was no defense to plaintiff's action. He was in no wise interested in the controversy between the defendants either with respect to their asserted liens on the property or their claims that the deeds referred to were fraudulently executed. Indeed, it could be said with some reason that a suit by Nichols, or the bank, against the Davis family, to set aside a deed as fraudulent to creditors has no necessary place in an action by a third person to foreclose a prior mortgage on land belonging to Davis. It further appears that in the attachment suits of defendant Nichols against Davis and wife appeals have been taken from orders refusing to dissolve the attachments; that said appeals and said actions are still pending; that Davis and wife had begun an action in Alameda county against Nichols to cancel the notes on which the Nichols actions were based; that judgment therein had been given against them, from which they had appealed, and that said appeal was also pending. The plaintiff not only had no interest in

these disputes, but he had no power to end or control them. The litigation was of a character which usually engenders bitter feeling and continues many years. It was both just and reasonable to give the plaintiff the relief which all the parties admitted he was entitled to, and not compel him to wait the termination of litigation of that character before enabling him to recover a just debt. There is no force in the argument of the appellants that such practice would be improper because it would imperil or prejudice the defendants' right of redemption. The redemption would run from the time of sale and the amounts to be paid would depend on the price paid at the sale. The postponement of the decision of the disputes between the defendants would have no direct effect upon the right of redemption. We are satisfied that the court wisely exercised its discretion in this instance.

In case No. 2160 Baur and others have sued to foreclose a mortgage given by Davis and wife on another tract of land in Yolo county to secure a debt of \$7,000. The same persons were made defendants, and the pleadings, proceedings, and judgment were in all material particulars the same as those in No. 2159 aforesaid. The same principles and conclusions apply to that case as to the other.

The judgment in each case and the orders denying a new trial in each case are, respectively, affirmed.

We concur: LAWLOR, J.; SLOSS, J.

169 Cal. 732

EMPIRE INV. CO. v. MORT et al.

(Sac. 2175, 2176.)

(Supreme Court of California. March 31, 1915.)

1. APPEAL AND ERROR ⇐1015 — REVIEW — NEW TRIAL.

An order granting a new trial for insufficiency of the evidence to support the verdict will not be disturbed where the evidence conflicted, though made by a judge who did not preside at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. ⇐1015.]

2. VENDOR AND PURCHASER ⇐299—DEFAULT IN PAYMENT—RECOVERY OF POSSESSION.

Purchasers may not hold land and withhold the purchase price and in event of default, the vendor can maintain ejectment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 837-842; Dec. Dig. ⇐299.]

3. VENDOR AND PURCHASER ⇐299—ACTIONS TO RECOVER POSSESSION—DEFENSES—"PREVENTION."

A contract for the sale of land, payable in installments, provided that defendants should be admitted to possession, but that upon their failure to make required payments the vendor might reenter and take possession. There was nothing in the contract suggesting that crops were to be raised on the land, or that the purchase price was to be obtained by the sale of such

crops. *Held*, that, defendants having defaulted in payments, plaintiff's tort in cutting a levee and flooding a portion of the land could not be set up as a defense to ejectment because it was not a prevention, which is a breach of some duty one party to a contract owes the other as a condition precedent to performance, nor could it be relied on as a counterclaim, not arising out of the same transaction.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 837-842; Dec. Dig. ☞299.]

4. EVIDENCE ☞400 — PAROL EVIDENCE TO VARY CONTRACT.

Where a contract for the sale of land purported to include all of the terms of the agreement, parol evidence is not admissible to add to it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1778-1793; Dec. Dig. ☞400.]

5. FRAUDS, STATUTE OF ☞60—AGREEMENTS WITHIN.

Under Code Civ. Proc. § 1971, declaring that no estate or interest in real property other than leases not exceeding one year can be created, granted, or declared, save by a conveyance in writing, an easement in real property cannot be created by verbal agreement.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 94, 95; Dec. Dig. ☞60.]

6. PRINCIPAL AND AGENT ☞22—AGENCY—ESTABLISHMENT—DECLARATIONS OF AGENT.

Extrajudicial statements by an alleged agent are inadmissible to establish agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. ☞22.]

Department 2. Appeal from Superior Court, Kings County; J. A. Allen, Judge on Order, and John G. Covert, Judge on Judgment.

Action by the Empire Investment Company against C. E. Mort and another. From a judgment for defendants, plaintiff appealed, and from an order granting new trial, defendants appealed. Order affirmed, and plaintiff's appeal dismissed.

Scarborough & Bowen, of Los Angeles, for plaintiff. H. Scott Jacobs and John G. Covert, both of Hanford, for defendants.

MELVIN, J. The Empire Investment Company, in September, 1910, entered into a contract with defendants whereby plaintiff agreed to sell and defendants to buy a tract of land in Kings county for something more than \$23,000, payable in annual installments. The first payment was due on November 1, 1911, but was not met by defendants, and, plaintiff having elected to declare the contract forfeited and so to notify defendants, brought suit to recover possession of the tract and for damages for retention, alleging in its complaint that it was the owner in fee of the property. Defendants answered, and upon issues thus joined and upon others, arising by reason of a pleading in the nature of a cross-complaint and an amendment to the answer (both of which defendants were permitted to file after the cause had come on for trial before the court and jury), the case was tried and judgment was given in favor

of defendants. From this judgment plaintiff appealed during the preparation of the statement on motion for a new trial. Subsequently the motion for a new trial was granted, and from the court's order in that behalf defendants have appealed. Both appeals are by stipulation heard together.

By the contract of sale and purchase, which admittedly was made by the parties hereto, it was provided, among other things, that Messrs. Mort and Wagy should take and occupy the premises until they should make default; that they should pay all taxes and all dues for water; that time was of the essence of the agreement; and that failure by the vendees to perform any of the covenants would, at the option of the vendor, terminate the contract and the interest of the vendees and give the Empire Investment Company the right to reenter and take possession of the land. These provisions of the agreement and others were set forth in plaintiff's amended complaint, and in addition to the allegation that no part of the purchase price had been tendered or received, it was averred that defendants had failed to settle the water rent and had, in fact, paid nothing under the contract; that upon their refusal, upon request of performance of the terms of that agreement, plaintiff had demanded possession of the land and notified defendants that it elected to terminate the agreement. The prayer was for the usual relief in such cases. In their answer as originally filed defendants denied plaintiff's title to a part of the land in dispute and to the water rights attached thereto, and alleged that by plaintiff's fraud they had been prevented from learning such facts until long after the suit had been instituted; denied that plaintiff was entitled to possession of the land; admitted their own possession thereof; and denied that the water company had furnished water, as agreed, for the land, or that they owed for water used on the premises. As a separate defense it was alleged that in June, 1911, plaintiff, by the blowing up of a certain levee, had caused the waters of the river to overflow the planted crops of defendants, thus preventing them from making the payments stipulated in the contract and damaging them in a large sum of money. When the case came on for trial the court permitted the filing of an amended answer, setting up substantially all of the matters pleaded in the original answer, but introducing for the first time a counterclaim against plaintiff for the alleged damages suffered by defendants because of the overflow of the water. On motion, the parts of the answer denying plaintiff's title to the land in controversy were stricken out on the ground that defendants were estopped from disputing such title. The court ruled that it would be taken as an admitted fact in the case that plaintiff owned the property described in the

complaint. Plaintiff thereupon offered evidence on the issue of the rental value of the premises after the default of defendants, and upon the matter of the furnishing of water to defendants by the water company referred to in the complaint and the failure of defendants to pay for such water. During the trial defendants sought unsuccessfully to introduce evidence of a certain oral agreement made by the parties at the time the written contract was executed; but subsequently, by amendment to the answer, they were allowed to plead it and in the trial to offer testimony in support of such oral agreement. The alleged verbal contract was, in brief, that if Messrs. Wagy and Mort would sign the written instrument which was then presented to them, the Empire Investment Company would complete the levee along the west line of the land now in question in the suit, being the east bank of Kings river, would repair the weak places in the levee; would bring it up to grade, and would construct and complete a levee along the south line of the property.

[1] Plaintiff insists that, even upon the assumption of the absence of error from the court's ruling permitting the amendments and the testimony in support of them, defendants have no standing in their attack upon the order granting a new trial, for the reason that the facts forming the basis of the answer were all disputed. For example, defendants introduced testimony tending to show that one Howard Odale blew up the levee, thus causing a great and destructive flow of water over their crops and that Odale was the agent of plaintiff, acting within the scope of his employment. Plaintiff denied Odale's agency, and also the existence of any oral agreement binding it to repair any levees or to keep them in repair. These denials were all supported by testimony in conflict with that which defendants offered. One of the grounds upon which the court granted the motion for a new trial was insufficiency of the evidence to support the verdict. We may not disturb such an order where there was a conflict of evidence upon material issues, unless we may say that a verdict in favor of the moving party would not have found sufficient legal support in the evidence adduced at the trial. *Wendling Lumber Co. v. Glenwood Lumber Co.*, 153 Cal. 416, 95 Pac. 1029; *Gordon v. Roberts*, 162 Cal. 509, 123 Pac. 288. And this is the rule even in a case in which, as in this one, the judge who made the order did not preside at the trial. There was direct testimony that Odale was not employed by plaintiff at all, but was a servant of the Empire Water Company. Defendants introduced testimony of circumstances tending to show that Odale was the ostensible agent of plaintiff, but the existence of many of these circumstances was denied by plaintiff's witnesses. Both defendants gave testimony regarding the oral agreement, but they were flatly contradicted by

plaintiff's witnesses. There was ample evidence in the record to have given support to a verdict in favor of plaintiff if such evidence had been accepted as true. Therefore under the pleadings, as they stood, the order should be affirmed.

[2, 3] As the case may be tried again, we shall discuss some of the errors of law specified. Plaintiff contends that the action was one in ejectment and not on the contract. It is insisted that when defendants failed to perform the conditions of the contract plaintiff immediately became entitled to possession of the land, and might maintain ejectment to obtain such possession. Defendants may not hold the premises and withhold the purchase price. Undoubtedly that is the rule. *Gervaise v. Brookins*, 156 Cal. 104, 103 Pac. 329; *Champion Gold Mining Co. v. Champion Mines*, 164 Cal. 205, 128 Pac. 315. This is an action in ejectment. *Haggin v. Kelly*, 136 Cal. 483, 69 Pac. 140; *Newman v. Duane*, 89 Cal. 598, 27 Pac. 66; *Kerns v. Dean*, 77 Cal. 557, 19 Pac. 817. As against the issues tendered by such a pleading an independent tort was not available. There was nothing in the contract suggesting that a crop was to be raised upon the land, or that the purchase price was to be earned by sale of the proceeds of any crop or crops. The contract provided for money payments at specified times. There were no precedent duties to be performed by plaintiff before defendants upon the dates indicated in the agreement should be bound to make payments. The alleged tort, therefore, had no relation to the payments under the contract. An act which amounts to prevention of the performance of a contract must be one which has relation to the subject thereof. The crops were not mentioned in the agreement. There was no sale of them to plaintiff, and no pledge or understanding that the proceeds of the land should be devoted to the payment of the purchase price. Therefore this was not an instance of the destruction of the subject of the sale. There was nothing in the tort or its results which essentially interfered with the carrying out of the stipulations contained in the writing. A "prevention" must be a breach of some duty which one party to the contract owes to the other as a condition precedent to performance. Therefore the tort was not properly pleaded as a defense to the action. *Cox v. McLaughlin*, 54 Cal. 605; *Porter v. Arrowhead R. Co.*, 100 Cal. 500, 35 Pac. 146; *Alderson v. Houston*, 154 Cal. 13, 96 Pac. 884. For like reasons the counterclaim was not a proper one in such an action. The alleged tort of defendants and the tort of plaintiff averred by way of counterclaim did not arise out of the same transaction. In any event, such a counterclaim may not be set up in an action of ejectment. *Wigmore v. Buell*, 116 Cal. 95, 47 Pac. 927.

The counterclaim does not tend to defeat plaintiff's recovery. Plaintiff asked for possession of certain land. Defendants' de-

mand was for a money judgment by way of damages. Plainly the two causes of action founded on tort were distinct and did not arise out of the same transaction. It was therefore error to allow the amendment introducing the so-called counterclaim. *Yorba v. Ward*, 109 Cal. 108, 38 Pac. 48, 41 Pac. 793; *Meyer v. Quiggle*, 140 Cal. 499, 74 Pac. 40; *Glide v. Kayser*, 142 Cal. 420, 76 Pac. 50; *Engebretson v. Gay*, 158 Cal. 29, 109 Pac. 879.

[4] The trial court at first rejected all evidence regarding the oral agreement on the ground that no such contract had been pleaded. Subsequently, and after amendment to the complaint, evidence regarding it was received. Two of the questions submitted to the jury related to this oral understanding, and the jury decided that plaintiff did enter into such agreement and failed to perform it. The secretary of plaintiff with whom, according to defendants, they made the oral contract, denied that he made any such arrangement with them. This conflict of testimony would prevent us, upon principles previously discussed herein, from disturbing the order granting a new trial. But plaintiff contends that evidence of the alleged contract was improperly admitted because by its terms the agreement was not independent of and collateral to the written contract. During the earlier negotiations between the contracting parties there were discussions with reference to the construction of levees to protect the land which defendants wished to purchase, and a contract relating to the construction of such levees was prepared and inspected by defendants. Before the consummation of the negotiations the levees had been built, and the contract in its final form, when it was signed by the vendees, omitted all reference to the levees. The oral agreement dealt, therefore, with a subject which had been discussed in the preliminary negotiations and rejected from the culminating terms set forth in the written instrument, and it sought to impose duties upon the vendor with reference to a part or appurtenance of the land mentioned in the agreement. It is contended that improvement of the levees and maintenance of them were two subjects upon which the written contract was silent, and that therefore proof of an oral agreement regarding these matters was perfectly proper. But where a written agreement purports to be complete, parol evidence is no more admissible for the purpose of adding terms to it than would such evidence be proper in an effort to vary the terms of the instrument itself. *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 594, 96 Pac. 319; *Johnson v. Bibb Lumber Co.*, 140 Cal. 98, 73 Pac. 730.

[5] The oral agreement was also inadmissible because it dealt with the creation of a fixture on real property and with the granting of an easement in real property. It was

therefore within the statute of frauds. Section 1971, Code Civ. Proc.; *Dorris v. Sullivan*, 90 Cal. 289, 27 Pac. 216; *Hayes v. Fine*, 91 Cal. 398, 27 Pac. 772; *Oliver v. Burnett*, 10 Cal. App. 408, 102 Pac. 223.

[6] Plaintiff attacks the sufficiency of the evidence offered for the purpose of proving Odale's implied agency existing at the time he blew up the levee, but as the evidence at the new trial may be totally different from that on the record before us, we will not here discuss this contention. It was error, however, to admit testimony regarding Odale's extrajudicial statements or declarations in pais for the purpose of establishing his agency. *Kast v. Miller & Lux*, 150 Cal. 728, 115 Pac. 932.

No other alleged errors require discussion.

The order granting the motion of plaintiff for a new trial is affirmed, and as that order operates in effect to set aside the judgment, plaintiff's appeal from said judgment is dismissed.

We concur: HENSHAW, J.; LORIGAN, J.

(169 Cal. 740)

NATIONAL OIL REFINING CO. v. PRODUCERS' REFINING CO.

(L. A. 3389.)

(Supreme Court of California. March 31, 1915.)

1. CONTRACTS ⇐349—BREACH—ACTION—EVIDENCE.

In an action for damages for breach of a contract to furnish crude oil sufficient to keep plaintiff's refinery going at full capacity, evidence that plaintiff's manager was having trouble with his stockholders and had promised them a large dividend; that he had obtained a newspaper write-up to soothe the stockholders—as tending to show that plaintiff's motive was not to recover damages actually sustained, but to impress its stockholders that it had claims against the defendant, was inadmissible.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1809, 1811-1814, 1817, 1818; Dec. Dig. ⇐349.]

2. WITNESSES ⇐363—COMPETENCY—MOTIVE—STATUTES.

Under Code Civ. Proc. § 1847, declaring that the presumption that a witness speaks the truth may be repelled by evidence affecting his motives, the cases in which motive, apart from its establishment by interest, relationship, or bias, and aside from criminal cases, becomes a proper subject of inquiry are those where malice or a malicious motive may make an otherwise lawful act unlawful and actionable.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1177, 1178, 1181; Dec. Dig. ⇐363.]

3. WITNESSES ⇐363—INTEREST AND BIAS—IN GENERAL.

The interest or bias of a witness may be shown.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1177, 1178, 1181; Dec. Dig. ⇐363.]

4. PLEADING ⇐69—ADMISSIONS—ACTION FOR BREACH OF CONTRACT.

In an oil refining company's action for damages for breach of contract to supply sufficient crude oil for its capacity, an allegation in the

complaint that defendant began the delivery of oil, and up to and including a certain month furnished and delivered oil to plaintiff, was not an allegation or admission that during such period defendant furnished sufficient crude oil, but a declaration merely that defendant furnished some, and that if there was a shortage in the delivery, plaintiff was not seeking to recover on account of it.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. ¶69.]

5. DAMAGES ¶126—MEASURE — BREACH OF CONTRACT—STATUTE.

In an action for damages for breach of a contract to furnish crude oil sufficient for the capacity of plaintiff's refinery, and to repurchase certain refinery products at a fixed price, where in it was pleaded and proven that plaintiff, after the breach was unable to purchase crude oil in the open market, the proper measure of damages was the loss of profit to plaintiff by reason of defendant's failure to furnish oil at a fixed price and to repurchase the refinery products, as prescribed by Civ. Code, § 3300, declaring the measure to be the amount which will compensate the party aggrieved for all the detriment approximately caused by the breach; and sections 3353, 3354, relating to violations of contracts for the purchase and sale of personal property, did not apply.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 344-353; Dec. Dig. ¶126.]

Department 2. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the National Oil Refining Company against the Producers' Refining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. E. Barton, of Bakersfield, for appellant. Kaye & Siemon, of Bakersfield, for respondent.

HENSHAW, J. Plaintiff and defendant entered into a contract, by the terms of which the latter agreed to supply the former with all of the crude oil required to keep the former's refinery running to its full capacity from January 29, to December 31, 1907. The full capacity was understood to be the capacity of this refinery on January 29th. The defendant was to sell this oil at a stipulated price, and in turn was to purchase from the plaintiff the products of the refinery, these products being the distillates and the asphaltum residuum. This action was brought laying damages for defendant's breach of this contract. Plaintiff alleged that the capacity of its refinery was 8,927.18 barrels of distillate and 812.29 tons of asphaltum per month; that it had not been furnished sufficient crude oil to keep the refinery running continuously to its capacity, whereby plaintiff was obliged to close down repeatedly, to its great damage. It was further alleged that the plaintiff could not procure oil in the open market to supply the deficiency. On the trial the quantity of oil that was actually delivered to the plaintiff by the defendant was agreed upon by stipulation to be 58,224.28 barrels. A basic question upon the trial was obviously the capacity of plaintiff's refinery at the time

when the contract became effective. If defendant did not furnish oil to that capacity in accordance with its contract, and its failure so to do was not occasioned by causes which the contract itself provided should relieve the defendant from liability, such as fires, strikes, and accidents, then defendant had violated its contract, and the remaining question in the case was the measure and amount of damages. Plaintiff offered evidence upon the capacity of its refinery. The court found that capacity to be 12,000 barrels of crude oil per month, or 80,000 barrels for the period from May to November; this being the period during which plaintiff charged that defendant had breached the contract by failure to supply oil in sufficient quantities. Twelve thousand barrels a month was well within the capacity shown by plaintiff's evidence. Appellant does not argue that it did not violate the contract, but urges as serious error certain rulings of the court touching the admission of evidence, and also it insists that the court adopted an inaccurate measure of damages.

[1-3] George Calhoun was the manager of plaintiff's business. He signed on behalf of the plaintiff the contract the breach of which is the subject-matter of this litigation. He was plaintiff's principal witness in the case. He was interested financially in the affairs of plaintiff as a stockholder as well as manager. Upon cross-examination the witness was asked numerous questions, to which objections were interposed and sustained as not being proper cross-examination. These were matters concerning which the witness had not been interrogated upon his examination in chief. The attorney for the defendant made a long statement to the court of what he proposed to show by this cross-examination. The statement itself covers several printed pages. Summarized it amounted to this: That the witness manager was having trouble with the stockholders; that to keep them quiet he had promised them a dividend of \$30,000; that he sought to make this \$30,000 by this unwarranted and unjustifiable suit prosecuted against defendant; that further to show the unjustifiableness of the action, defendant wished to prove that the witness had made several or many sets of figures, endeavoring fictitiously to swell the amount of damages which plaintiff claimed; "that it was with the utmost difficulty, and required the greatest ingenuity, to get items of alleged damage that would make any plausible showing of approximately \$30,000"; that plaintiff, after beginning this suit, for the purpose of soothing the stockholders, "got a big newspaper write-up"; that therefore the plaintiff's motive was not to recover damages actually sustained, but merely to impress its stockholders that plaintiff had

large assets growing out of the asserted damages which it had sustained at the hands of defendant. The same effort was made with the witness McGrath, who had formerly been the secretary of the plaintiff, McGrath being a witness for defendant. The court ruled against the admissibility of such evidence, and its ruling was wise and proper. It permitted all evidence touching the interest of the witness and his relationship to plaintiff. The court even offered to allow evidence that Calhoun had made different figures and estimates going to the damages which plaintiff had sustained. Indeed, the court's declaration upon this offer was, if anything, an expression of its willingness, not alone to go as far as the law allowed in the matter of the reception of evidence, but perhaps a trifle further. But very properly, as we have said, did it refuse to allow this wandering excursion into the domain of motive. The interest of a witness may be shown. His bias and prejudice may be shown. But if in cases such as this the motive, separated from these elements, is the subject of evidence, civil trials beginning now will end with eternity. By this we mean motive apart from those admissible inquiries prosecuted within reasonable bounds, which may be regarded as involving motive—the inquiries as to relationship, interest, bias, and prejudice. A man may have a right to foreclose a mortgage against A. and refuse to do so out of friendship. He may have the same cause of action against B. and insist upon prosecuting it because of his dislike for B. In the latter case his motive does not affect his right of action, nor the measure of his recovery, and it is not, therefore, a proper subject-matter of inquiry. The cases in which motive, apart from its establishment by interest, relationship, bias, or prejudice, and aside from criminal cases, becomes a proper subject-matter of inquiry, are ones where it is held that malice or a malicious motive may make an otherwise lawful act unlawful and actionable. See note to *Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Ins. Co.*, 29 L. R. A. (N. S.) 869. No such contention is here advanced, and for the rest, upon plain grounds of expediency and in accordance with the public policy which declares it to be to the interest of the state that there should be an end to litigation, these far journeys into the speculative realm of motive are not permitted. The motive to which section 1847 of the Code of Civil Procedure refers when it declares that the presumption that a witness speaks the truth may be repelled by evidence affecting his motives means the kind of motive we have been discussing. Finally it may be added that if for a moment it could be thought (the vital interest of this witness having been shown) that evidence of this remote motive, namely, that he was having trouble with the stockholders, could have exercised a more com-

elling influence upon the witness to deceive, the answer is that he could not have deceived the court as to the measure of damages, for that was a matter of law, and as to the capacity of the refinery, his evidence may be rejected entirely, and there is left uncontradicted evidence of other witnesses, in no wise discredited, showing a capacity even greater than that which the court found.

[4] Appellant next contends that the obligation which defendant undertook was to supply sufficient crude oil for the capacity which the refinery had in January, the month when the contract was entered into. This is true. Appellant then argues that the complaint alleges, and by alleging admits, that defendant furnished oil up to the capacity of the refinery for the months of February, March, and April. Defendant then shows the amount of crude oil that was furnished in those three months, and, averaging the amount, finds that 5,482.18 barrels per month was the full capacity of the refinery. Wherefore, as appellant argues, it follows that the finding of the court that the capacity was 12,000 barrels per month is beyond the admission of the pleadings. In its argument appellant states that it was alleged by the plaintiff and admitted that "the defendant furnished crude oil in accordance with and as required by the contract." It was neither so alleged nor so admitted, the complaint in this regard stating merely that defendant began the delivery of crude oil and "up to and including the month of April, 1907, furnished and delivered to the plaintiff crude oil." This is far from being either an allegation or admission that during this period of time defendant furnished sufficient crude oil. It is a declaration merely that defendant furnished some, and that if there was a shortage in the delivery, plaintiff is not seeking a recovery on account of it. This is fully explained by reason of the fact that defendant's pipe line was incapable, during that time, of supplying the necessary quantity; that defendants seemed to be using its best endeavors to correct the situation and furnish the oil, and that plaintiff in its action has seen fit to waive any claim for compensation for the shortage during that time. Appellant likewise insists that the same matter—the monthly capacity of the refinery—is covered by a stipulation of the parties. We need not elaborate upon the matter nor say anything further than that this contention finds as little support as does the one we have just been considering, namely, that plaintiff's pleadings admit the capacity. Indeed, it would be remarkable if this were the case, since the actual capacity was upon the trial made the subject of voluminous evidence and was one of the important issues in the case.

[5] Next it is insisted that the court erred as to the measure of damages. It is said

that the damages should be measured under sections 3353 and 3354 of the Civil Code, which have relation to violations of contract for the purchase and sale of personal property. The court for the measure of damages applied section 3300, which declares that the measure is the amount which will compensate the party aggrieved for all the detriment proximately caused by the breach. What the court did was to estimate the loss of profit to the plaintiff by reason of the failure of the defendant to furnish oil at a fixed price and to repurchase the products after refinement, also at a fixed price. It was pleaded and proved that plaintiff, after the breach, was unable to purchase crude oil in the open market. The measure of damages adopted by the court was the precise one applicable to the case, and the case itself is exceptional in that to determine those profits no resort is necessary to the uncertainty of current market value, the price being fixed by the contract. That the loss of profits in a case such as this is a just element in the admeasurement of damages is abundantly established. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020; *McKay v. Riley*, 65 Cal. 623, 4 Pac. 667.

No other matters seem to merit specific consideration.

For the reasons given, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

169 Cal. 694

HAPPY VALLEY LAND & WATER CO. v. NELSON et al. (Sac. 2167.)

(Supreme Court of California. March 29, 1915. Rehearing Denied April 26, 1915.)

1. WATERS AND WATER COURSES — 27 — WATER RIGHTS IN PUBLIC LANDS — STATUTES.

A tunnel and flume company which actually appropriated and used a ditch constructed to convey water for mining purposes over government lands before their sale into private ownership acquired a vested, possessory title under the act of Congress of 1866 (Act July 26, 1866, c. 262, § 9, 14 Stat. 253 [U. S. Comp. St. 1913, § 4647]), and required no further or other record title for its support.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 19; Dec. Dig. — 27.]

2. WATERS AND WATER COURSES — 156 — CONVEYANCES — DESCRIPTION — SUFFICIENCY.

Where all the properties and rights of a tunnel and fluming company vested by grant in plaintiff, a public service corporation engaged in supplying water, without objection by any of the grantors, and plaintiff had paid taxes upon such properties for more than five years previous to its injunction suit, and defendants had recognized its rights by paying it for water, defendants could not successfully assert that the description in the mesne conveyance from the tunnel company to the plaintiff were so defective as to convey no title.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 153, 174-183; Dec. Dig. — 156.]

3. WATERS AND WATER COURSES — 145 — APPROPRIATION — CHANGE IN USE.

Where a tunnel and fluming company was incorporated for "the purpose of ditching and conveying water for mining and other purposes," etc., its change from the sale of water for mining purposes to sales for irrigation and domestic uses was legitimate.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 20; Dec. Dig. — 145.]

4. EVIDENCE — 471 — OPINIONS — FACTS OR CONCLUSIONS.

In a suit by a public service water company to enjoin defendants from interfering with its ditch and water, in which they claimed certain rights, where there was testimony that one H. had been in charge of the ditch as the agent of the company's predecessor, testimony of such agent that he was the superintendent and manager of the system and had always claimed the ditch in question as part of such system was admissible over objection that it was a conclusion.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. — 471.]

Department 2. Appeal from Superior Court, Shasta County; Chas. M. Head, Judge.

Action for injunction by the Happy Valley Land & Water Company against P. Nelson and others, with cross-complaint by defendants. Judgment for plaintiff, motion for new trial denied, and defendants appeal. Affirmed.

Wal. J. Tuska, of San Francisco, for appellants. Francis Carr, of Redding, for respondent.

HENSHAW, J. Plaintiff, a public service corporation, engaged in the rental, distribution, and sale of water, sued defendants, asserting title to certain water and water rights and a ditch through which the water was carried, and seeking to restrain defendants from interfering with the ditch and water. The complaint alleged that the defendants asserted some right and interest to the plaintiff's water and water rights and ditches, and asked a decree affirming and quieting its title and rights against those asserted by defendants. The court gave judgment for plaintiff, and from that judgment, and from the order denying a motion for a new trial, defendants appeal. Upon the appeal no contention is made that the judgment is not supported by the findings; the questions on appeal being limited to the proposition that the findings are not supported by the evidence.

[1] It was established that plaintiff's predecessor in interest, the Dry Creek Tunnel & Fluming Company, was incorporated for "the purpose of ditching and conveying water for mining and other purposes," etc. Years before the predecessors in interest of these defendants acquired title to their lands this corporation, with actual appropriation and user, had constructed the ditch in question, and was carrying water through it, originally for mining purposes, subsequently for pur-

poses of irrigation and domestic use. These rights of plaintiff's predecessors, having been acquired over the government lands before their sale in private ownership, gave a vested possessory title under the act of Congress of 1866, and required no further or other record title for their support.

[2] Complaint is made by appellants that the description in the mesne conveyances from the Dry Creek Tunnel & Fluming Company to plaintiff were so defective as really to convey nothing. But it is not controverted, and cannot successfully be controverted, that all of the properties and rights of the Dry Creek Tunnel & Fluming Company have vested in this plaintiff without objection by any of the grantors; that taxes upon these properties have been paid by plaintiff and its predecessors for more than five years previous to the commencement of the action; and that there was upon the part of these defendants a recognition of plaintiff's rights, in that they paid for the use of the ditch and the water taken therefrom a sum of money seasonally, and, in addition, kept the ditch in repair. All this was done by them in subordination to, and in recognition of, the rights of plaintiff, and only when plaintiff raised its water rates shortly before the commencement of this action did the defendants refuse to pay, and assert title and ownership in themselves.

[3] The Dry Creek Tunnel & Fluming Company having appropriated the water for a useful purpose, its articles of incorporation authorizing it to use the water for mining and "other purposes of said corporation," the change in the use from sale for mining purposes to sale for purposes of irrigation and domestic use was legitimate. Moreover, it is not questioned but that the plaintiff, which, as has been said, has succeeded to all of the rights of the Dry Creek Tunnel & Fluming Company, is formally and regularly incorporated for the supplying of water as a public service corporation.

Certain rulings in the admission of evidence are objected to. It may not be doubted that some of those objections were well taken; the answers admitting improper hearsay evidence. But it is not perceived that the answers themselves were of such a nature as to prejudice the case of appellants.

[4] It was testified to without objection by the witness Taylor that Harvey was in charge of the ditch as the agent of the Dry Creek Tunnel & Fluming Company, and that the witness, using water from the ditch, recognized the right of the company to the ditch and water at all times. Subsequently Harvey, called as a witness, testified that he was the superintendent and manager of the ditch system, and was claiming the ditch in controversy as part of the system. The objection was made that the question was suggestive, called for the conclusion of the witness, and assumed that he had authority to make

a claim on behalf of the company. Undoubtedly, the form in which the question was cast made it suggestive, but the evidence elicited by the question was competent, and the technical error worked no substantial injury.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

169 Cal. 725

In re HARRIS' ESTATE. (L. A. 3839.)

(Supreme Court of California. March 31, 1915.)

1. JOINT TENANCY $\Leftrightarrow$ 1—PROPERTY SUBJECT—PERSONAL PROPERTY—"JOINT INTEREST."

Under Civ. Code, § 683, declaring that a "joint interest" is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants, personal property may be held by two or more persons in joint tenancy, as well as real property.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. § 1; Dec. Dig. $\Leftrightarrow$ 1.]

For other definitions, see Words and Phrases, First and Second Series, Joint Interest.]

2. JOINT TENANCY $\Leftrightarrow$ 3—CREATION—ORAL AGREEMENT—STATUTE.

Under Civ. Code, § 1052, providing that a transfer may be made without writing in every case in which a writing is not expressly required by statute, and in view of the absence of any Code provision requiring the execution of a writing to transfer personal property, a joint tenancy in personal property may be created by an oral agreement by which the title thereto is transferred to two persons as joint tenants.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. § 1; Dec. Dig. $\Leftrightarrow$ 3.]

3. JOINT TENANCY $\Leftrightarrow$ 6—INCIDENTS—SURVIVORSHIP.

Upon the death of one of two joint tenants, the survivor thereupon becomes the sole owner of the entirety, not by descent, but by survivorship and in virtue of the original grant creating the tenancy.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. § 4; Dec. Dig. $\Leftrightarrow$ 6.]

4. HUSBAND AND WIFE $\Leftrightarrow$ 14—JOINT TENANCY—ORAL AGREEMENT—SURVIVORSHIP.

Where husband and wife, who at their marriage each had some separate property, accumulated other property by their joint efforts during the marriage, and orally agreed that all the property held or acquired by either of them during the marriage should be owned as joint tenants, and their bank deposits were indorsed to show such tenancy and the right of survivorship, all the property acquired under such agreement was held in joint tenancy, so that upon the death of the husband, the widow became the owner of all the property by right of survivorship.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 71-86, 88, 89; Dec. Dig. $\Leftrightarrow$ 14.]

Department 1. Appeal from Superior Court, Orange County; Z. B. West, Judge.

In the matter of the Estate of R. T. Harris, deceased. From an order determining that certain property belonged to Maria L. Harris, administratrix, and adjudging the

account settled, Clara G. Fulsom appeals. Affirmed.

Williams & Rutan, of Santa Ana, for appellant. Scarborough & Forgy, of Santa Ana, for respondent.

SHAW, J. [1] Personal property may be held by two or more persons in joint tenancy. There is no distinction, in this respect, between real property and personal property. *Denigan v. San Francisco Sav. U.*, 127 Cal. 142, 59 Pac. 390, 78 Am. St. Rep. 35; *Kennedy v. Kennedy*, 146 Pac. 647.

[2] "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." Civ. Code, § 683.

"A transfer may be made without writing, in every case in which a writing is not expressly required by statute." Civ. Code, § 1052. Section 1091 of the Civil Code provides that an estate in real property can be transferred only by operation of law, or by a duly executed instrument in writing. But there is no provision of the Code which requires the execution of a writing to effect a transfer of personal property. It follows, therefore, that a joint tenancy in personal property may be created by an oral agreement by which the title to the property is transferred to two persons as joint tenants.

[3] One of the incidents of a joint tenancy is that, upon death of one of two joint tenants, the survivor thereupon becomes the sole owner of the entirety, not by descent, but by survivorship and in virtue of the original grant creating the tenancy. *Hannon v. Southern P. R. R. Co.*, 12 Cal. App. 356, 107 Pac. 335; *Kennedy v. Kennedy*, supra; *De Witt v. San Francisco*, 2 Cal. 297; *Greer v. Blanchard*, 40 Cal. 197. No rights of creditors are involved in this case, and consequently we need not determine whether or not a creditor would have a right to resort to the estate of a decedent in property held in joint tenancy by him and another person.

[4] These propositions determine the rights of the parties here and uphold the decision of the court below. The decedent and Maria L. Harris were married 23 years before his death. Each had some separate property, and they accumulated other property by their joint efforts during the marriage. An agreement was made between them in the early years of their marriage, which, in effect, provided that all the property held or acquired by either or both of them during the marriage should be held together in joint ownership as joint tenants. To carry out this agreement, the money received from earnings, proceeds of property, and all other sources by either of them was

deposited in a bank from time to time to their joint account in pursuance of an agreement between them, which was entered in writing in the passbook of said account as follows:

"It is expressly agreed that the money represented by the within account is, and all future deposits of the account shall be, the joint property of the undersigned, and is and shall be held in joint tenancy, subject to checks by either of us during life, and at the death of either the balance remaining in this account does and shall belong to the survivor, and the bank is directed to pay such balance to such survivor upon his or her check and the return of this book."

All the property in controversy was acquired with money from this joint account, and it was agreed between them that the title thereto should be taken and held by them as joint tenants in the same manner as the money was deposited. Some of it was corporate stock, the certificates whereof were issued to R. T. Harris and were by him indorsed and placed in a safe deposit box in which they kept the papers pertaining to the joint property. Part of it was loaned upon a note made payable to "R. T. Harris or Maria L. Harris."

Upon the death of R. T. Harris, his widow, respondent herein, was appointed administratrix of his estate. She filed her final account as such administratrix, showing total receipts of \$5,040, and that she had paid out all of it and a little more on debts of the decedent and on expenses of administration. She did not include in the account the joint property in controversy, nor account for it at all in the administration. There were no children of the marriage, and Harris left no father, mother, or issue surviving. The appellant, a sister of Harris, objected to the final account, claiming that the property acquired as above stated was not held in joint tenancy, but was either community property of the marriage or the separate property of the decedent, in either of which alternatives a portion of it would descend to the sister, and all of it would have been subject to administration. The court overruled her objections, decided that the property belonged to Maria L. Harris, that nothing remained to be accounted for in the estate, and adjudged the account settled. From this order the sister appealed. The case is not essentially different from *Kennedy v. Kennedy*, supra. The property acquired with money taken from the bank account would retain the character of joint property, the same as the money with which it was obtained, unless by some agreement between the parties its character was changed. No such agreement was made, but the contrary was agreed upon. On the authority of the case of *Kennedy v. Kennedy*, the order of the court below is correct.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(169 Cal. 749)

CITY OF HANFORD v. HANFORD GAS & POWER CO. (Sac. 2118.)

(Supreme Court of California. March 31, 1915.)

TAXATION ⚡157—**FRANCHISES—GROSS RECEIPTS.**

Though a corporation maintained mains and laterals in city streets to supply gas to the city and its inhabitants, the city, on granting a franchise to the corporation to supply gas for heat, light, and power, could require payment to the city of a per cent. of the gross annual receipts from the operation of the franchise; for the corporation, on accepting the franchise, acquired the additional right to supply gas for heat and power.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 277; Dec. Dig. ⚡157.]

In Bank. Appeal from Superior Court, Kings County; J. A. Allen, Judge.

Action by the City of Hanford against the Hanford Gas & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John G. Covert, of Hanford, for appellant.
F. E. Kilpatrick, of Hanford, for respondent.

HENSHAW, J. The city of Hanford, a city of the sixth class, sued defendant, the Hanford Gas & Power Company, to recover judgment for a specific sum, with interest, this sum being 2 per cent. of the gross annual receipts of the defendant, earned by operating its plant in the city of Hanford, under the provisions of Ordinance No. 115 of that city. Defendant demurred to the complaint. The demurrer was overruled. Defendant declining to answer, judgment was given against it, and it appeals. It appears that the defendant, a public service corporation, was and had been for many years occupying the streets of the city of Hanford with mains and laterals for the supplying of gas to the inhabitants of the city. It was exercising this franchise under the constitutional grant and permission of section 19, art. 11, of the Constitution as it read prior to the amendment of October 10, 1911. The Legislature in 1901 enumerated certain franchises which a municipality might dispose of by sale, and provided for the manner of disposition. Stats. 1901, p. 265. Amongst these franchises was the franchise "to lay gas pipes for the purpose of carrying gas for heat and power." In 1902 an application was filed with the board of trustees of the city of Hanford for a franchise for the privilege of using the public streets and thoroughfares of the city for the purposes of laying pipes and conduits therein to supply the city and its inhabitants with gas "for heat, light, and power." Pursuing the course prescribed by the act of 1901, above cited, the city of Hanford advertised for bids, and sold this franchise to the applicant Young, who, in turn, conveyed and assigned all his franchise rights to defendant corporation. The act of 1901 required that the successful bidder and

this assigns must, during the life of the franchise, pay to the municipality 2 per cent. of the gross annual receipts arising from the use and operation or possession of the franchise. Such provision was contained in the grant to Young. It is this 2 per cent. which defendant has refused to pay, and for which judgment was sought and obtained. Upon appeal appellant places reliance upon such cases as *In re Johnson*, 137 Cal. 115, 69 Pac. 973; *Denninger v. Recorder's Court*, 145 Cal. 629, 79 Pac. 360; *People v. Los Angeles Gas Co.*, 150 Cal. 557, 89 Pac. 108; and *Town of St. Helena v. Ewer* (Cal.) 146 Pac. 191. To sum up its argument under these cases, appellant declares that, by virtue of the constitutional grant in section 19, art. 11, it had the free right to use the streets for gas mains and laterals without being subject to any charge for such use by the municipality. This may at once be conceded to be true. It argues that, while the Constitution limits the right of public service corporations to the use of the streets for the purpose of supplying "gaslight or other illuminating light," the fact that by the same mains and laterals the gas so carried and purveyed may be used for heat or power imposes no additional burden upon the municipality or its streets, and does not therefore become the legitimate subject-matter of a new franchise, with onerous payments and exactions thereunder; that therefore it acquired nothing by virtue of the franchise which it secured for the furnishing of gas for heat and power, and, as it acquired nothing, can be made to pay nothing for nothing. The cases upon which appellant relies, however, are not decisions in accordance with its contention, which contention was in no one of them involved. In *re Johnson*, 137 Cal. 115, 69 Pac. 973, merely decided that certain onerous provisions of an ordinance of the city of Pasadena unconstitutional hampered the right of public service corporations to lay their pipes for illuminating gas or water in the streets of that city, and, so far as the matter before us is concerned, it decided nothing more. To the suggestion on the part of the city of Pasadena that it was the purpose of the corporation to supply gas for other than illuminating purposes, this court answered that, even if the suggestion were founded upon fact, it did not deprive the corporation of the right conferred upon it by the Constitution (to lay pipes for the furnishing of gas for light) "or authorize the municipality to prevent it from enjoying that right." In *Denninger v. Recorder's Court*, 145 Cal. 632, 79 Pac. 361, an ordinance regulating and fixing gas rates was under consideration. The petitioner was convicted of having collected a rate in excess of the municipal rate. The conviction was upheld. In the course of the discussion this court said:

"Section 19 of article 11 does not directly confer upon any individual or company the right

to lay pipes and conduits in the streets of a city in order to supply gas for cooking and heating purposes, but only so far as may be necessary for supplying the city and its inhabitants with gaslight. The same gas, however, which furnishes light also serves for cooking and heating, and the pipes and connections necessary for the one purpose make the gas available for the other purposes without subjecting the streets to any additional burden."

In *People ex rel. City of Los Angeles v. Los Angeles Independent Gas Co.*, 150 Cal. 557, 89 Pac. 108, the state, by quo warranto, sought to forfeit the unquestioned constitutional franchise of the defendant gas company to use the streets for the supplying of gas for illuminating purposes because the company was also through the same mains, laterals, and connections supplying the same gas for purposes of heat, power, and cooking. It is to be borne in mind that the effort was not to prevent the defendant company from using a franchise which it did not possess, namely, the franchise to supply the gas for purposes other than illumination, but it was to forfeit its franchise for the supplying of gas for illumination because it was permitting the gas to be used for other purposes. The trial court refused to forfeit the franchise, and this court affirmed the judgment. In so doing it nowhere declared that a gas company, purveying gas under the Constitution for illuminating purposes, had under that constitutional franchise the right to supply it for other purposes. It held merely that it would not forfeit the franchise because it was so doing. It is not even intimated as to what the decision of this court would have been had the action been addressed to an effort to restrain the defendant corporation from exercising a franchise not given to it by the Constitution, namely, the franchise of supplying gas for heat, power, and cooking. It is said in this case, but only arguendo, that:

"The burden upon the street is in no way increased by the fact that the use of the gas carried through the pipe is not confined to illumination."

In *St. Helena v. Ewer*, *supra*, the Court of Appeal had under review an ordinance of the town of St. Helena granting a franchise for supplying the town and its inhabitants with water. The defendant acquired this franchise under a bid agreeing to pay 7½ per cent. of the gross annual receipts from the sale of water under the franchise. This franchise was one granted under the franchise act of 1897 (Stats. 1897, p. 135), held to be unconstitutional in *Pereria v. Wallace*, 129 Cal. 397, 62 Pac. 61, as an attempt to impose illegal conditions upon the franchises freely granted by the Constitution under section 19, art. 11.

Manifestly, no one of these cases is in point upon the question here under consideration. The franchise granted by the city of Hanford did not attempt to touch upon, nor deal with, defendant's rights to supply

gas for illuminating purposes. Unquestionably, while the same gas may be used through the same mains and laterals, the use of gas for heat and power is a distinct and different use from its use for illumination, and it is only the right to the latter use which is protected and, so to speak, given free under the Constitution. To say, as our decisions have said, that the franchise to supply illuminating gas will not be forfeited because the purveyor permits its gas to be used for purposes not covered by the franchise, is very different from saying that with the franchise to furnish gas for lighting purposes goes the franchise right to furnish it for the other purposes. The latter this court has never said, and from nothing that it has said can any such inference be derived. If the use is different, the right to the use is different. Conceivably a corporation might be formed for the purpose of supplying a gas unfit for illumination, but eminently well suited for purposes of heat and power. Could such a company without a franchise occupy the streets for this purpose under the constitutional grant of a right to occupy the streets for the supplying of illuminating gas? If it could not, then per contra a company supplying illuminating gas has acquired no right to supply a gas for the other separate enumerated uses. The vital question then is: Did the defendant, in accepting this franchise from the city of Hanford, acquire anything of value? If it did, then, no element of fraud entering into the case, it is bound by its contract. We think clearly that it did. Up to the time that it acquired the right to supply gas for purposes of heat and power it had the franchise right to supply gas solely for purposes of illumination, with the added guaranty under the decisions of this court that its franchise to supply illuminating gas would not be forfeited merely because it permitted its gas to be used for these other purposes. It was not told that it had the right, and it did not have the legal right, to permit its gas so to be used. If effort had been directed to that end, this use could undoubtedly have been restrained. The city of Hanford admittedly, under its charter (Mun. Cor. Act, [St. 1883, p. 270] § 862, subd. 13), had the power to grant the franchise for the use of its streets for the purveying of gas for heat and power, if the constitutional grant before referred to did not stand in the way. Clearly, it did not stand in the way, and, moreover, the Legislature itself had recognized that the different uses were subject to different franchise rights, and had made provision for the award by municipalities of separate franchises permitting these new uses.

The judgment appealed from is therefore affirmed.

We concur: ANGÉLOTTI, C. J.; LORIGAN, J.; MELVIN, J.; SHAW, J.; SLOSS, J.

(169 Cal. 746)

NICOLOSI v. CLARK. (Sac. 2174.)

(Supreme Court of California. March 31, 1915.)

1. NEGLIGENCE — 136 — INJURY TO CHILD — COMPLAINT—QUESTION OF LAW.

Though plaintiff, complaining of negligent injury, be a child of tender years, yet, the complaint setting forth all the facts and clearly establishing that he, through negligence or other cause, was so in fault as to destroy his right of action, there is no question for the jury, but the complaint is demurrable.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. —136.]

2. EXPLOSIVES — 8 — INJURY TO CHILD — TRESPASSER.

A boy of 10 years old, not alleged to be of deficient intellect and understanding, will be held as matter of law chargeable with knowledge that he has no right to take things from the open implement box of a contractor on a street, and so guilty of an unwarranted trespass in so doing, barring right of recovery for injury by dynamite caps so taken.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. —8.]

Department 2. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Angelo Nicolosi, a minor, by L. Nicolosi, guardian ad litem, against T. E. Clark. Demurrer to complaint was sustained, and plaintiff appeals. Affirmed.

John C. March, of Sacramento, for appellant. John W. Johnston, of Sacramento, for respondent.

HENSHAW, J. The complaint charged that the defendant was a street contractor, and in pursuance of his business was engaged under a contract with the city of Sacramento in excavating a sewer trench in one of the streets of that city; that during the progress of this work the roadbed and sidewalks were open to the traveling public; that in the prosecution of his work defendant kept upon this street a large box, used for storing tools and implements; that this box was standing within three feet of the sidewalk; that there was kept in this large box a small box containing dynamite caps; that plaintiff, passing along the street, saw the large box, and—

“being a child of tender years, to wit, of the age of 10 years, and being attracted by the said open box, and being prompted by childish curiosity, said plaintiff approached the said open box and took therefrom the said small box containing said dynamite caps, and said plaintiff, being wholly ignorant of the dangerous character and composition of said dynamite caps, and without fault or negligence on his part, took from the small box one of the said dynamite caps, and while handling the same the said dynamite cap exploded with great force and violence, and by the explosion greatly bruised, maimed, and injured plaintiff.”

To this complaint a general demurrer was interposed and sustained. From the judgment which followed plaintiff appeals.

[1] The mere fact that plaintiff in such an action as this is of tender years does not

require that the alleged cause of action be submitted to the jury to determine whether or not the plaintiff, through negligence or other cause, was himself so in fault as to destroy his right of action. Where the facts, as here, are set forth in the complaint, the question is one of law. If the complaint clearly establishes plaintiff's negligence in point of law, the demurrer was properly sustained. If the complaint does not do this, or even if it be reasonably debatable whether it does so or not, the question is one for the jury. *Nagle v. California Southern R. R. Co.*, 88 Cal. 86, 25 Pac. 1106; *Studer v. Southern Pacific Co.*, 121 Cal. 404, 53 Pac. 942, 66 Am. St. Rep. 39; *Bresette v. E. B. & A. L. Stone Co.*, 162 Cal. 74, 121 Pac. 312.

[2] The contention of respondent upon this appeal is that the complaint itself shows such contributory negligence as to destroy plaintiff's right of action, even assuming that the placing of an open box for tools and appliances placed away from the sidewalk and on a highway in which street work was in progress was a negligent act of defendant. This court has so recently, in *Cahill v. Stone & Co.*, 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094, entered into an elaborate consideration of the general question, that nothing further is necessary than a reference to that case. It is sought to bring this case within the principle of the turntable cases, the attractive machinery cases, and the attractive nuisance cases, a principle which has been applied in such cases as *Barrett v. Southern Pacific Co.*, 91 Cal. 302, 27 Pac. 666, 25 Am. St. Rep. 186, and *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 Pac. 700. To the contrary, however, the governing principle here is that declared in such cases as *Peters v. Bowman*, 115 Cal. 349, 47 Pac. 113, 598, 56 Am. St. Rep. 106, and *Loftus v. Dehall*, 133 Cal. 214, 65 Pac. 379. In the first of these, water had accumulated upon a vacant lot. Plaintiff, a child, playing in this water, was drowned. The child was a trespasser, and it was held that defendant owed no duty to guard his lot against such trespassers. In the latter, there was an open cellar upon a vacant lot. A child playing about the edge of it was pushed or fell in. It was declared that the fact that the lot was attractive to children as a playground did not cast a duty upon the owner of the lot to guard the cellar against trespassers. In *Cahill v. Stone*, supra, it was declared that the child, injured in playing about a push car upon the track of defendant, would have been a trespasser except for the allegation that “children were accustomed to play upon it with the knowledge and consent of the defendant.”

In the case at bar the plaintiff was clearly guilty of trespass, if not of pecculation. If a boy of 10 years of age is not chargeable with knowledge that he has no right to make free

with the contents of a box placed such as this, manifestly a box belonging to other people and containing their goods, it can only be because that particular boy is of deficient intellect and understanding. But this is not alleged. Not being alleged, we hold it plain, as a proposition of law, that he was guilty of an unwarranted trespass, barring his right of recovery.

The judgment appealed from is therefore affirmed.

I concur: LORIGAN, J.

MELVIN, J. I concur in the judgment, but I do not wish to be understood as unqualifiedly approving the decision of department 1 of this court in *Cahill v. Stone*, 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094. As a judge of the superior court I sustained the demurrer to the complaint in that case, and while having great respect for the learning and ability of the justices who rendered that opinion, a respect which has continued and grown through years of intimate association with them, I have not been able to agree with their conclusion that the facts pleaded in that complaint brought the case within the principle of the turntable cases. I thoroughly agree with Mr. Justice HENSHAW in his conclusion that a normal boy of 10 years knows that it is wrong for him to appropriate another's property, and I also believe that a boy of 12 having average intelligence, fully realizes the danger of playing on a loaded flat car. In the general discussion of law contained in the opinion in *Cahill v. Stone*, supra, I concur. I simply do not think that the facts set forth in that case justify the application of the rule in the turntable cases. In *Cahill v. Stone*, 167 Cal. 141, 138 Pac. 712, I concurred only in the affirmation of the order granting a new trial.

169 Cal. 675

GLOUGIE v. SUPERIOR COURT OF CALIFORNIA IN AND FOR COUNTY OF FRESNO. (S. F. 7358.)

(Supreme Court of California. March 26, 1915.)

PROHIBITION — 3 — GROUNDS — REMEDY BY APPEAL.

An application for prohibition presenting a question as to the jurisdiction of the superior court will be denied, where applicants had a remedy by appeal which, in view of the Supreme Court's power to prevent by supersedeas a retrial pending appeal, was plain, speedy, and adequate.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. — 3.]

In Bank. Application by A. V. Glougie for alternative writ of prohibition against the Superior Court of the State of California in and for the County of Fresno. Denied.

C. K. Bonestell, of Fresno, for petitioner.

PER CURIAM. We are of the opinion that the application should be denied. The petition does present a question as to the jurisdiction of the superior court. Petitioner, however, has his remedy by appeal, and in view of the power of this court to prevent by supersedeas a retrial pending appeal, if a sufficient showing is made to warrant such action, we are of the opinion that the remedy by appeal is sufficiently plain, speedy, and adequate.

The application is denied.

169 Cal. 658

THOMAS v. VISALIA ELECTRIC R. CO. (Sac. 2168.)

(Supreme Court of California. March 24, 1915.)

1. TRIAL — 206 — INSTRUCTIONS — ISSUES AND EVIDENCE.

A litigant is entitled to proper instructions bearing upon any legitimate legal inference which may be drawn from evidence given, and is not limited to instructions addressed only to the positive evidence in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 500; Dec. Dig. — 206.]

2. EVIDENCE — 53 — "EVIDENTIARY PRESUMPTION" — "EVIDENTIARY INFERENCE."

In view of Code Civ. Proc. § 1958, defining an inference, and section 1959, defining a presumption, the difference between an "evidentiary presumption" and an "evidentiary inference" is that, when the law requires the jury to draw a certain designated conclusion from particular evidence, that conclusion is a presumption, and that, when mandatory presumptions are not exacted, it is the right and duty of the jury to draw such reasonable inferences from the evidence as may appeal to and satisfy their minds.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 73; Dec. Dig. — 53.]

3. RAILROADS — 351 — INJURY FROM MAINTENANCE — ACTION — INSTRUCTIONS.

In an action against an electric railroad company for injuries from its negligence in maintaining its crossing without suitable approaches, so that the rails stood above the highway from four to six inches, whereby the wheels of plaintiff's vehicle struck them, broke the pole, frightened the horses, overturned the vehicle, and threw plaintiff out, wherein defendant offered evidence that many other people had driven across the tracks before and after without difficulty, although it was necessary to drive slowly and carefully, defendant was entitled to instructions on the negligence of plaintiff's driver and on defects in the vehicle.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. — 351.]

4. RAILROADS — 324 — CROSSING ACCIDENT.

In such case, plaintiff was not an insurer of the soundness of the vehicle, and he and the driver were not responsible for any defect therein, latent or otherwise, unless it was known or could have been known by the exercise of ordinary care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1020-1025; Dec. Dig. — 324.]

5. RAILROADS — 351 — CROSSING & ACCIDENT — CONTRIBUTORY NEGLIGENCE.

In such case, an instruction for defendant that whether "a requisite or ordinary prudence" required plaintiff to carry a light sufficient to show the defective condition of the highway, was properly refused as intimating that plaintiff was

bound to carry such a light to enable her to determine whether defendant had obstructed the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. § 351.]

6. RAILROADS § 307 — OBSTRUCTING CROSSING.

A railroad obstructing a highway, even under license, is bound to maintain proper barricades and warnings by day and proper signal lights by night.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 972-977, 979, 980; Dec. Dig. § 307.]

Department 2. Appeal from Superior Court, Los Angeles County; W. B. Wallace, Judge.

Action by Sarah J. Thomas against the Visalia Electric Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Karr, J. W. McKinley, and A. W. Ashburn, Jr., all of Los Angeles, and Power & McFadzean, of Visalia (W. R. Miller, of Sacramento, of counsel), for appellant. E. I. Feemster and Feemster & Walker, all of Visalia, for respondent.

HENSHAW, J. Plaintiff sued to recover damages for personal injuries which she received in the manner hereinafter set forth. The cause was tried before a jury, which awarded her damages in the sum of \$3,368. Defendant moved for a new trial. Upon denial of its motion it appealed from the judgment and from the order of the court.

The complaint alleged that plaintiff, in company with three other persons, was riding in a two-horse surrey along one of the public roads of Tulare county. Her brother was driving. It was in the nighttime. The railroad tracks of the defendant crossed this highway, and the crossing was so negligently maintained that there were not suitable approaches; the rails standing above the surface of the highway from four to six inches. The tracks of defendant did not cross this highway at right angles, but at an acute or obtuse angle, depending upon the direction of one's approach to them. As a result, it is asserted that, when the wheels of the vehicle struck the high rails, the wheels cramped, the doubletree broke, the singletrees and pole fell to the ground, and the horses became frightened, ran away, overturned the vehicle, and inflicted the injuries for which compensation was sought. The answer was by denial and set forth contributory negligence. Defendant having no eyewitnesses to the accident, nor any eyewitnesses to the physical condition of the surrey, produced evidence that many other people had driven across these tracks before and immediately after the accident and had experienced no particular difficulty in so doing. Care was required, and it was necessary to drive slowly, but that was all. Upon this evidence the defendant sought to have

the jury draw the inference that the accident was occasioned either through the careless and reckless driving of plaintiff's brother, or through some defect in the vehicle itself; upon the one hand, that reckless driving, where care was required, occasioned the accident; upon the other, that, if the vehicle was being driven with due care, then the vehicle itself, by reason of rusted bolts or defective doubletree, was not physically capable of bearing the strain of ordinary careful driving, and so broke down and occasioned the accident. Certain instructions were proposed by defendant in support of this view, and the refusal of the court to give these instructions is the matter complained of on this appeal.

[1] A litigant is entitled to proper instructions bearing upon any legitimate legal inference which may be drawn from evidence given. He is not limited in this right to instructions addressed only to the positive evidence in the case. Inferences properly drawn are in many cases the only method of arriving at the truth. In every case where direct and positive evidence of a fact is not possible, proof, the result of evidence, must be reached either by presumption or by inference.

[2] The difference between an evidentiary presumption and an evidentiary inference is simply this: That, when the law requires the jury to draw a certain designated conclusion from particular evidence, that conclusion so forced upon the jury is a presumption. Where mandatory presumptions are not exacted, it is the right and duty of the jury to draw such reasonable inferences from the evidence as may appeal to and satisfy their minds. *Davis v. Hearst*, 160 Cal. 143, 176, 116 Pac. 530; Code Civ. Proc. §§ 1958, 1959.

[3] Therefore appellant was within its rights in asking that instructions be given to the jury touching the conclusion which they should reach, if they did draw from the evidence in the case the inference of the negligence of plaintiff's driver or of a defective vehicle. The difficulty, however, is that the instructions which the defendant proposed went beyond its rights in the matter.

[4] Thus, defendant's proposed instruction 16 is as follows:

"If some of the appliances by which the horses were hitched to the rig in question were defective, and as the result of such defect broke, thereby causing the horses to run away and the vehicle to be overturned, you must find for the defendant, because such defect in said appliances and the running away of the horses were the direct and proximate cause of the accident."

This instruction, however, is not correct in point of law. It would in effect make the plaintiff an insurer of the soundness of the vehicle in which she was riding. But plaintiff and plaintiff's driver were not responsible for any defect in the vehicle, latent or otherwise, unless it was known or could

have been known by the exercise of ordinary care. To like effect are the other instructions also refused by the court.

[5, 6] Still another one, standing upon slightly different ground, informed the jury that in determining—

“whether or not plaintiff exercised ordinary care, you are instructed that you are to consider the circumstances surrounding the said plaintiff, in determining what amount of care should reasonably be expected of a person traveling along a road, as she was. In this respect, you will take into consideration the fact that she was traveling at night, the rate of speed at which she was traveling, the question of whether it was dark enough to make the use of lights on said vehicle a requisite of ordinary prudence, and the question of whether or not any lights were carried on said vehicle to show the condition of the road ahead, and all the circumstances and surroundings.”

The difficulty with this instruction, which justified the court's refusal to give it, is that, while in general terms it properly advises the jury that they were to determine from all the facts, circumstances, and surroundings in the case whether plaintiff's driver was exercising ordinary care, they are specifically told to consider whether “a requisite or ordinary prudence” required plaintiff to carry light sufficient to show the defective condition of the highway. We know of no law imposing any such duty in the exercise of ordinary care upon the driver of a horse-drawn vehicle upon the public highway. To the contrary, one who obstructs the highway, even under license, is under duty to maintain proper barricades and warnings by day and proper signal lights at night. There was in this, at least, an intimation to the jury that it was plaintiff's duty to carry upon her surrey some sort of a searchlight, not as a mere warning signal to other approaching vehicles, but to enable her to determine whether somebody else had obstructed the passage of a highway that she was entitled to believe was free and unobstructed. This particular instruction, for the indicated reason, was properly refused.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

169 Cal. 754

KEATING v. KEATING et al. (L. A. 3234.)
(Supreme Court of California. March 31, 1915.)

1. NEW TRIAL ⚡131—STATEMENT OF CASE—SETTLEMENT.

Code Civ. Proc. §§ 650, 659, as to settlement of statement of case for motion for new trial, held substantially complied with, though the proposed statement and proposed amendments were not formally presented by defendant to the judge, and though formal notices were not given, the statement and amendments having been filed with the clerk, the judge, who had been away, having on his return received the papers, and having then, from the bench, all the attorneys being present, given notice when the settlement would be taken up; the object of

the statute being to prevent delay or surprise to the adverse party, and none having occurred.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 263-269; Dec. Dig. ⚡131.]

2. JUDGES ⚡49—CHANGE FOR BIAS—MOTION FOR NEW TRIAL.

Code Civ. Proc. § 170, subd. 4, requiring the judge about to try a case, on its appearing from affidavits that a party cannot have a fair trial before him, because of his prejudice or bias, to call in another judge to preside at the trial of said action or proceeding, applies to the hearing of a motion for new trial; such a motion being an independent proceeding, and the hearing thereof being a trial.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 187, 188; Dec. Dig. ⚡49.]

3. JUDGES ⚡51—CHANGE FOR BIAS—COUNTER AFFIDAVITS.

Under Code Civ. Proc. § 170, subd. 4, requiring the judge about to try a case, when it appears from affidavits that a party cannot have a fair trial before him, because of his prejudice or bias, to call in another judge to preside at the trial, the matter of change of judge must be determined on affidavits alone, and, there being no counter affidavit of the judge himself denying his alleged bias, he must grant the motion.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. ⚡51.]

4. APPEAL AND ERROR ⚡1106—DISPOSITION OF CAUSE—DENIAL OF NEW TRIAL—DISQUALIFIED JUDGE.

The order of a judge denying a motion for new trial, heard by him after his erroneous denial of a motion to call in another judge, because of his bias, is void, on direct appeal, as made by a judge disqualified to sit on the hearing, and therefore, instead of being reversed, with the effect of granting a new trial will be vacated, and the cause restored to the trial court for hearing on the motion by a qualified judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4386-4398, 4585; Dec. Dig. ⚡1106.]

In Bank. Appeal from Superior Court, Los Angeles County; George E. Church, Judge.

Action for divorce by Hazel M. Keating against Edward Keating, in which Mrs. Vinette Lehman was made correspondent. From an adverse judgment and orders, defendant Keating appeals. Order denying new trial vacated, and cause remanded, with directions.

See, also, 23 Cal. App. 384, 138 Pac. 118.

J. Wiseman Macdonald and Waldo M. York, both of Los Angeles, for appellant. James P. Clark, of Los Angeles, for respondent. George L. Keefer, of Los Angeles, for correspondent.

HENSHAW, J. A rehearing was granted in this case for the correction of a statement of fact, mistakenly made, and for further consideration of the effect which a correction of the misstatement might have upon the merits of the controversy. In the previous opinion Mr. Justice Melvin, speaking for the court in bank, said:—

“Plaintiff sued for a divorce upon the ground of extreme cruelty, and defendant answered.

Subsequently the plaintiff having obtained leave of court filed a supplemental complaint charging adultery, and defendant answered the supplemental complaint. Defendant also asked and received permission to file a cross-complaint setting up as cruelty the filing of plaintiff's supplemental complaint charging adultery and other matters. On motion of the plaintiff, Hazel M. Keating, part of his cross-complaint was stricken out. Judgment was in favor of plaintiff upon both grounds, adultery and cruelty, and against Edward Keating also on his cross-complaint. Alimony in the sum of \$55,000 was awarded by the decree. He moved for a new trial, and his motion was denied on the 4th day of March, 1912. Meanwhile, on March 2, 1912, defendant applied to the trial court for a change of judges, but his application was denied. On March 4th he moved to strike out a portion of the certificate of the judge settling the statement. This motion was denied. Defendant's appeals are from the judgment, from the order denying his motion for a new trial, from the order denying the application for change of judges, from the order striking out a portion of his cross-complaint, and from the order denying his motion to eliminate part of the certificate to the engrossed statement on appeal.

[1] "Respondent objects to the consideration of the alleged statement of the case upon which the appeal from the judgment is wholly, and that from the motion for a new trial is partly, based. This objection is founded upon the supposed failure of the appellant to comply with sections 659 and 650 of the Code of Civil Procedure in preparing and presenting his said statement of the case. The same objections were urged before the trial court, and the learned judge in a written opinion overruled them. The facts are these: On September 2, 1911, defendant's notice of intention to move for a new trial on a statement of the case and affidavits was filed. On November 16, 1911, the attorneys for defendant left with the deputy county clerk of the department in which the cause had been tried their proposed statement, which bore an admission of service signed by the attorney for plaintiff. On December 28th plaintiff's attorney left with said deputy clerk plaintiff's proposed amendments to the statement. The judge who tried the case was absent from the county from December 28, 1911, to January 20, 1912. On the last-named day he received all of the papers either from the clerk or from the judge of the department, in whose place he had presided during the trial. On that day the judge who had tried the case stated from the bench, in the presence of all the attorneys, that he would take up the settlement of the statement on January 27, 1912, at a certain hour. On the 20th of January counsel for plaintiff presented his objections, specifying that defendant had not given plaintiff notice at any time that he would present the proposed statement; that notice had been served upon plaintiff within ten days after service of plaintiff's proposed amendments of defendant's intention to present his proposed statement to the judge who tried the case; and that defendant failed, within ten days after the service of plaintiff's proposed amendments, to deliver the proposed statement and the offered amendments to the clerk of the court for the judge, nor had such delivery been made at any time. It is clear that the statute was substantially complied with. The purpose of the statute is to prevent delay or surprise to the adverse party. No such delay nor surprise occurred. The clerk had the proposed statement immediately after its service on the plaintiff's attorney. When the proposed amendments were prepared and served they were also left with the clerk. While they were not thereafter formally called to his attention or presented by the counsel for the appellant, they were as much in his possession for the judge as if the exact requirements of the statute had been complied with. And the judge re-

ceived timely notice, upon his return to Los Angeles, of the pendency of the matter of settling the statement, and counsel for plaintiff, having received actual notice, was present in court. *Curtin v. Ingle*, 155 Cal. 55, 99 Pac. 480.

[2] "After the settlement of the statement on motion for a new trial, the defendant, Edward Keating, served upon plaintiff and filed a demand that the judge who had presided at the trial should secure the services of some other judge to hear said motion for a new trial. On the day set for the hearing on motion for a new trial Edward Keating, by his counsel, moved the court for a change of judges in accordance with the demand previously made, and in support of his motion read a number of affidavits tending to show that a member of the judge's family had attended the court sessions during the trial of the case of *Keating v. Keating*, had shown great interest in the success of the plaintiff in that litigation, and had expressed certain views with reference to the case in the presence of the judge. Affidavits were filed in opposition to the request for a change, and the court refused to comply with defendant's desires in the matter. The proceeding was held in contemplation of the fourth subdivision of section 170 of the Code of Civil Procedure. At the outset respondent contends that this section applies only to the trial of causes, and not to the hearing of motions for new trials. We can see no reason for this distinction. If, after trial, and before the hearing of a motion for a new trial, one of the litigants should discover that the judge who had tried the cause was prejudiced against him, we see no reason why he might not invoke the provisions of subdivision 4 of section 170 of the Code of Civil Procedure. In *Estudillo v. Security Loan & Trust Co.*, 158 Cal. 70, 109 Pac. 884, the motion was made at this same stage of the case, and the proceeding was not questioned. A motion for a new trial is surely a 'trial' under the principles and the definition announced in *Tregambo v. Comanche M. & M. Co.*, 57 Cal. 505, and such a motion has been held to be an independent proceeding. *Galbraith v. Lowe*, 142 Cal. 296, 75 Pac. 831.

[3] "The judge did not subscribe any affidavit in answer to that of the defendant, and appellant's counsel insist that, as Mr. Keating's sworn allegation of the judge's prejudice stands uncontradicted, the refusal to grant the motion was erroneous, under the authority of *People v. Compton*, 123 Cal. 403, 56 Pac. 44, and similar cases. We see no escape from this conclusion. The law of California upon this subject was discussed in an opinion by Mr. Justice Henshaw in the recent case of *Bassford v. Earl*, 162 Cal. 119, 121 Pac. 395, where the following language was used: 'The law governing the conduct of a judge upon the hearing and determination of a motion presented by authority of section 170 of the Code of Civil Procedure has often been discussed, and is well settled. The earlier rule announced in *Heinlen v. Heilbron*, 97 Cal. 107, 31 Pac. 838, that "the fact that a judge had acted in a trial must be held conclusive that, in his own opinion, he was competent to act, and in such a case he who would attack his right to act therein must show his disqualification by facts of a positive and unequivocal character," by force of section 170 of the Code of Civil Procedure, no longer obtains. The matter must be tried upon affidavits, and upon affidavits alone. Whatever knowledge may repose within the breast of the judge must now appear by affidavit, or it does not appear at all. Inferences or presumptions arising from the judicial decision in no wise control. The judge "must decide upon the facts averred in the affidavits, without reference to his own knowledge of his state of mind." *Hoyt v. Zumwalt*, 149 Cal. 388, 86 Pac. 600; *People v. Compton*, 123 Cal. 412, 56 Pac. 44; *Morehouse v. Morehouse*, 136 Cal. 352, 68 Pac. 970.'

"It is true that many of the statements in the affidavits filed by defendant are squarely contradicted by counter affidavits, but the fact remains that the judge did not deny by affidavit the prejudice which was attributed to him in appellant's sworn statement, and the law is definitely settled that only by affidavit may that issue be met. Bias might have arisen from the statements admitted in the counter affidavits. It is idle to contend that the affidavit of Mr. Keating, although positive in form, must of necessity rest upon information and belief, and that therefore it should be rejected. Knowledge of facts which might cause a litigant to feel that a judge was prejudiced against him would naturally often be only that to be derived from information conveyed to him by others. Complete and effective denial of such alleged facts, while it might be the basis for a finding by the court that the litigant's conclusions were based upon false premises, would not dispose of the matter of the mental attitude of the judge, which may only be placed of record by his own solemn affidavit. This was lacking, and therefore his denial of the motion was error."

[4] The error which inadvertently crept into the statement is found in the sentence next following:

"The same affidavits as those upon which the demand for a change of judges was based were used on the motion for a new trial, and appellant contends that the motion should have been granted because of such an irregularity as is contemplated by subdivision 1 of section 657 of the Code of Civil Procedure."

The conclusion from this was the necessary one, that the order denying a new trial should be reversed because of the showing of the disqualification, by bias and prejudice, of the judge who had conducted the trial.

Upon the petition for rehearing our attention was specifically directed to the fact that, in connection with, and as a part of, the motion for new trial, certain affidavits intimating the existence of bias and prejudice were filed by the moving party not later than November, and answering affidavits by respondent in December, but that no affidavit specifically charging bias and prejudice upon the part of the judge was filed in support of the motion for a new trial. Next, it was shown that, while the motion for new trial was pending, before, indeed, it had been heard, appellant, in February, filed another independent motion seeking a motion of the trial judge and the calling in of another; the ground of this motion being the bias and prejudice of the judge presiding, which bias and prejudice were specifically charged. This motion the judge denied. Thereafter he proceeded to hear and determine the motion for a new trial, upon which motion there was not judicially before him the affidavit or affidavits specifically charging bias and prejudice.

What are the legal consequences which necessarily flow from this state of facts? Everything that has been said by this court in the earlier opinion above quoted is affirmed. Resulting from this is the inevitable conclusion that the trial judge erroneously refused to call in another judge to hear and

determine the motion for a new trial. His error in so doing necessitates a reversal of his ruling refusing to call in another judge, and with that reversal is imposed the duty to call in another judge who shall hear and determine the motion for a new trial. The order of the court refusing to grant the motion for a new trial is not, therefore, subject to reversal in the sense that a reversal would be the equivalent of an order granting a new trial. The order refusing to grant the motion for a new trial, under the circumstances attending its making, was void upon this direct appeal, as being an order made by a judge disqualified to sit on the hearing. For this reason the order refusing a new trial is not reversed, but is vacated and declared null, and the cause will be restored to the jurisdiction of the trial court, with directions to the qualified judge who may be called in to hear and determine that motion.

It is ordered accordingly.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

(109 Cal. 764)

SCHAFFER v. SMITH, City Treasurer.

(L. A. 3833.)

(Supreme Court of California. April 1, 1915.
Rehearing Denied April 29, 1915.)

1. MUNICIPAL CORPORATIONS $\S$ 294 — PUBLIC IMPROVEMENTS — STREET WORK — BONDS REPRESENTING ASSESSMENT — STATUTE.

A resolution of a board of trustees of a city initiating certain street improvements, to cover the assessment for which bonds and securities were issued by the municipality under St. 1893, p. 33, providing for a system of street improvement bonds to represent assessments for street improvements within municipalities, was proper, although posted and published without having thereon the city clerk's certificate to its passage, which the clerk did not sign until after the posting and publication; the certificate being merely evidence on the minutes of the board of the fact that the resolution was passed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 776-788, 791; Dec. Dig. $\S$ 294.]

2. MUNICIPAL CORPORATIONS $\S$ 485—PUBLIC IMPROVEMENTS—STREET WORK—ASSESSMENT—STATUTES.

Where the warrant of assessment for a street improvement was not certified by the street superintendent, but by the city engineer, who was acting as such superintendent and thus certified to his own previous acts as engineer, the bonds issued, representing assessments for the cost of the improvements, were not thereby rendered invalid, under St. 1893, p. 33, providing for the issuance of such bonds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1140-1144; Dec. Dig. $\S$ 485.]

3. MUNICIPAL CORPORATIONS $\S$ 485—PUBLIC IMPROVEMENTS—STREET WORK—ASSESSMENT—STATUTES.

Where the recorded warrant for a street improvement was not signed by the president of the board of trustees of the city, although the original warrant was so signed, bonds representing such assessment, issued under St. 1893, p.

33, providing a system of street improvement bonds to represent assessments for the cost of street improvements within municipalities, were not thereby invalidated.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1140-1144; Dec. Dig. ☞485.]

4. CONSTITUTIONAL LAW ☞290—MUNICIPAL CORPORATIONS ☞527—PUBLIC IMPROVEMENTS—STREET WORK—ASSESSMENT—BONDS—STATUTES—CONSTITUTIONALITY.

St. 1893, p. 33, provides a system of street improvement bonds to represent assessments for the cost of street work and improvements within municipalities. Section 4 provides that if any person shall present to the city treasurer his affidavit, accompanied by a certificate of a searcher of records, that he is the owner of a lot of land in the list of unpaid assessments, and if he notifies the treasurer in writing that he desires no bond to be issued for the assessment upon his lot, then no bond shall issue, and the payee of the warrant or his assigns shall retain his right for enforcing collection as if the lot had not been listed. *Held*, that the Legislature, having power to provide that bonds shall issue for the amount of a delinquent assessment, is not bound to give the property owner opportunity to avoid their issuance, further than his opportunity to pay the assessment before its becoming delinquent, and that in extending to him the further privilege, to avoid the issuance of bonds, in the statute, the Legislature has the right to impose upon such privilege reasonable conditions to its exercise, so that the section of the statute is not unconstitutional, as being in effect a taking of property without due process, through the provision requiring the property owner to present a certificate made by a searcher of records.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 871-875; Dec. Dig. ☞290; *Municipal Corporations*, Cent. Dig. §§ 1242, 1243; Dec. Dig. ☞527.]

5. MUNICIPAL CORPORATIONS ☞474—PUBLIC IMPROVEMENTS—STREET WORK—ASSESSMENT OF RAILROAD RIGHT OF WAY—BONDS—VALIDITY—STATUTE.

Where street improvement bonds were issued to represent delinquent assessments on a certain betterment, the street being one occupied on one side by individual owners, who were assessed, and on the other by an unassessed railroad right of way, the assessment was void as partial, and the bonds securing delinquencies worthless, since, while the right of way could not be assessed, the land itself was land fronting upon the street, within the meaning of the street work act of 1885 (St. 1885, p. 147), providing for work upon streets, and for the construction of sewers, within municipalities, and so assessable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1122-1124; Dec. Dig. ☞474.]

6. MUNICIPAL CORPORATIONS ☞562—PUBLIC IMPROVEMENTS—STREET WORK—BONDS REPRESENTING ASSESSMENTS—STATUTES.

Under St. 1893, p. 33, providing a system of street improvement bonds to represent delinquent assessments, as amended by St. 1911, p. 1204, providing that the bonds shall be conclusive evidence of regularity of issue, where, in suit against a city treasurer to compel the sale of property for the assessments upon which such bonds had been issued, it appeared that the original assessment for the work had been absolutely void, as partial, the fact was fatal to the validity of the bonds, since, despite the amended act, the issuance of the bonds is conclusive evidence of the regularity of the performance of all required steps in the proceedings, ex-

cept those that are necessary to constitute due process of law, or comply with any other constitutional prerequisites.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1269-1271; Dec. Dig. ☞562.]

7. MUNICIPAL CORPORATIONS ☞562—PUBLIC IMPROVEMENTS—STREET WORK—BONDS REPRESENTING ASSESSMENTS—STATUTES.

Under St. 1893, p. 33, providing a system of street improvement bonds to represent assessments for the cost of street work and improvements, and declaring that no assessment shall be held invalid, except upon appeal to the city council, as provided under the street work act of 1885, where the owners, aggrieved by a partial assessment, did not appeal to the board of trustees of the city, bonds securing delinquent assessments being issued, in suit upon such bonds to force sale of the property they represented, the city treasurer could set up the invalidity of the partial assessment, such assessment being void on its face.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1269-1271; Dec. Dig. ☞562.]

In Bank. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by M. E. Schaffer against Sarah A. Smith, as City Treasurer of the City of Watts. Judgment for defendant, and plaintiff appeals. Affirmed.

Crouch & Crouch, of Los Angeles, for appellant. A. R. Holston, of Los Angeles, and Peebles Shoaff, of Watts, for respondent.

PER CURIAM. A hearing in the above cause was ordered in this court, after decision by the District Court of Appeal of the Second District. The opinion of the District Court of Appeal, written by Mr. Presiding Justice Conrey, is adopted as the opinion of this court. It is as follows:

The plaintiff, as owner of certain street improvement bonds transferred to him by a holder who acquired them from Municipal Securities Company (a corporation), to which the bonds had been issued by the city of Watts, brought this proceeding against the defendant as city treasurer, and applied for a writ of mandate commanding defendant to advertise and sell the property described in the petition. The bonds, purporting to be issued as required by an act approved February 27, 1893 (Stats. 1893, p. 33), are alleged to cover said property by lien claimed to exist under assessments made representing the cost of certain street work. From a judgment entered in favor of defendant, plaintiff appeals.

The street work in question was done pursuant to a contract entered into by the superintendent of streets with a contractor, and the proceedings were in form according to the requirements of the street work act, commonly known as the Vrooman Act. The record of these proceedings, so far as necessary to be noted here, begins with a resolution of the board of trustees, adopted on December 28, 1909, and known as "Resolution No. 123," ordering the work to be done. The bonds are valid, unless their invalidity can be established for at least one of the reasons here presented by the respondent for our consideration.

[1] It is suggested by her counsel that the resolution, No. 123, was posted and published without having thereon the city clerk's certificate to its passage, and that the clerk did not sign

the certificate until after such posting and publication. Respondent asserts that this was an omission of a legal requirement; but we do not find either in the resolution or in the statute anything which supports the assertion made. The certificate is evidence on the minutes of the fact that the resolution passed, and it is nothing more.

[2, 3] It is further claimed that the warrant and assessment were not certified by the duly appointed street superintendent, and that the original warrant was not signed by the president of the board of trustees. These points cannot be sustained. The record shows that A. B. Waddingham who, on July 29, 1911, signed the certificate to the record of warrants, diagrams, and assessments following upon the contractor's return thereof, was then acting as street superintendent. The only point made against this is that earlier in the proceedings he was city engineer, and had not yet relinquished that office, and that he as superintendent of streets was certifying to acts which had been done by him as city engineer. No reason is shown why he should not do this. Upon the objection that the original warrant was not signed by the president of the board of trustees, the answer is that the original warrant was so signed, although that signature is absent from the warrant as recorded. This omission is not material. *Gillis v. Cleveland*, 87 Cal. 214, 220, 25 Pac. 351.

[4] Next it is contended that certain provisions contained in section 4 of the bond act are unreasonable and unconstitutional. That section as amended in 1899, and also in its original form (Stats. 1893, p. 33; Stats. 1899, p. 41) provides: "That if any person, or his authorized agent, shall at any time before the issuance of the bond for said assessment upon his lot or parcel of land, present to the city treasurer his affidavit, made before a competent officer, that he is the owner of a lot or parcel of land in said list, accompanied by the certificate of a searcher of records, that he is such owner of record, and with such affidavit and certificate, such person notifies said treasurer, in writing, that he desires no bond to be issued for the assessments upon said lot or parcel of land, then no such bond shall be issued therefor, and the payee of the warrant, or his assigns, shall retain his right for enforcing collection, as if said lot or parcel of land had not been so listed by the street superintendent."

The argument for respondent is that the provision requiring the property owner to present to the treasurer a certificate made by a searcher of records is in effect the taking of property without due process of law, and that it places upon the property holder a burden above his just share of the expense of the improvement. In our opinion, the statute does not have the effect thus claimed. The Legislature has the power to provide, as by this bond act it does provide, that bonds shall issue for the amount of a delinquent assessment. The Legislature is not bound to give the property owner any opportunity to avoid the issuance of bonds further than his opportunity to pay the assessment before the time fixed when it would become delinquent. In extending to him the further privilege whereby he may be subject to the assessment alone and may prevent the issuance of such bonds, any reasonable condition to the exercise of that privilege may be imposed. The rule requiring him to produce from the records some evidence that he owns the property imposes only a reasonable condition. The case of *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, cited by counsel for respondent, does not support their position. After much searching through the 82 pages of that decision, we think that we have found at page 396 the reference intended. The court there holds that where a person is about to be illegally deprived of his property by another person claiming to act as receiver,

and where the superior court in appointing a receiver exceeded its jurisdiction, the property owner may have a writ of prohibition and is not obliged to submit to the wrong and rely on a long and expensive litigation for recovery of his property. But the provisions above quoted in the bond act are in their effect confined to proceedings within the jurisdiction of a city and its officers.

[5] In respondent's answer to the petition herein she alleged, and the court found, that along the westerly side of Melvin avenue, and along the entire length thereof within the north and south limits of the street work described in said Resolution No. 123, "extends the lands of the Pacific Electric Railway Company, which lands are used as a part of the right of way of said railway company for its line of railway from the city of Los Angeles to the city of Long Beach, and which right of way abuts and fronts upon the westerly side of said Melvin avenue between said Main street and Shorb avenue, the entire distance." After deducting from the total cost of the street work certain amounts which were paid partly by the city out of a street improvement fund obtained from the proceeds of a municipal bond issue, and partly by \$1,500 voluntarily paid by the Pacific Electric Railway Company to the city of Watts on account of said street improvements, the remainder of said cost (such remainder amounting to much more than half of the total cost) was assessed solely and only against the lots and lands fronting on the easterly side of Melvin avenue between Main street and Shorb avenue. The bonds here in question are based upon this assessment.

Upon the facts above stated, the respondent claims that the land covered by the railroad right of way is part of the land fronting on the improved street, and that the assessment is void because the right of way land is not included therein, or that if by reason of the principles of law controlling assessments against rights of way no interest in this land could be subjected to assessment, then the street could not be improved at all under the street work act. In Pennsylvania it has been held that for the purposes of asserting claims for street paving against the roadbed of a railway company "the distinction between the right of way and the fee is a shadowy one." *Junction City R. Co. v. City of Philadelphia*, 88 Pa. 424. In California this point appears to be not definitely decided. In *Southern California Ry. Co. v. Workman*, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79, 2 Ann. Cas. 583, it was decided that a railroad right of way could not be sold under a street work assessment. With respect to the question now under consideration, the statute applicable to this work on Melvin avenue was the same as that under which the case last mentioned was determined. At that time the Legislature had not provided for such sales of rights of way. In that decision the Supreme Court declined to decide whether or not the fee or reversion in right of way land could be assessed, as it held that the proceeding there was merely "for the purpose of enjoining a sale of plaintiff's right of way—that is to say, its easement." In *Fox v. Workman*, 155 Cal. 201, 204, 100 Pac. 243, 247, referring to the same proceedings as in the earlier case, the court again found that the question of right to assess the fee separately from the right of way was not involved, and said: "The court did not, therefore, in the former decision, determine that the fee, subject to the easement, could not be, or that it had not been assessed. The judgment there affirmed merely declared that the bond created no lien upon the right of way. It could not bar plaintiff's right to have the fee, subject to such easement, sold. * * * Here the plaintiff, having at most a right to compel the sale of the fee, subject to the easement, made a demand for a sale of property described in terms covering both fee and easement. The officer was justified in refusing

to comply with this excessive demand, and no liability for damages accrued upon such refusal."

If the case of *Fox v. Workman* does not carry an intimation that lands subject to a railroad right of way, as were the lands of the Pacific Electric Railway on the west side of Melvin avenue, are subject to assessment and should be assessed as lands fronting on the street, but excluding from such assessment the easement held for right of way purposes, we are at least left free to deal with the subject as an undetermined matter. From the record in this case we are unable to say that the right of way over the land in question is complete either in the sense of being perpetual, or of being such as to necessarily require the company to continue to occupy the whole thereof in the operation of its railroad. This land abutting upon the street, although subject to such right of way, may have a substantial value to the owner of the fee. Our conclusion is that, while the right of way cannot be assessed, the land itself is land fronting upon the street within the meaning of the street work act, and under the limitations defined is subject to assessment.

[6, 7] But it is suggested on behalf of appellant that the property owners aggrieved by the assessment as it was made did not, within the time required by law, appeal to the board of trustees from the assessment, and that since they did not so appeal the assessment became final and is not further subject to attack on account of the alleged errors. The statute declares that no assessment shall be held invalid, except upon appeal to the city council as provided in section 11 of the street work act (Stats. 1885, p. 156), for any error, informality, or other defect in any of the proceedings prior to the assessment, or in the assessment itself, where notice of the intention of the city council to order the work to be done has been published in accordance with law.

Appellant further calls attention to the fact that on June 26, 1911, four days before issuance of the warrant of assessment in the case at bar, there became effective an amendment to section 4 of the street improvement bond act, providing that bonds issued thereunder "shall be conclusive evidence of the regularity of all proceedings thereto under said street work act and under this act, previous to the making of the certified list of all assessments unpaid to the amount of twenty-five dollars or over by the street superintendent to the city treasurer, and of the validity of said lien up to the date of said list." Stats. 1911, p. 1204. In *Chase v. Trout*, 146 Cal. 350, 30 Pac. 81, the Supreme Court declared its interpretation of the meaning of the conclusive evidence clause as formerly contained in the same section of the statute. Without repeating at length the principles there set forth, we find the decision in substance to be that under the quoted clause of the statute the issuance of the bonds shall be conclusive evidence of the regularity of the performance of all the required steps in the proceedings leading up to the bonds, excepting those that are necessary to constitute due process of law, or to comply with any other constitutional prerequisite. Answering the question as to what are the essentials the non-observance of which cannot be cured, one item specified is that there must be an assessment or apportionment of the amount to be raised. The court there calls attention to the fact (citing *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 381, 45 Am. St. Rep. 33) that power could not be given to the street superintendent to change the amount of the contract price and of the assessment. Such attempted plan would be beyond the reach of a curative provision, because it would give power to that officer to improve the street and levy an assessment without a substantial compliance with the constitutional conditions. After pointing out some of the objections made to the proceedings in that case,

the court said: "All of them relate to the manner of the work and the method of procedure to get it done, and not to the subjects of the notice to the owners, the hearing of grievances, the fact that work was done, nor to the existence of a uniform assessment."

But in the case at bar the claim is, under the facts to which we have referred, that the attempted assessment made wholly against the lots on the easterly side of Melvin avenue is not a uniform assessment, and that on its face it shows a willful failure to make an assessment according to the plan provided by law. We think this claim should be sustained, and that the assessment belongs to that class where the owner may, without appealing to the city council, resist the enforcement of the assessment because it is void on its face. In *Perine v. Lewis*, 128 Cal. 236, 241, 60 Pac. 422, 423, referring to an assessment made upon a plan not in accordance with the law and which resulted in assessing certain lots in double the right amount, the court said: "As the objection did not require extrinsic evidence for the purpose of establishing the fact, but the assessment appeared upon its face to have been made in violation of the statute, the defendants are not precluded from making the objection without having previously appealed to the board of supervisors." To the same effect is *Kenny v. Kelly*, 113 Cal. 364, 45 Pac. 699. In *San Diego Investment Co. v. Shaw*, 129 Cal. 273, 61 Pac. 1082, no question was raised with respect to the right of the property owner to resist the enforcement of a street assessment lien for irregularities that might have been passed upon by the city council, but it was there directly decided that where the whole cost of certain street grading work was apportioned and assessed against the lots fronting on one side of the street, when according to the statute both sides should have been assessed, the assessment was void and the lien claimed thereunder could not be enforced.

Since the assessment in the present case was void upon its face, and since the bonds issued pursuant to such assessment were also void, it follows that no duty has devolved upon the defendant city treasurer to foreclose those bonds or sell the property described therein. This being so, the appellant is not injured or aggrieved by the affirmative part of the judgment which directs that defendant cancel of record the bonds and assessments described in plaintiff's petition.

The judgment is affirmed.

169 Cal. 671

THAYER v. TYLER. (Sac. 2146.)

(Supreme Court of California. March 25, 1915.)

1. APPEAL AND ERROR ⇐1071 — HARMLESS ERROR—FINDINGS.

A general finding of the untruth of all the allegations of the complaint, though contrary to the evidence as to certain facts, does not require reversal of the judgment, being supported as to all the facts on which validity of the judgment depends.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. ⇐1071.]

2. APPEAL AND ERROR ⇐1002—FINDINGS OF FACT.

Findings of fact on conflicting evidence cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇐1002.]

3. TRIAL ⇐404—FINDINGS—CONSTRUCTION.

Where defendant asserted one counterclaim of \$671.50, another of \$9, and another for profits, a general finding for defendant, except that

no profits accrued, and that only \$518.30 is due him, instead of \$697.50, with the conclusion that he is entitled to judgment for \$518.30, is one that the total amount, under the first two counterclaims, that he is entitled to recover is \$518.30.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. Ⓒ404.]

4. EVIDENCE Ⓒ474—OPINIONS—QUALIFICATION OF WITNESS—IRRIGATION.

It cannot be said that witness was not qualified to testify that during two seasons there was not enough water to irrigate an orchard, when it appears that he had been a farmer for 15 years, had lived in the neighborhood, and been engaged in cultivating the orchard and attending to its water supply.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. Ⓒ474.]

Department 2. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by I. E. Thayer against Carl R. Tyler. Judgment for defendant, and plaintiff appeals. Affirmed.

James M. Oliver, of San Francisco, and John M. Fulweiler, of Auburn, for appellant. Prewett & Chamberlain, of Auburn, for respondent.

HENSHAW, J. Plaintiff alleged that he was the owner of a ranch situated in the county of Placer; that the ranch was of about 500 acres, 50 acres of it being planted to orange and other fruit trees. The remainder was grazing land on which were a number of cattle. He employed defendant for a period of three years from April, 1909, as manager of the ranch. He authorized defendant to procure from business houses in the city of Lincoln, near the ranch, all materials necessary properly to care for the orchard and properly to feed and care for the stock. Plaintiff alleged that he had ample credit in the business houses of Lincoln to enable defendant so to procure all of the indicated necessities; that defendant negligently failed to care for the orange trees, so that 400 or more of them died, and he negligently and willfully failed to procure sufficient feed for the stock and to properly and sufficiently feed them, whereby about 20 head of cattle died from starvation and diseases incident thereto. He laid his damages for the loss of his orange trees in the sum of \$4,000, and for his cattle in the sum of \$600, and prayed judgment accordingly. The answer denied substantially all the allegations of the complaint. In denying the existence of the contract between the parties set up in the complaint, defendant averred a specific contract in terms as follows:

"March 20, 1909.

"Mr. Carl R. Tyler, Lincoln, California—Dear Sir: In regard to future management of Valle Vista, I offer the following for your consideration:

"I will pay you a monthly salary of \$75.00 and you to do the best you can to early get the place on a paying basis. In addition to monthly salary, if on the first of April each year, it is found that the income from the orchard and cat-

tle exceeds the expense of maintenance, you to then receive 25 per cent. of that net profit.

"Agreement for three years from April 1st, 1909.

"Yours very truly, I. E. Thayer."

By way of alleged counterclaim and cross-complaint defendant set forth the due performance of his duties under this contract and an indebtedness in his favor arising thereunder in the sum of \$697.51. He further alleged that profits had accrued under his management, and asked for an accounting of these profits. By a separate defense, alleged by way of counterclaim and cross-complaint he set forth an indebtedness due him from plaintiff in the sum of \$9 for merchandise purchased for plaintiff at his special instance and request. The court found and concluded as follows:

"The court finds that each and all the allegations of the amended complaint of plaintiff are untrue and that each and all the denials and allegations of the answer, counterclaim, and cross-complaint of defendant are true, except that no profits have accrued from the ranch, and except that only \$518.30 is due to defendant (instead of \$697.50).

"The court concludes that defendant is entitled to a judgment, that plaintiff take nothing by this action and that defendant should have judgment for \$518.30, and costs."

[1, 2] These general findings of the untruth of each and all of the allegations of the complaint are made the basis of the attack upon this appeal. Thus it is said that in this general finding is embraced the finding that plaintiff was not the owner of the land in question, and that this was abundantly proved. Appellant is correct in this respect. The general finding declares it to be untrue that defendant entered upon the properties of plaintiff and accepted employment from him, while the uncontroverted evidence establishes that defendant did so. In this also appellant is correct. Again it is said that the findings negative the allegations of the complaint that plaintiff had full and ample credit in the business houses of the city of Lincoln for all necessary purposes connected with the operation of his ranch. The evidence abundantly establishes that he did have such credit. The findings negative the allegations of the complaint that 400 or more orange trees died, and this finding is certainly contrary to the evidence. Sufficient has been said to exemplify the proposition which appellant advances upon this appeal. But as to some of these allegations there was no denial in the answer. As to the others, if the judgment depended upon them, a reversal would be necessitated. But, as we shall proceed to show, they are not material to the decision of the case and the judgment which the court gave is not dependent on them. It is only when a judgment rests for its validity upon a finding which is not supported, or which negatives a fact admitted by the pleadings, that injury is worked and a reversal must follow. *Silvey v. Neary*, 59 Cal. 98; *Estate*

of Doyle, 73 Cal. 570, 15 Pac. 125; Diefendorf v. Hopkins, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549; Machado v. Kinney, 135 Cal. 354, 67 Pac. 331. Thus, assuming for the moment that plaintiff did own the ranch, that he did have ample credit, that 400 orange trees of the value of \$4,000 died, that cattle to the value of \$600 died, underlying all these facts, to establish the responsibility of defendant, it must be shown that the death of the orange trees and the cattle resulted from his negligent performance of the duties imposed upon him. For if these losses did not so result, there is an end of defendant's responsibility and so of plaintiff's cause of action. Upon this all vital proposition the evidence is conflicting, and the determination of the trial court in defendant's favor may not here be disturbed.

[3] A minor objection advanced by plaintiff is that the findings are contradictory and therefore will not support the judgment. The attack under this proposition is based upon the finding of the court that the allegations of the answer, counterclaim, and cross-complaint are true, except that no profits accrued from the ranch, and that only \$518.30 is due to the defendant instead of \$697.50, the amount defendant alleges. We need not follow in detail appellant's argument. It is, in brief, to the effect that if all the allegations of the counterclaim and cross-complaint are true, there was due to defendant \$697.50 under the first item of counterclaim, and \$9 under the second. But the court awarded only \$518.30. It is said that the court evidently did not, in its own mind, believe the allegations of the counterclaims to be true, or it would have awarded this amount, and that it cannot be determined what of these allegations the court believed to be untrue when it awarded only \$518.30. We are not able to approve this reasoning. Manifestly what the court meant was that while defendant asserted a right to recover upon one counterclaim and cross-complaint \$697.50, and upon another independent claim \$9, it finds that the total amount under the two which he is entitled to recover is \$518.30. So construed, there is no contradictoriness nor even ambiguity.

[4] Julius Hibbe, called upon the part of the defendant, testified that he was a rancher by occupation, lived in the neighborhood of the Thayer ranch for 15 years and knew the ranch well; that he had worked upon it; that his work was to attend to the irrigation of the ranch; that the water used in the irrigation was obtained from the South Yuba Company; that frequently there was a shortage of water—and then answered, over the objection of plaintiff, certain questions, to the effect that in 1910 there was not water enough to irrigate the orchard, using all of the water available; that the same was true in 1909. It is contended that these answers

were inadmissible; but as the witness was not shown to be an expert in the matter of the water requirements of an orange orchard, some practical knowledge and familiarity with conditions were necessary before any witness could intelligently and properly answer the question. But it by no means follows that a man who has been a farmer for 15 years, who has been engaged in the work of cultivating the orchard in question and in attending to its water supply, was not qualified to answer upon these matters of fact.

No other matters advanced by appellant call for specific consideration.

For the reasons given, the judgment appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

26 Cal. App. 584

A. MEISTER & SONS CO. v. WOOD & TATUM CO. (Civ. 1257.)

(District Court of Appeal, Third District, California. Feb. 18, 1915. Rehearing Denied by Supreme Court April 19, 1915.)

1. CORPORATIONS ⇐513—ACTIONS—ISSUES—PLEADINGS.

A seller suing a corporation for the balance due on goods sold to it need only allege a sale to and purchase by the corporation, and the corporation, denying the averments, may show want of authority on the part of the officer making the purchase, and, when that is done, the seller may rely on ostensible authority, estoppel, or ratification, though not pleaded.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2017-2027, 2031-2034, 2036-2045; Dec. Dig. ⇐513.]

2. CORPORATIONS ⇐410, 426—ACTS OF OFFICERS—OSTENSIBLE AUTHORITY—RATIFICATION.

A corporation in the real estate business employed a dozen or more salesmen. Automobiles were used in the business, and the secretary of the corporation contracted in the name of the corporation for the purchase of an automobile to be paid for in monthly installments. He was one of the managers of the business. Two installments and accrued interest were paid, and repairs made on the car were paid. The corporation assumed ownership in an endeavor to exchange the car with the seller for another type of car. *Held*, that the secretary had ostensible authority to make the purchase, and that the purchase was ratified, and the corporation could not repudiate the transaction under Civ. Code, §§ 2318, 2319, defining the authority of agents.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1629-1632, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. ⇐410, 426.]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by the A. Meister & Sons Company against the Wood & Tatum Company. From a judgment for plaintiff, defendant appeals. Affirmed.

White, Miller & McLaughlin, of Sacramento, for appellant. Butler & Swisler, of Sacramento, for respondent.

CHIPMAN, P. J. This is an action to recover the sum of \$775, and interest, being

the balance alleged to be due from defendant to plaintiff for the purchase of an automobile. The cause was tried by the court without a jury, and plaintiff had findings and judgment in its favor. Defendant appeals from the judgment upon transcript brought up under the alternative method. Plaintiff and defendant are corporations.

The sole question presented in defendant's brief is: Did F. P. Tatum, who was secretary of defendant corporation, have authority to purchase the automobile for his company?

The contract for the purchase of the car was originally made by I. T. Roberts under the name of I. T. Roberts Company, a corporation, on June 26, 1910, upon an installment or rental plan. Roberts subsequently became a salesman in the employ of defendant, making use of this automobile in connection with his services. Failing in his payment of the installment due November 20, 1910, defendant took possession of the car shortly thereafter, and before November 28th. On November 28, 1910, Tatum met E. A. Meister, secretary of plaintiff corporation, at the office of defendant. Meister testified that:

Tatum "wanted to get the terms reduced to \$50 a month; he said that is all they could afford to pay out at that time. The Court: Q. Who could pay out? A. Wood & Tatum Company. He asked how much was due on the car, and went into the thing very carefully. We made the indorsements that appear on the contract. * * * Q. What did you finally do? A. Finally reduced it to \$50 a month; he made a payment of \$50. Q. When you reduced it to \$50 a month what did he say about it? A. He told me to make the indorsement on this contract, Exhibit A. (Exhibit A is the contract with I. T. Roberts.) Q. Did he say whether his company would pay for that; whether they would or would not? A. Yes, sir. Q. What did he say? A. He said we would have no further trouble getting our money; we would get our money promptly as it came due. Q. From whom? A. From Wood & Tatum Company. Q. Did you have that contract with you at that time? A. Yes, sir; I made the following indorsement: 'The monthly installments on the within lease are hereby reduced from \$75 to \$50 per month, from October 20, 1910. Signed A. Meister & Sons Co., per E. A. Meister.' He made a payment in currency of \$50, and \$24.83 interest—back interest. Then we went out to the front office. He had Mr. Roberts assign his interest in this contract to Wood & Tatum Company, * * * and he accepted the assignment. Mr. Swisler: Q. How did he accept it? A. By writing the following: 'The Wood & Tatum Company hereby accepts the above assignment. Wood & Tatum Co., by F. P. Tatum.' * * * Then he re-read the contract. He said: 'You haven't signed yourself that you agree to deliver a bill of sale.' He suggested that I put the following indorsement on the contract: 'We herewith agree to all the conditions contained in the above agreement. A. Meister & Sons Company, per E. A. Meister, Secretary.' * * * Q. What was done with reference to the car? A. The car was delivered to a representative of Wood & Tatum Company. Q. But not until all had been done that you have testified to? A. Yes, sir. Q. You still had the car in your possession up to that time? A. Up to that time; yes."

It appeared further: That Mr. Wood was president and F. P. Tatum secretary, and

both were directors and held a majority of the shares of the corporation, each owning 300 shares; that the three other directors were the only other stockholders, two holding merely enough shares to qualify them to act, and the third had 200 shares; that the company was engaged in the real estate business in the city of Sacramento; that the company's salesmen used automobiles and the company owned some horses and buggies, but had not owned automobiles prior to this alleged purchase; that automobiles were useful, and were used in the business, and had been rented and used by the corporation; that Salesman Roberts had previously used this car in the course of his employment, as he was serving for a small salary and on a percentage of commission earned in sales made by him, and he continued to use the car, both Wood and Tatum also using it on occasion; that Wood had repairs of the car made, and the defendant paid the bills by its checks; that Wood endeavored to effect a trade of this car with plaintiff for a Stoddard-Dayton car. In addition to the cash payment made on November 28th, defendant paid by its check, on account of the transaction, \$55.53, on December 22, 1910, \$5.53 of which was interest. Mr. Tatum testified that he and Mr. Wood "practically administered the policy of the corporation," and that "the board of directors never overruled the judgment of himself and Mr. Wood," and that both he and Mr. Wood had equal managerial authority.

It appeared that, on October 20, 1910, when Roberts paid an installment on the contract, the money was advanced to him by defendant, and Roberts executed an assignment of his interest in the contract to defendant as security. The claim of defendant was that when Tatum made the contract testified to by Meister he was merely getting possession of the car for Roberts and to secure his company for payments made and to be made, and was not purchasing it for the Wood & Tatum Company. There was no evidence that plaintiff knew of Roberts' assignment of October 20th to defendant, and Tatum's testimony showed that he had no very clear recollection of having explained to Meister his purpose in taking over the Roberts contract on November 28th.

In rebuttal, Meister was asked if Tatum, on the 28th day of November, 1910, or at any other time, told him that he had taken an assignment or was taking an assignment to secure him, or the Wood & Tatum Company, for advances they had made or advances they would make for I. T. Roberts, and answered: "He did not." It was admitted that the minutes of the corporation showed no resolution authorizing the purchase of this car and Mr. Wood testified that while he knew that Mr. Tatum had made some deal with plaintiff concerning it he did not know until about the time the suit was brought that the indorse-

ments shown were on the contract, and he had no recollection of Tatum having explained the matter to him.

In support of its contention that Tatum had no authority to purchase the automobile, appellant advances the following: That the secretary of a corporation has no power to bind the corporation in such a purchase; that Tatum was given no direct authority and hence plaintiff must rely upon ostensible authority or ratification; that neither ostensible authority nor ratification was pleaded or proven.

[1] We do not deem it necessary to inquire to what extent the secretary of a corporation may bind the latter without the express authority of its directors. The question was discussed, to some extent, in *Newhall v. Joseph Levy Bag Co.*, 19 Cal. App. 9, 124 Pac. 875, and in *Leitch v. Marx*, 21 Cal. App. 208, 131 Pac. 328. See, also, *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 128 Pac. 399. We think there was sufficient shown here to establish both ostensible authority and ratification. It was not necessary to plead the one or the other. Plaintiff alleged the sale by it and the purchase by defendant of the automobile, and defendant denied the averments. Under the issues defendant could and did endeavor to show want of authority. The cause of action did not rest upon either ostensible authority, estoppel, or ratification. These elements of the transaction developed in reply to the defense made and were open to plaintiff without having pleaded them. *Donnelly v. S. F. Bridge Co.*, 117 Cal. 417, 421, 49 Pac. 559; *Young v. Blakeman*, 153 Cal. 477, 484, 95 Pac. 888; *Blood v. La Serena L. & W. Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

[2] Here was a corporation extensively engaged in selling real estate, employing, as Mr. Wood testified, "a dozen or more salesmen"; automobiles were used in the business, and it may be safely said that they have become almost indispensable to the successful conduct of that business; the liability of \$50 per month, incurred by Tatum in the name of the corporation, was comparatively small as an expense in the conduct of the business and was reasonably within the general scope of the company's powers; he held himself out to be, and was, in fact, one of the managers of the business, and plaintiff might reasonably have assumed that he had authority to make the purchase for his company; this assumption by plaintiff was confirmed by the fact that defendant took the car into its service, used it, paid two installments and accrued interest on account of the purchase, had repairs made on the car and paid for them, and assumed ownership in an endeavor to exchange it with plaintiff for another type of car. These and other circumstances, in our opinion, show both ostensible authority in Tatum to make the purchase, and rat-

ification of the transaction. Upon every principle of right and fair dealing, defendant is estopped to repudiate its agreement. Civ. Code, §§ 2318, 2319; *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913; *McKiernan v. Lenzen*, 56 Cal. 61, 63; *Stevens v. Selma Fruit Co.*, 18 Cal. App. 242, 123 Pac. 212; *Leavens v. Pinkham & McKevitt*, supra.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

26 Cal. App. 580

LOS ANGELES COUNTY v. HAMMEL,
Sheriff, et al. (Civ. 1605.)

(District Court of Appeal, Second District, California. Feb. 18, 1915. Rehearing Denied by Supreme Court April 19, 1915.)

SHERIFFS AND CONSTABLES ⇐28 — FEES — SALARIES.

Pol. Code, § 4290, providing that the salaries and fees prescribed should be in full compensation of all services rendered, declares that the sheriff shall be entitled to receive certain per diem and mileage for conveying prisoners and insane persons to state prisons and asylums, and may retain for his own use the mileage for service of process. The charter of the county of Los Angeles adopted pursuant to the authority given by Const. art. 11, § 7½, provides that the board of supervisors shall fix by ordinance the compensation of elective officers which shall not be increased or diminished during the term for which they were elected nor within 90 days preceding election. Other sections provide that all fees collected by any county officer shall be paid to the county treasurer. *Held*, that a sheriff elected before the adoption of the charter, and whose term continued thereafter, was entitled to retain as part of his salary the mileage and per diem prescribed by Pol. Code, § 4290.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 45, 49, 51, 54-56, 58; Dec. Dig. ⇐28.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the County of Los Angeles against W. A. Hammel, Sheriff, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

A. J. Hill, County Counsel, of Los Angeles, for appellant. Leon F. Moss, of Los Angeles, for respondents.

JAMES, J. Judgment in favor of defendants followed upon the demurrer to plaintiff's complaint being sustained without leave to amend. This appeal is from that judgment.

Appellant, the county of Los Angeles, sought by its action to recover from respondent Hammel and his codefendants, the sureties on his official bond, a sum of money which it was alleged had been collected after June 1, 1913, as fees for services rendered by said Hammel in his official capacity as sheriff of the county. It was the contention of the sheriff that the law entitled him to retain the fees for his own use as part of his compensation. The judgment of the lower court was in agreement with that contention. The people of the county, at the No-

vember election of 1912, adopted for the purposes of local government a charter pursuant to the authority given by an amendment to the state Constitution, known as section 7½ of article 11. At the time this charter became of effect the sheriff of the county was serving an unexpired portion of the term for which he had theretofore been elected. In addition to the salary allowed him, he had received and retained certain fees. These fees were retained by him under express authority of section 4290, Political Code, which in the part material to this consideration, provides as follows:

"The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title either as officers or ex officio officers, their deputies and assistants, unless in this title otherwise provided. * * * Provided, further, that the sheriff shall be entitled to receive and retain for his own use, five dollars per diem for conveying prisoners to and from the state prisons, and for conveying persons to and from the insane asylums, or other state institutions not otherwise provided for by law; also, all expenses necessarily incurred in conveying insane persons to and from the insane asylums, and in conveying persons to and from the state prisons, or other state institutions, which per diem and expenses shall be allowed by the board of examiners and collected from the state. * * * The sheriff may retain for his own use the mileage for service of papers or process issued by any court of the state. * * *

Under this provision the authority of the sheriff to retain the fees as a part of his general compensation is too clear to admit of dispute. We then have to determine as to whether the charter adopted by the people for the government of the county worked any change in the matter of the amount of the sheriff's compensation. Under the power given by the constitutional amendment to counties, permitting them to adopt charters for the control of their local affairs, it is provided that it shall be competent in such charters to provide for the election and appointment of officers, and—

"for the times at which and the terms for which, said officers shall be elected or appointed, and for their compensation, or for the fixing of such compensation by boards of supervisors."

Agreeable to the terms of this provision, it was provided by section 11, art. 3, of the Los Angeles county charter, that the board of supervisors should provide by ordinance for the compensation of elective officers, unless such compensation was otherwise fixed by the charter. There was a further provision, being section 52, art. 11, which provided that:

"The compensation of any elective county or township officer shall not be increased nor diminished during the term for which he was elected, nor within ninety days preceding his election."

In the same article, section 56 provided as follows:

"Nothing in this charter is intended to affect, or shall be construed as affecting, the tenure of office of any of the elective officers of the county or of any district, township or division thereof, in office at the time this charter goes into effect, and such officers shall continue to hold

their respective offices until the expiration of the term for which they shall have been elected unless sooner removed in the manner provided by law; nor shall anything in this charter be construed as changing or affecting the compensation of any such officer during the term for which he shall have been elected. But the successors of each and all of such officers shall be elected or appointed as in this charter provided, and not otherwise."

Under the provisions of the charter the office of sheriff remained elective, as it had theretofore been. The claim of appellant, which if sustained would require a reversal of the judgment, is based wholly upon a section of the charter which provides that:

"All fees collected by any county officer, board or commission shall be paid into the county treasury on the first Monday of each calendar month, together with a detailed statement of the same in writing, a duplicate copy of which shall be filed with the auditor at the same time." Article 4, § 15, Charter of L. A. County.

It is argued that the fees which the sheriff retains should not be classed as a part of his compensation; that the salary as fixed by law is the compensation intended. This view is entirely inconsistent with the provisions of section 4290, Pol. Code, as above cited, wherein it is stated that "the salaries and fees provided in this title shall be in full compensation for all services." As a part of the same section, the fees which it is here sought to have the sheriff account for are provided to be paid to him for his own use. How to justify the distinction between the fees provided to be paid to an officer for his own use and the lump sum as salary for the same purpose, as not both being by way of compensation, we are unable to produce any logical reason and have failed to find any such in the brief of appellant. Those decisions touching cases where it has been held that the compensation of an officer might properly be changed during his term of office from that of a salary to fees, or from fees only to a salary, throw no light upon the question here presented. Without any doubt at all, the conclusion is impressed that the fees allowed by law to the sheriff for his own services were allowed by way of compensation and not otherwise. Now, in determining the effect of the charter provisions upon this question, appellant asks the court, in brief, to adopt one of the express provisions of the charter and make it effective, and discard altogether another plain provision which places a clear limitation upon the effect of the former; in other words, we are to take the expressed will of the people in one direction without admitting a qualification which they have placed upon their declarations, and give the charter an effect which it was not intended to have. From the sections we have quoted it must appear very clear that the people have intended that neither the tenure of office nor the compensation to be paid to officers elected theretofore should be changed or altered until they had served the terms for which they had been chosen by the electorate. Not only that, but it was also

declared that the compensation of any elective county or township officer should not be increased nor diminished during the term for which he was elected, nor within 90 days preceding his election. It was altogether within the power of the people in adopting the charter to provide for the compensation to be paid to the officers of the county, and as an incident thereto, it certainly would be within the scope of that power to provide as to when the diminished compensation, if any, provided to be paid should commence, or as to the time when the board of supervisors might begin to exercise the authority granted to it, to make changes in the amount of compensation allowed to such officers.

In our opinion, the ruling of the trial judge as made in this case was in conformity with the plain declaration of the law.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 631

Ex parte MEADS. (Cr. 301.)

(District Court of Appeal, Third District, California. Feb. 23, 1915.)

HABEAS CORPUS $\hookrightarrow$ 4—EXISTENCE OF REMEDY BY APPEAL.

Habeas corpus will not lie to review objections to a judgment of conviction by a court having jurisdiction when such objections, if raised at the trial and overruled, would have given him a right of appeal.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. $\hookrightarrow$ 4.]

Application by Oscar E. Meads for writ of habeas corpus. Writ denied.

A. H. Carpenter, of Stockton, for petitioner.

PER CURIAM. It appears from the petition that petitioner was convicted, in the superior court of Sacramento county, of the offense of failing to provide for his minor child the common necessities of life. The court had jurisdiction of the offense (Penal Code, § 270), and by service on petitioner it had jurisdiction of his person. Having appeared, opportunity was given him to present the objections he now makes to the judgment of conviction, and, if overruled he had his remedy by appeal to this court.

The writ is denied.

26 Cal. App. 601

CALKINS v. BERLINER et al. (Civ. 1576.)

(District Court of Appeal, Second District, California. Feb. 19, 1915.)

1. TRIAL $\hookrightarrow$ 395—FINDINGS—SUFFICIENCY.

In a suit begun May 17th, for compensation due for the use of horses and wagons in April, the court found that payment should be made on the 10th of each month for the preceding month, or as soon thereafter as defendants received their money for grading. There were other findings that between the 1st and 10th of May defendants received approximately the amount

sued for, and that on or about the 10th of May they received another amount considerably in excess of the sum claimed. *Held*, that these findings, taken in connection with defendants' admission of the amount due, and that it should be paid as soon after the 10th of the month as they received their compensation, warranted a judgment for plaintiff showing that, at the date of suit, his claim was matured.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927-934, 939; Dec. Dig. $\hookrightarrow$ 395.]

2. APPEAL AND ERROR $\hookrightarrow$ 907 — RECORD — QUESTIONS PRESENTED.

Where the evidence was not preserved in the record, it will be presumed that the defendants offered no testimony in support of their counterclaim, and so judgment will not be reversed because it was not disposed of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. $\hookrightarrow$ 907.]

3. CONTRACTS $\hookrightarrow$ 303 — PAYMENT FROM SPECIAL FUND — EXCUSE FOR FAILURE — PENDING ATTACHMENT.

Defendants had a subcontract to do grading. They secured horses and wagons from plaintiff under an agreement to pay him as soon as they received their compensation from their principal. *Held*, that the fact that moneys due them were attached was no defense to a suit by plaintiff; it appearing defendants did not apply for a suspension of the action until the attachment should be disposed of, or ask for any stay of execution.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409-1443; Dec. Dig. $\hookrightarrow$ 303.]

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by F. A. Calkins against Samuel Berliner and William J. Taylor, partners trading as Taylor & Berliner. From a judgment for plaintiff, defendants appeal. Affirmed.

Robert T. Linney and Ralph W. Schoonover, both of Los Angeles, for appellants. T. A. Williams and W. O. Morton, both of Los Angeles, for respondent.

CONREY, P. J. The defendants appeal from the judgment rendered against them for a specified sum of money, and the appeal is presented on the judgment roll alone.

In January, 1913, a contract was entered into between the plaintiff and the defendants, under which the defendants, as lessees, took possession of certain mules and wagons delivered to them by the plaintiff, and were to pay to plaintiff a certain sum per month for each pair of mules and another certain sum per month for each wagon. The complaint alleged that on May 17, 1913, when the action was commenced, there was due the plaintiff under said contract, as rental for the month of April, the sum of \$454.32, and for the month of May, up to the 17th day of May, \$247.98, which said sums had been demanded and payment refused. As the court held that, in respect to the latter amount, the action was prematurely brought, and only rendered judgment for the indebtedness accruing in April, it is not necessary to discuss any questions arising, except with reference to the demand for April.

[1] The answer of the defendants admitted that on May 1, 1913, they were indebted to plaintiff on account of the use of said personal property for the month of April in a sum \$1 less than the amount stated in the complaint, and alleged that said sum was not due or payable, in whole or in part, to plaintiff "until on or after May 10, 1913." They further alleged that by the terms of the contract they were to pay the rental accruing in any one month upon a day subsequent to the 10th day of the succeeding month, the exact day to be determined by the date of the "actual receipt by defendants of the amount earned by them in grading during the preceding months" under a contract of the defendants with other parties for grading upon the Ardmore Heights Tract, in the county of Los Angeles. The court found that the rental due for April was \$453.32, as stated in the answer; and that the money due for the use of said property should be paid on the 10th of each month for the preceding month, "or as soon after the 10th day of the month as the money was received by the defendants from the Ardmore Heights Tract Company." The court further found that between the 1st and 10th of May, 1913, defendants received from said company a payment of approximately \$450, and on or about the 19th of May, \$500.

The claim urged by the appellants, that the findings of fact above stated do not show that the April rental had become due to plaintiff, is a claim which could not be sustained, except by exceedingly technical construction of the words used in the finding with reference to said moneys which were received by the defendants. But the rule of construction runs the other way. *Bank of Willows v. Small*, 144 Cal. 709, 711, 78 Pac. 263; *Lomita L. & W. Co. v. Robinson*, 154 Cal. 36, 39, 97 Pac. 10, 18 L. R. A. (N. S.) 1106. We think that these findings, taken together with the admissions to which we have referred, as contained in the answer, are sufficient to establish both the amount of indebtedness included in the judgment and the fact that it was due and payable at the time of commencement of this action.

[2] The findings and judgment ignore a counterclaim of \$11.50 upon facts set forth in the answer. As the evidence is not presented on this appeal, we should assume, in favor of the judgment, that the defendants offered no evidence concerning this counterclaim, and the omission of the court to find upon the issue thus raised by defendants' pleading is not a sufficient ground for reversal of the judgment. *Roberts v. Hall*, 147 Cal. 434, 82 Pac. 66.

[3] The answer alleged that on May 9th, and on other days to and including May 19, 1913, in certain actions against the plaintiff, attachments had been issued and duly and legally served upon the defendants herein,

"whereby all the moneys then owing from defendants herein to plaintiff herein were attached and garnished under order of court." The findings are silent as to two of these attachments, and it may be assumed, as in the case of the counterclaim above stated, that no evidence concerning them was received. The court did find, however, that one of said attachments was served on the defendants and was released prior to the commencement of this action; and that another of said attachments was served on defendants herein on May 13th, and had not been released at the time of commencement of this action.

The matter thus pleaded by the defendants did not constitute a defense. The defendants here did not apply for a suspension of the action until the action of the attaching creditor could be disposed of, and did not ask for any stay of execution. Under these circumstances, the court was justified in rendering judgment absolute for the sum found to be due. *Glugermovich v. Zicovich*, 113 Cal. 64, 45 Pac. 174.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

26 Cal. App. 477

GRIFFITH v. WELBANKS & CO.

(Civ. 1283.)

(District Court of Appeal, Third District, California. Feb. 5, 1915.)

COSTS $\S$ 203—TAXATION—MEMORANDUM OF COSTS—FILING AND SERVING—STATUTORY PROVISIONS.

The purpose of Code Civ. Proc. $\S$ 1033, providing that the party recovering judgment and claiming costs must deliver to the clerk and serve on the adverse party, within 5 days after verdict or judgment, a memorandum of the item of his costs in the action, and an adverse party may, within 5 days after notice, file a motion to have the costs taxed by the court, is to limit the time within which the question of costs, if it arises, may be determined, and a party who fails, within the time prescribed, to file and serve memorandum of costs is conclusively deemed to waive costs accruing in his favor; and, where the memorandum has been in due form filed and served within the time prescribed, the adverse party, failing within the specified time to file the notice of motion to have the costs taxed, is conclusively deemed to waive any objections thereto.

[Ed. Note.—For other cases, see Costs, Cent. Dig. $\S\S$ 768-771, 779; Dec. Dig. $\S$ 203.]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Jesse Griffith against Welbanks & Co. From an order striking from the files plaintiff's memorandum of costs in the action, he appeals. Affirmed.

Theodore A. Bell and Dudley D. Sales, both of San Francisco, and E. S. Bell, of Napa, for appellant. W. H. Mahoney, of San Francisco, for respondent.

HART, J. This is an appeal from an order striking from the files the plaintiff's memorandum of costs in this action.

The order appealed from was based upon and is the culmination of a motion duly interposed by the defendant for that purpose upon the ground that the plaintiff did not serve upon it or its attorney a copy of said memorandum of costs within five days after the rendition by the jury of the verdict in this action, as required by section 1033 of the Code of Civil Procedure. Said motion was supported by an affidavit by the attorney for the defendant, in which it is alleged that the verdict was rendered on the 4th (stated in the briefs of counsel on both sides as the "5th") day of December, 1913; that a bill of costs was filed by the plaintiff with the clerk of the superior court of Napa county on the 5th day of December, 1913, purporting to contain a statement of the costs and disbursements accruing in favor of and made by the plaintiff in this action, but that the plaintiff did not, within five days after the rendition of the verdict in the action, serve upon the defendant or its attorney a copy of said bill of costs, or any notice of the filing of the same. The affidavit then proceeds:

"That on the 15th day of December, 1913, affiant received at his office in San Francisco, through the United States mail, an inclosed envelope, addressed to him, containing a paper purporting to be a copy of a bill of costs in said action, and indorsed upon the back thereof the following: 'Filed this 5th day of Dec., A. D. 1913. N. W. Collins, Clerk of the Superior Court.' That said envelope also contained a letter, bearing date December 13, 1913, containing the following words: 'The cost bill was filed on December 5th, 1913, with the clerk.' That affiant herein never saw or had any knowledge of said alleged cost bill, or the items contained therein, or of the date of filing the same, until said 15th day of December, 1913, when said communication was received by affiant through the mail as aforesaid; and no other or further notice or service of said bill of costs, or of the time of filing same, has been made or given to affiant by the plaintiff or his said attorney."

The plaintiff, contesting the motion, filed an affidavit by one Emil Locarnini, a law clerk in the office of E. S. Bell, Esq., one of the attorneys for the plaintiff. He declares that, having been directed so to do by said E. S. Bell, he, on the 5th day of December, 1913, prepared and filed with the clerk of the superior court of Napa county the plaintiff's memorandum of costs; that on the following day he wrote a letter to W. H. Mahoney, attorney for the defendant, and inclosed said letter in a sealed envelope, properly directed to said Mahoney, at his law office in San Francisco, prepaid the postage thereon, and on said 6th day of December, 1913, caused the same to be duly deposited in the post office at the city of Napa; "that, in addition to inclosing said letter in said envelope, this affiant also inclosed a copy of a notice of entry of judgment, * * * and affiant verily believes, and upon such belief alleges the fact to be, that at the same time and place he inclosed in said envelope a true copy of the memorandum of costs above referred to." It appears from said affidavit

that on or about the 11th day of December, 1913, said E. S. Bell received a letter from the attorney for the defendant, dated at San Francisco, December 10, 1913, acknowledging receipt of Bell's letter and notice of the entry of judgment in this action, but saying that "the envelope did not contain a copy of the cost bill, as your letter indicates." The affidavit then proceeds to aver that investigation was immediately started by said Bell to ascertain, if possible, whether a copy of the cost bill had actually been inclosed in the envelope, with the letter and notice of the entry of judgment, addressed to the said Mahoney, and sets forth in minute detail certain probative facts and circumstances which, it is claimed, strongly tend to show that a copy of said memorandum of costs must have been inclosed in said letter addressed to Mahoney by the affiant.

Upon the facts thus briefly narrated, the court predicated its order striking the plaintiff's cost bill from the files.

It is conceded by counsel for the plaintiff that, the evidence being conflicting upon the question, the finding of the court that a copy of the memorandum of costs was not served upon the defendant or its attorney within the time prescribed by the statute cannot be successfully challenged. It is contended, however, that the evidence discloses a substantial compliance with the terms of the statute, and that this is all that is required; the argument being that the "provisions of section 1033 of the Code of Civil Procedure should be liberally construed with a view to effecting its objects and to promote justice (section 4, Code Civ. Proc.), and its substance rather than its form should be respected (section 3528, Civ. Code)."

Section 1033 of the Code of Civil Procedure reads as follows:

"The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict, or notice of the decision of the court or referee, or, if the entry of the judgment on the verdict or decision be stayed, then, before such entry is made, a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within five days after notice of filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers. * * *"

Originally said section contained no provision requiring the memorandum or a copy thereof to be served on the adverse party, but the Legislature of 1874 (St. 1873-74, p. 343) so amended it as to require such service, with the result that service of the memorandum is now one of the indispensable steps to be taken before the matter of costs may be considered by the court or judge.

The manifest purpose of the section is to limit the time, after verdict or judgment, within which the question of costs, if it arises, may be definitively determined, so that, when ascertained and taxed, the costs may be included in the judgment, to the end that the party entitled thereto may secure his rights as speedily as practicable. The section cannot therefore, be held to mean anything less than what its language plainly expresses. In other words, the terms of said section are mandatory, and a substantially strict compliance therewith is required, not alone of the party claiming costs, but also of the party dissatisfied with the costs claimed. Indeed, section 1033, as to the subject to which it applies, is a statute of limitation, and to it, no less than to statutes prescribing and limiting the time within which actions may be brought, is applicable the maxim, "*Vigilantibus et non dormientibus servat lex.*" No one would, for a moment, undertake to maintain that the time limit prescribed for the bringing of actions is not a vital and mandatory requirement of the statute.

It follows that if the one party fails, within the time prescribed, to file and serve his memorandum of costs, then he is to be conclusively deemed to have waived the costs, if any, accruing in his favor. And if, the memorandum having been in due form filed and served within the time prescribed, the adverse party fails, within the specified time, to file or notice a motion to have the costs taxed, he is conclusively deemed to have waived any and all objections thereto. *Chapin v. Broder*, 16 Cal. 403; *Hotchkiss v. Smith*, 108 Cal. 285, 41 Pac. 304; *Galindo v. Roach*, 130 Cal. 389, 390, 62 Pac. 597.

The rule applied in the case of *Carpy v. Dowdell*, 129 Cal. 244, 61 Pac. 1126 (cited by the appellant), while proper enough in that case, cannot be applied here without rendering nugatory what we conceive to be the vital purpose of section 1033 of the Code of Civil Procedure. There the defendants, against whom judgment was had, in due time served notice on the plaintiff that they were dissatisfied with the cost bill filed by the plaintiff, and that they would make a motion to strike out certain items specified therein. When the hearing of the matter came on, the plaintiff objected to the consideration of the application on the ground that no written motion to strike out said items had been filed, and the court, conceiving that a written motion and none other was contemplated by section 1033 of the Code of Civil Procedure, sustained the objection. Reversing the order, the Supreme Court held that, proper written notice of the motion having been given within the time fixed by said section, an oral motion amounted to a substantial compliance with the requirement thereof in that particular. There is, as is readily perceivable, a marked

difference between the proposition thus established and the one here. In that case the parties had acted within the time limited by the statute, and knew precisely what was proposed to be done in the proceeding. The manner in which the proceeding, then regularly before the court or judge, was to be presented, involved nothing more than a mere matter of form. In other words, there was no deviation from the requirements constituting the substance of the law or the essentially vital parts thereof. But even in that same case the court said that:

"The substance of the law as it stands is that the party who is dissatisfied with the bill of costs as filed must within a certain time, make his objection known and the grounds on which he will move the court to correct or strike out the cost bill. When this is done by the proper notice in writing, served and filed, specifying the time when the application to the court or judge will be made, the object of the law would seem to have been complied with."

Thus it will be perceived, the court holds, at least inferentially, that the requirement as to the time within which the parties must act in order to preserve and secure their rights with respect to costs, involves a matter of substance and not of mere form, and that it must be followed as it is laid down in the Code.

Our conclusion is that, under the facts as disclosed, no other course was open to the court below but to make the order appealed from.

Some other points in support of the order are made and discussed, but, in view of the position taken and the conclusion arrived at herein, they do not call for consideration.

The order is affirmed

We concur: CHIPMAN, P. J.; BURNETT, J.

26 Cal. App. 607

PACIFIC CARBONATOR CO. v. HAYDES & SON. (Civ. 162.)

(District Court of Appeal, Second District, California. Feb. 19, 1915.)

1. SALES ⇐479—CONDITIONAL SALES—DEFAULT OPTION.

Where property is sold and possession given under a contract providing that in case of default in payment of an installment, the seller may repossess himself of the property and forfeit all payments, and that the whole amount of the purchase price shall become at the seller's option immediately due and payable, the seller may either retake the property and forfeit the installments paid, or sue for the entire purchase price.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. ⇐479.]

2. SALES ⇐479—CONDITIONAL SALES—RIGHT OF SELLER.

The agent of a seller of property under a conditional contract of sale upon default demanded payment of the installment and gave the buyers three days to make that payment. After that time he again demanded payment, and the buyers confessed their inability. Held, that though the agent on his second call stated that

he had come for the money or the property, it was not an election by the buyer to retake the property and not to sue for the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. ☞ 479.]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the Pacific Carbonator Company against Haydes & Son, a copartnership. From a judgment and an order denying a new trial, plaintiff appeals. Judgment and order reversed.

Irwin, White & Rosecrans, of Los Angeles, for appellant. Bowman & Rodabaugh, of San Diego, for respondent.

JAMES, J. Plaintiff sued on two counts, one being for merchandise sold to defendants, and the other for a balance of \$640, with interest, alleged to be due on a promissory note executed by defendants in favor of plaintiff. The trial court awarded judgment to plaintiff for \$22.50 on account of the merchandise sold, but denied judgment for any amount on the promissory note. The appeal is taken by the plaintiff from the judgment so rendered against it, and from an order denying a motion for a new trial.

The promissory note was given as evidence of an indebtedness created by a written contract under which a certain lot of machinery was sold to defendants. The promissory note was made payable in monthly installments of \$40, which represented the terms under which the machinery was to be purchased. That the transaction amounted to a conditional sale, with title reserved in the vendor until all payments had been made, is admitted by both parties. It is also admitted that only the sum of \$160 was paid by the defendants on account of the contract for the purchase of the machinery. The trial court made the following finding of fact under which the judgment was directed to be entered in favor of defendants:

"That defendant was unable to make the payments that became due thereafter and during the month of April, 1913, plaintiff informed defendant that owing to its being unable to make the payments when due, under the provisions of the said written agreement hereinbefore set forth, plaintiff would take the property described and remove it from the possession of defendant, and that all of the payments made thereon would be forfeited to plaintiff, to all of which defendant agreed, and plaintiff elected to cancel said contract, and take back said property, and, believing and relying on plaintiff's said statement and election, defendant immediately procured other machinery and apparatus, and without delay notified plaintiff to remove the said machinery and apparatus from the premises of defendant."

It is claimed, among other contentions, that the evidence does not support the findings. In examining this point, we are referred to a statement of the evidence which was agreed to by the plaintiff and the defendants. In that statement the testimony of one of the

defendants is given. This party testified that he and his codefendant were unable to make payments which became due after February, 1913, under this contract; that during the month of April, 1913, the agent of the plaintiff informed the defendants that:

"Owing to defendants' failure to make the payments when due under the provisions of the written agreement between defendants and plaintiff, he was instructed by plaintiff to take the property described in the said agreement and remove it from the possession of defendants, and that all payments which had been made thereon would be forfeited to plaintiff; that Mr. Edmunds informed defendants that he would give them until a certain time, about three days thereafter, in which to make the payments then due, or that he would take out the machinery, and at the end of said three days Mr. Edmunds came to defendants' place of business and informed defendants that he had come for the money or to take the machinery; defendants informed Mr. Edmunds that they did not have the money, and that he would have to take the machinery, that it was the best they could do, to which Mr. Edmunds replied, 'All right,' and immediately left defendants' place of business, but before leaving he adjusted a valve on one of the machines, but did not remove machinery from defendants' premises; that believing and relying upon the statements of Mr. Edmunds that plaintiff was going to take out the machinery because the overdue installments were not paid, and not being able to make the said payments, defendants believed that they would be left without the necessary machinery to carry on the business, and in order to protect themselves immediately, on the same day of their last conversation with Mr. Edmunds, purchased other machinery to take the place of that which they expected plaintiff to remove, and immediately, upon the receipt of the new machinery, the machinery of plaintiff was taken down and piled in one end of the building, and notice sent to plaintiff that it was stored there, subject to plaintiff's orders, but that said machinery had not been removed by plaintiff; that at the time of the trial of this action, a bottling attachment belonging to the plaintiff's machinery was attached to the new machinery purchased by defendants; that defendants had used said attachment after notifying the plaintiff to remove the said machinery from the defendants' place of business and until the new bottling attachment had arrived, but that it had not been used after defendants' new bottling attachment had arrived, but was kept mounted on said new machinery besides defendants' new bottling attachment, to prevent it from being broken by piling it with the remainder of plaintiff's machinery."

The foregoing statement constitutes all of the material evidence shown in the transcript from which the court made the deductions set forth in the findings.

[1, 2] A vendor of property which has been delivered to his vendee under a conditional sale contract has the option, in case of default, either to recover payments provided to be made under the contract, or to retake the property and put at an end all further obligation on the part of either party. The contract in this case expressly provided that, in the event of default as to any payment agreed to be made by the vendees, repossession of the machinery sold might be acquired by the vendor, and in that event all payments theretofore made should be deemed and con-

sidered as having been paid for the use of the machinery. In fact, the agreement accorded in its general terms with the usual and ordinary contract for conditional sale. The contract being considered here also provided that, in event default was made as to any payment, the whole amount of the purchase price mentioned in the contract should become immediately due and payable. It was in enforcement of its right under this term of the contract that plaintiff brought this action to recover the entire balance due on the promissory note. That the vendor under a conditional sale agreement may either retake the property or pursue his remedy to recover the purchase price is formulated as a general rule by the text-books and decisions. Mechem on Sales, vol. 1, § 615; Williston on Sales, § 579. There is no dispute made by counsel for respondents as to the general rules and principles applicable to contracts of the class mentioned. It is contended, however, in support of the judgment as rendered, that the vendor definitely elected to retake the property agreed to be sold and that he, having manifested his election, was estopped from bringing this action to recover the balance of the purchase price. We have examined very carefully the cases cited in the argument advanced in support of this proposition, as found in the brief of respondents, but have not been able to reach the same conclusion as indicated by the judgment of the court. We do not believe that the vendor was bound by its statement as to an intent to retake the property until some affirmative step was shown to have been made in that direction. All that was shown in this case was the fact that appellant was endeavoring to secure payment of the amount of the installments due to it under the contract, and had threatened to take the machinery in the event respondents failed to fulfill their obligations. Further, that the agent of appellant, after having notified respondents that it would take the property unless payment was made, called again to insist upon payment and was then told that respondents had no money, and that he could take the property. His reply was, "All right" but he neither then demanded that possession be turned over to him, nor did the appellant make any subsequent demand for its possession. The agent of appellant adjusted a valve on the machinery and left it in the possession of respondents and in a condition to be used by them. At no time prior to the day of the trial does it appear that he returned; nor does it appear that appellant made any request for possession of the property or attempted in any way to take it. Respondents say that they took it for granted that the property would be taken away, and proceeded to purchase new machinery which they installed. They continued to use, however, a part of the machinery received from the ap-

pellant, and the property never was received by appellant from them. As to whether anything was paid for the new machinery, or how respondents were damaged because of their belief that appellant would retake the property in dispute, does not appear in any way by the testimony shown in the transcript. But, even though it had appeared that respondents had assumed some obligation by reason of their reliance upon the declaration of appellant's agent, we are of the opinion that they were not justified in so doing until appellant had exercised its option to retake the property by giving notice or performing some act such as would amount, at least, to a demand for its possession, or show an actual attempt to get it.

Holding these views, we think that the judgment as entered is not justified.

The judgment and order appealed from are reversed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 611

BURR v. MACLAY RANCHO WATER CO.
(HILLE et al., Interveners).

(Civ. 1534.)

(District Court of Appeal, Second District, California. Feb. 19, 1915.)

1. STIPULATIONS — COSTS — TAXATION.

A stipulation made subsequent to a decision of the Supreme Court modifying and affirming the judgment appealed from, which recites that, pending the agreement, rights adjudged to either party by the judgment shall be held in abeyance, does not prevent the successful party from perfecting his judgment and inserting therein the costs allowed on appeal.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.]

2. APPEAL AND ERROR — PRESUMPTIONS — OFFICIAL DUTIES — CLERK OF SUPREME COURT.

The court, on appeal from an order denying plaintiff's motion to tax costs claimed by defendant and interveners, will presume that the clerk of the Supreme Court, modifying and affirming the judgment, inserted the direction as to costs in compliance with Supreme Court rule 23 (119 Pac. xiii), providing that, where the order of reversal or modification of a judgment contains no direction as to costs, the clerk will enter on the record a judgment that appellant recover costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3782, 3787; Dec. Dig. § 936.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by John Burr against the Maclay Rancho Water Company, in which R. H. Hille and another intervened. From an order denying the motion of plaintiff to tax costs, claimed by defendant and interveners, he appeals. Affirmed.

Stephens & Stephens, of Los Angeles, for appellant. Williams, Goudge & Chandler, of Los Angeles, for respondents.

JAMES, J. Plaintiff herein appealed from an order made in the superior court denying

his motion to tax the costs claimed by respondents as having been incurred by them as expense on an appeal taken to the Supreme Court from a judgment theretofore made in the action. That judgment on the appeal taken by respondents was by the Supreme Court modified. *Burr v. Maclay Rancho Water Co.*, 160 Cal. 268, 116 Pac. 715. Subsequently a bill of costs was regularly filed in the superior court on behalf jointly of defendant and the interveners, who were the appellants in the appeal mentioned. Plaintiff made his objections thereto in due time in writing, and moved the court to disallow all of the items of the cost bill on two grounds: First, that because of a stipulation entered into between the parties the entry of any costs would be premature; and, second, that interveners were not entitled to costs, and it could not be ascertained from the joint statement as to what costs were properly chargeable as the expense incurred by defendant and what by the interveners.

[1] It seems that after decision by the Supreme Court, reported in the volume and at the page above stated, the parties entered into a stipulation which, in part provided as follows:

"During the currency of this agreement, all rights finally adjudged to either party by the judgment in the action of John Burr against the second party herein, and others, in the superior court of Los Angeles county, Cal., as modified and affirmed by the Supreme Court by its judgment, shall be held in abeyance."

As the terms of that agreement present themselves to us, they seem to indicate the understanding of the parties to have been only that their rights, as affecting the matter of taking water from their several lands, should be held in abeyance because they had, temporarily at least, agreed upon conditions affecting the matter. But, giving the stipulation its greater effect, as claimed for it by appellant, it still falls short of showing any term which can properly be said to have limited respondents in their right to have the judgment as made in their favor perfected or completed by the insertion therein of costs allowed to them on appeal.

[2] By reference to the decision rendered by the Supreme Court on the appeal of these respondents, as hereinabove cited, we find that there was a modification made of the judgment, and it cannot be said that such modification was not beneficial to interveners, who were claiming under defendant in the action. Rule 23 (119 Pac. xiii), as adopted by the Supreme Court, provides that:

"In all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no directions as to the costs of appeal, the clerk will enter upon the record, and insert in the remittitur, a judgment that the appellant recover the costs of appeal."

The bill of exceptions does not show what was provided by the remittitur issued by the clerk of the Supreme Court, although coun-

sel for the parties in their briefs state it as a fact that the remittitur did direct that the costs of the appellants be recovered. It will be presumed that the clerk followed the practice required of him, and did insert the direction that the costs be recovered. The matter of determining what costs shall be allowed on appeal is largely one which is regulated by the appellate court in the absence of statute. We are of the opinion that costs were properly allowed in this case, and that the superior court did not err in refusing to tax the same upon the motion of the plaintiff.

The order is affirmed.

I concur: SHAW, J.

I concur in the judgment: CONREY, P. J.

26 Cal. App. 604

HARTFIELD v. ALDERETE. (Civ. 1652.)
(District Court of Appeal, Second District, California. Feb. 19, 1915.)

1. APPEAL AND ERROR ⇌801 — MOTION TO DISMISS—CONCLUSIVENESS OF ORDER.

An order denying a motion to dismiss an appeal after it became final was the law of the case on the points involved in the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3161-3164; Dec. Dig. ⇌801.]

2. APPEAL AND ERROR ⇌801 — MOTION TO DISMISS—DELAY IN GIVING NOTICE OF INTENT TO APPEAL.

A motion to dismiss an appeal on the ground that notice of appeal and request for a transcript were not filed within 10 days after notice to defendant of the entry of the judgment, was properly denied, where there was nothing in the record showing that defendant ever had notice of the entry of judgment, or ever waived notice thereof by any act done by him prior to filing his notice of appeal; the only document relied upon as showing actual notice being a paper not a part of the record and not constituting a waiver of notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3161-3164; Dec. Dig. ⇌801.]

3. APPEAL AND ERROR ⇌348—NOTICE OF INTENT TO APPEAL—TIME FOR FILING.

Under Code Civ. Proc. § 953a, providing that any person desiring to appeal may, in lieu of preparing and settling a bill of exceptions, file with the clerk a notice stating that he intends to appeal, or has appealed, and requesting that a transcript of the testimony, etc., be made up and prepared, and that such notice must be filed within 10 days after notice of entry of the judgment, any actual notice of the entry of judgment, established by satisfactory evidence of record, will start running the time for filing the notice of intent to appeal and the request for a transcript, and a notice in writing of the entry of the judgment is not required.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900-1904; Dec. Dig. ⇌348.]

4. APPEAL AND ERROR ⇌1011 — REVIEW — QUESTIONS OF FACT.

In an action on an account stated, where it appeared that a statement purporting to show the account was presented to defendant shortly before the commencement of the action, and that an acknowledgment of its correctness annexed

thereto was signed in defendant's name and in his presence by his daughter, but the evidence was conflicting as to whether defendant assented to the account and requested his daughter to sign the acknowledgment for him, the facts must be assumed to be in accordance with the trial court's finding for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ☞ 1011.]

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by A. J. Hartfield against Frank Alderete. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Marion Wright, of Los Angeles, for appellant. L. E. Hardy, of Los Angeles (S. C. Schaefer, of Los Angeles, of counsel), for respondent.

CONREY, P. J. A motion to dismiss the appeal in this case was denied by order of this court entered November 11, 1914. 145 Pac. 146. Respondent now further insists that the appeal should have been dismissed, and that this court has no jurisdiction other than to enter a dismissal.

[1, 2] The order of November 11, 1914, being now final, is the law of the case on the points involved in the motion. The motion to dismiss was based upon the ground that notice of appeal and request for a transcript was not filed within 10 days after notice to the defendant of the entry of the judgment. We think that the order denying said motion to dismiss was correctly made, since there was nothing in the record showing that the defendant ever had notice of entry of judgment, or ever waived notice of entry of judgment by any act done by him prior to filing his notice of appeal. The document upon which respondent relied as showing actual notice was a paper not capable of being considered as part of the record, and the filing of that paper did not constitute a waiver of the notice of entry of judgment referred to in section 953a, Code of Civil Procedure.

[3] While the order denying the motion to dismiss was therefore a correct order in this case, the opinion of this court contained one statement which it seems should be modified. Referring to section 953a, we said:

"The notice of entry of the judgment contemplated by this section, while not so stated, must nevertheless, under section 1010 of the Code of Civil Procedure, be a written notice."

In Estate of Keating, 158 Cal. 109, at page 114, 110 Pac. 109, at page 111, the Supreme Court said concerning the same section 953a:

"The proposition that a written notice of the entry of the order is necessary to start running the time for filing the notice to the clerk by the appellant is not sustained, as we understand the authorities."

The court then proceeds to a comparison between sections 953a and 941b, and holds that, although the notice (of entry of judgment) under section 941b is intended to be

necessarily a notice in writing, the words used in section 953a with reference to notice of entry of judgment are such, as to that section, that—

"actual notice established by satisfactory evidence of record will start the statute in motion without the service of a formal written notice."

[4] The plaintiff's action is brought to recover a sum due on an account stated. Plaintiff had judgment for the amount of his demand and the defendant appeals therefrom. It is claimed by appellant that the evidence is insufficient to support the finding that there was an account stated between plaintiff and defendant. The plaintiff had made sales of merchandise from time to time to the defendant, and on that account defendant was indebted to the plaintiff, but they were not agreed as to the amount due. Whether, as claimed by appellant, the items, or any of them, were barred by the statute of limitations, is not material to the case presented. A short time before the commencement of this action a statement purporting to show the account and the balance due was presented by the representative of plaintiff to the defendant. After some discussion, a correction was made and a new balance shown at the foot of the statement. At the bottom of the sheet the plaintiff's agent wrote as follows:

"Nov. 10, 1913.

"This last above mentioned amount (\$495.00) is hereby agreed to be correct, which said amount I will pay."

This was signed: "Frank Alderete, by Annie Alderete." Plaintiff's agent testified at the trial that Frank Alderete assented to this statement and asked his daughter, Annie Alderete, to sign it for him, which she did in the presence of plaintiff's agent and the defendant. Frank Alderete and Annie Alderete both admitted that she made the signature at that time, and that her father was present in the same room at that time. They denied that the defendant assented to the amount as correct, or that he requested his daughter to make the signature. As there was testimony directly to the contrary, in accordance with which the trial court made its finding, we must assume the facts in accordance with such finding.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

28 Cal. App. 624

WALKER v. ROCKWOOD. (Civ. 1694.)

(District Court of Appeal, Second District, California. Feb. 23, 1915.)

1. BILLS AND NOTES ☞ 474 — ACTIONS — PLEADINGS—ISSUES.

An answer in an action on interest notes which alleges the execution of a no-interest note, and that one of the interest notes was executed to take the place of the no-interest note, but which does not ask for any affirmative relief as

to the no-interest note, does not justify a decree canceling the no-interest note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1508-1513; Dec. Dig. ☞ 474.]

2. GIFTS ☞32—COMPLETION OF GIFT AFTER DEATH OF DONOR.

A gift of a note executed by the donor to the donee is not complete unless the donor definitely pays the note, and the donee may not after the death of the donor complete the gift by applying to the note a payment made by the donor.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 63, 64; Dec. Dig. ☞32.]

3. PAYMENT ☞41—APPLICATION—PRESUMPTIONS.

The payee of interest notes for \$3,000 and \$1,500 sought a recovery of \$2,015 due on the \$3,000 note and \$1,500 on the other note, and admitted a payment by the maker of \$3,985, and showed that the maker had delivered to the payee a \$3,000 no-interest note as a gift. There was no specific declaration as to the application of the payment admitted. *Held* that, in the absence of any definite direction from the maker, the court would presume that he intended the payment to be applied as a credit on the interest notes, instead of on the no-interest note delivered as a gift.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 115-120; Dec. Dig. ☞41.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by Charley Walker against C. R. Rockwood, administrator of Peter P. Walker, deceased. From a judgment granting partial relief, plaintiff appeals. Modified and affirmed.

F. E. Dunlap, of Stockton, H. F. Bridges, of Sierra Madre, and M. W. Conkling, of El Centro, for appellant. Collier & Clark, of Los Angeles, for respondent.

CONREY, P. J. In this action plaintiff seeks to recover the sum of \$2,015, with interest, being a balance claimed to be due and unpaid on a \$3,000 note; and also the sum of \$1,500, and interest, claimed to be due and unpaid on a \$1,500 note. It is alleged that these notes were made and delivered to plaintiff by Peter P. Walker, who died on May 6, 1912, and the defendant became administrator of his estate. It is admitted that the claims were duly presented, and were rejected by the administrator prior to the filing of complaint herein. Judgment having been entered for an amount less than that demanded by plaintiff, he appeals from the judgment and from an order denying his motion for a new trial.

The first of these notes was not dated, but was made on August 12, 1908. The second note bears date August 12, 1909. On the 25th day of October, 1910, Peter P. Walker paid to plaintiff the sum of \$3,985. The court found that no other sum was ever paid, and that at the time of this payment the accrued interest on the notes respectively amounted to \$528.66 and \$144.23; that, after applying the payment of \$3,985 first to the satisfac-

tion of the larger note and the remainder on account of the smaller note, there remained due \$1,187.89; that prior to the commencement of this action the defendant offered to pay said sum of \$1,187.89, with interest, from October 25, 1910, and that the plaintiff refused said offer; and that (presumably on account of the offer thus made) the plaintiff was not entitled to have interest after the 5th day of August, 1912, which is the date of filing of complaint herein, and is less than a week after the claims had been wholly rejected by the administrator.

Respondent's counsel admit that the record does not disclose any evidence in support of said finding as to an offer to pay the amount now conceded to have been due, and admit that the judgment should be modified by including the accrued interest for the entire period from October 25, 1910, down to the day of entry of judgment.

[1] In the answer filed by defendant it was alleged that on the 12th day of August, 1908, Peter P. Walker executed to plaintiff another note for \$3,000 in like terms as the \$3,000 note set forth in the complaint, except that this other note so referred to in the answer was to be without interest until paid. Defendant alleged that the \$3,000 note sued on was executed several months after, and for the sole purpose of taking the place of and canceling the no-interest note, and was given for the same and no other consideration. No affirmative relief was demanded by the defendant. No reason appears for the allegations in the answer concerning the no-interest note, unless we may infer that defendant considered it necessary to set up the facts above stated in order to overcome an anticipated claim by plaintiff that \$3,000 of the money received by him on October 25, 1910, was a payment of the no-interest note.

Concerning this last-mentioned note, the court found that it was without consideration, and was a gift, and was executed on August 12, 1908; from which facts the court made a conclusion of law that said no-interest note was "void and unenforceable, and should be delivered up and canceled." The judgment, in addition to allowing recovery by plaintiff of the sums found to be due and unpaid as above shown, follows this conclusion of law and orders that the no-interest note be delivered up to defendant and canceled. The court further concluded that the plaintiff was not entitled to costs, and the judgment provides that he shall not recover any costs.

The case presented by the pleadings does not raise any issue upon the determination of which a decree could properly be entered in this action for cancellation of the note.

[2, 3] But the evidence which was received concerning this note is relevant to the case in connection with plaintiff's claim that \$3,000 of the money received by him on October

25, 1910, was received in payment of the no-interest note, and that there remained only \$985 to be applied as a credit on either of the two notes sued on in this action. When the plaintiff received said sum of \$3,985, he did not deliver up either of the notes to the maker. He says in his testimony that decedent told him "to indorse the amount on the two \$3,000 notes"; and in another place he says that decedent told him "to indorse on one of the notes the amount he had paid"; and plaintiff says that his failure to return one of the notes to Peter P. Walker was due to neglect.

We think that the court was justified by the evidence in believing that the \$3,000 no-interest note was delivered by decedent to plaintiff without consideration, and was in the nature of a gift. The plaintiff has not shown that he had acquired any interest in the business of Peter P. Walker, or that plaintiff parted with any interest in that business, or with anything else of value, in consideration of said no-interest note. If the evidence had established that the deceased paid \$3,000 to the plaintiff clearly and definitely as a payment of that note, then there would have been a completed gift, and the money so paid could not be credited on the other note. But upon the evidence in this regard it appears that neither party made a specific declaration or election on the subject. In the absence of a definite direction from Peter P. Walker, the court was entitled to presume that he intended the money to be applied as a credit upon the note that was a legal obligation against him, rather than upon one which was not a legal and enforceable obligation; and, as to the plaintiff, since he retained both notes, and did nothing to definitely show satisfaction of the gift note during the lifetime of the maker, he cannot by his own act complete the gift to himself after the death of the intending donor. It follows that the \$3,000, together with the additional \$985, paid to the plaintiff, must be considered as having been applied upon the payment of the other two notes, and that it should be credited as so applied in the order of priority of the notes.

In the following order, wherein we shall strike from the judgment certain provisions relating to the said no-interest note, we make such order, not as an adjudication that the note is valid, but solely because the judgment on that subject and for cancellation of the note is without foundation in the pleadings in this action.

The order denying plaintiff's motion for a new trial is affirmed.

It is further ordered that the judgment be modified as follows: By striking therefrom the paragraph numbered "First," and reading as follows:

"That said one-day promissory note executed on the 12th day of August, 1908, by Peter P. Walker, deceased, in plaintiff's favor for \$3,000,

without interest, was at the time of its execution, and at all times thereafter, and is now, void and not enforceable, and that the same shall be immediately delivered up to defendant and canceled."

It is further ordered and directed that the amount to be recovered by plaintiff be modified by allowing the plaintiff, in addition to the sum of \$1,187.89, the interest thereon at the rate of 8 per cent. per annum from the 25th day of October, 1910, to the time of the entry of the judgment, to wit, the 20th day of January, 1913.

It is further ordered that said judgment be modified by striking therefrom the order "that plaintiff do not recover his costs and disbursements herein, and that defendant do have and recover his costs and disbursements herein, amounting to the sum of \$28.80," and substituting therefor an order allowing costs directions therefor, is affirmed.

The judgment, as modified by the foregoing directions therefor, is affirmed.

We concur: JAMES, J., SHAW, J.

26 Cal. App. 614

PEOPLE v. CLAYBERG. (Cr. 279.)

(District Court of Appeal, Third District, California. Feb. 20, 1915. Rehearing Denied by Supreme Court April 19, 1915.)

1. RAPE $\S$ 31—INFORMATION—SURPLUSAGE.

The allegations, in an information charging statutory rape, that force and violence were employed by accused in perpetrating the crime are mere surplusage and do not justify the setting aside of the information on the ground that accused had, by complaint, been charged only with the statutory offense.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 34; Dec. Dig. $\S$ 31.]

2. INDICTMENT AND INFORMATION $\S$ 45—REFILING OF INFORMATION—STATUTORY PROVISIONS.

Pen. Code, § 1008, as amended by St. 1911, p. 436, authorizing amendments to informations in specified particulars, does not apply to an information filed in lieu of one set aside on motion pursuant to order of the court, directing the district attorney to file an information, but the action of the court is authorized by section 997, providing that the court setting aside an information must discharge accused from custody, unless it directs the filing of another information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 156; Dec. Dig. $\S$ 45.]

3. INDICTMENT AND INFORMATION $\S$ 45—REFILING OF INFORMATION—STATUTORY PROVISIONS.

Where the information filed goes beyond the magistrate's commitment or charges an offense, different from that for which accused was committed the court setting it aside on that ground, may order the filing of a proper information pursuant to Pen. Code, § 997, providing that if an information is set aside, the court must discharge accused from custody unless it directs the filing of another information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 156; Dec. Dig. $\S$ 45.]

4. INDICTMENT AND INFORMATION $\hookrightarrow$ 45—REFILING OF INFORMATION—STATUTORY PROVISIONS.

Pen. Code, § 997, providing that the court setting aside an information must discharge accused unless it directs the filing of an information, does not limit the right of the court to direct the filing of an information only once, and where the district attorney fails to charge the proper offense in any information, the court may direct the filing of a proper information without reference to the number of informations previously filed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 156; Dec. Dig. $\hookrightarrow$ 45.]

5. CRIMINAL LAW $\hookrightarrow$ 703 — ARGUMENT OF PROSECUTING ATTORNEY—IMPROPER ARGUMENT.

Though in statutory rape actual force is not an element, the state may show actual force if existing, and hence the opening statement of the district attorney, to the effect that the state would prove acts of actual force and violence, was not improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1659; Dec. Dig. $\hookrightarrow$ 703.]

6. CRIMINAL LAW $\hookrightarrow$ 730—IMPROPER ARGUMENT OF COUNSEL—INSTRUCTIONS—WITHDRAWAL OF ARGUMENT.

Where, on objection to the statement of the district attorney, wherein he referred to a third person serving time in the penitentiary for a similar offense, the court promptly stopped him and directed the jury to disregard that part of the argument, and the district attorney withdrew it, the objectionable remarks were not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. $\hookrightarrow$ 730.]

7. CRIMINAL LAW $\hookrightarrow$ 807—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

An instruction that the policy of the law is opposed to the infliction of unusual and severe punishment is properly refused because argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. $\hookrightarrow$ 807.]

8. CRIMINAL LAW $\hookrightarrow$ 829—PUNISHMENT—INSTRUCTIONS.

Where, on a trial for statutory rape, punishable by Pen. Code, § 261, subd. 1, the court in its charge told the jury of their power, by virtue of section 264 as amended by St. 1913, p. 212, in the matter of designating the prison in which accused should be confined in case of his conviction, and correctly charged on reasonable doubt, and the jury designated the state prison as the place of punishment, refusal to charge on the power of the jury to determine the nature and extent of the punishment which might be inflicted and to determine whether accused, if convicted, should be punished by imprisonment in the county jail or state prison, and that the jury should consider all the circumstances with a view to a just determination of the mode of punishment, was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. $\hookrightarrow$ 829.]

9. RAPE $\hookrightarrow$ 52—STATUTORY RAPE—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction for statutory rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-74, 76; Dec. Dig. $\hookrightarrow$ 52.]

Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

C. E. Clayberg was convicted of crime, and he appeals. Affirmed.

E. M. Frost and Coonan & Kehoe, all of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by an information, filed in the superior court of Humboldt county, with the crime of rape, alleged to have been committed on the 29th day of May, 1914, upon the person of one Garland White, a female. Upon said information the defendant was duly tried, and a verdict of guilty of the offense so charged was returned by the jury. The defendant moved for a new trial, which was denied, and from the judgment and the order denying said motion he presents these appeals.

The first point made by the defendant is that the district attorney was without authority to file a new or, as he calls it, "an amended" information, after a second information, substituted for the original filed by the district attorney, had been set aside on motion. It appears that by the complaint filed in the magistrate's court, and which constituted the foundation of the preliminary hearing of the charge against the defendant, the latter was accused of statutory rape—that is to say, he was thus accused of criminally violating the person of the prosecutrix, "then and there under the age of 18 years, to wit, of the age of 17 years," the element of force not being therein alleged. Upon the conclusion of the preliminary examination of the charge, the magistrate indorsed on said complaint an order committing the defendant to trial in the following language:

"It appearing to me that the offense of rape as herein set forth has been committed, and that there is sufficient cause to believe the within named C. E. Clayberg guilty thereof, I order that he be held to answer the same."

Within due time after the commitment of the accused, the district attorney filed an information in the superior court charging the defendant with the crime as it was stated in the complaint filed before the magistrate and the order of commitment. Thereafter, upon his own initiative or without an order or authority from the court so to do, the district attorney filed in the place of the original a new information, charging the defendant with the crime for which he had been committed, but therein alleged, in addition to the statement that the prosecutrix was under the age of legal consent in such cases, that the act of sexual intercourse so charged was accomplished by the defendant by a resort to force and violence, "and without the consent and against the will of the said Garland White," and that she "resisted the accomplishment of said act of sexual intercourse, but her resistance was then overcome by force and violence upon" her by said de-

defendant, etc. The defendant demurred to the information as so filed and the demurrer was overruled, and thereupon he filed and the court granted a motion to set said pleading aside upon the ground that, before the filing thereof the defendant had not been legally committed by a magistrate. Section 995, Penal Code. In granting said motion, the court ordered "that a new information be filed herein against said defendant by the district attorney of the county of Humboldt, state of California," and thereupon that officer filed another information whose allegations conform to the charge as it was stated in the complaint and the magistrate's commitment of the defendant for trial.

[1] The information set aside by the court charged the offense for which the defendant was committed, and its allegations that force and violence were employed by the accused in the perpetration of the crime of rape were mere surplusage. The crime as described in the commitment or the depositions upon which the commitment was founded was also alleged. In our opinion, the motion to set aside the information should have been disallowed.

[2] However, we shall, in considering the argument against the action of the court in allowing another information to be filed by the district attorney, assume that the information set aside was defective in that it exceeded the scope of the commitment in stating the offense for which the accused was held, or, in other words in practical effect, the information did not state the precise crime for which the accused was committed.

Counsel for the defendant refer to the information upon which the defendant was tried as "an amendment to an amended information," and assert that there is no warrant of law for amending an information which is itself an amendment of the one previously filed. But the information last filed in this case was not an amendment of the information previously filed. Amendments of indictments or informations may be made by authority alone of section 1008 of the Penal Code, as amended by the Legislature of 1911. Stats. 1911, p. 436. That section expressly authorizes the amendment of an indictment or information in certain indicated particulars. The information upon which the defendant was tried, however, was the information which the district attorney may file, in lieu of one set aside on motion, upon an order by the court directing him to adopt that course, and is the result of a proceeding authorized by section 997 of the Penal Code. That section provides that, if the motion to set aside the indictment or information is granted—

"the court must order that the defendant, if in custody, be discharged therefrom; * * * unless it directs that the case be resubmitted to the same or another grand jury, or that an information be filed by the district attorney; provided, that after such order of resubmission the defendant may be examined before a magis-

trate, and discharged or committed by him, as in other cases, if before indictment or information filed he has not been examined and committed by a magistrate."

[3] There can be no doubt that where it is made to appear that an information as filed by the district attorney has gone beyond the scope of the magistrate's commitment or charges an offense different from that for which the accused has been committed by the magistrate, and the superior court for that reason sets it aside, as in such case it would be its duty to do, said court by the power vested in it by said section of the Penal Code, may authorize, by a proper order, the district attorney to file another information upon and conformably to the commitment as made by the magistrate upon the preliminary hearing of the charge. *People v. Lane*, 101 Cal. 513, 36 Pac. 16; *Carpenter v. Nutter*, 127 Cal. 61, 64, 59 Pac. 301; *Ex parte Fowler*, 5 Cal. App. 549, 90 Pac. 938. This is as it should be. The commitment is based upon testimony taken at the hearing, and, where an information has been set aside upon the ground that it does not charge the offense for which the accused has been committed, and the court thereupon directs, by a proper order, that another information be filed on such commitment, there is no conceivable reason calling for a re-examination of the same charge, thus necessitating the re-taking of testimony once heard, where the commitment, founded upon such testimony, discloses that an offense of which the superior court has jurisdiction has been committed, and that there is reasonable ground arising from the testimony so taken for committing the accused for trial upon the charge. Indeed, a document purporting to be an information, founded on a commitment by a magistrate, and which charges a different offense from that for which the accused has been so committed, is, in point of law, the same as no information at all in that case, and hence it was with much wisdom, indeed, that the Legislature authorized, in such circumstances, a procedure for the filing of a proper information which would obviate the necessity of repeating a proceeding which, having once been had, could accomplish no useful purpose either to the defendant or to the people. Section 997, as so construed, can certainly work no prejudice to the rights of the accused, and harmonizes with the spirit and central purpose of the reformed procedure.

[4] But counsel seem to lay particular stress upon the proposition that the court allowed the district attorney to file three informations in this case, two having been set aside, contending that, even if section 997 contemplates that an information may at all be filed in the place of one set aside on motion, without a re-examination of the charge, said section is to be so construed as to limit the right of the court to direct it to be done and of the district attorney to file it under

such direction to one time only in a single case. In other words, the contention appears to be that the procedure authorized by said section as to the filing of another information upon the setting aside of one previously filed may be resorted to but once in any one case, and that before a second information can legally be filed, two previous ones having been set aside, there must be another preliminary examination of the charge before a magistrate. The language of the section does not support that contention. We can see no reason why the same procedure may not be invoked more than once in any one case, where the district attorney fails to charge in any information he may file in such case the crime for which the accused has been committed and it appears that an information can be filed stating such offense.

[5] The next assignment involves the complaint that, in declaring to the jury in his opening statement that he would prove certain acts of actual force and violence on the part of the defendant in the accomplishment of the act of sexual intercourse with the prosecutrix, the district attorney went beyond the issues tendered by the information, inasmuch as the element of actual force was not of the essence of the crime as charged. But, while it is true that the crime as set forth in the information was not of that character to require the proof of force to establish its consummation, the district attorney nevertheless had the right to show the circumstances under which the crime was committed and to state to the jury his intention and ability to prove those circumstances, and if, perchance, they developed some element not essential to the consummation of the crime as charged, the defendant cannot complain, so long as they related to the transaction or act directly resulting in the consummation of the crime. In so-called statutory rape, actual force is not an element, but therein the law supplies the element of force by declaring that a sexual act with a female not the wife of the seducer and under a certain age is against her consent and therefore a crime. In such a case, in other words, force is implied, and proof of actual force in the commission of the crime of statutory rape can make it none the more a crime than if that element were absent.

The prosecutrix, in detailing the circumstances under which the defendant met and assaulted her, testified that he used actual force upon her; that he forcibly dragged her to the spot where the act was perpetrated, and that he gagged and administered chloroform to her and then violated her person. Thus the district attorney, not only with eminent propriety, showed how the act to the execution of which the prosecutrix could not in law consent was committed, but made good his promise to the jury that he would prove that the act was committed under the

circumstances as outlined by him in his opening statement.

[6] Again, it is urged that the district attorney was guilty of misconduct seriously violating the substantial rights of the defendant by referring, in his argument of the case to the jury, to an assault of the same general character as that charged against the defendant, which was made by another party upon another female on a previous occasion, in Humboldt county, and calling attention to the fact that the assailant "is now doing time in San Quentin for that crime." The district attorney obviously had no right to refer to other cases having no connection whatever with the present case in his argument to the jury, and this proposition the trial judge in this case readily recognized, for, upon objection by the attorney for the defendant, the court promptly stopped the prosecutor from further reference to the case mentioned by him and instructed the jury to disregard that part of the argument, "and not to be influenced by it in any respect." The district attorney thereupon also said, "I will withdraw that part of my argument and consent that it be stricken out." The prompt and emphatic admonition by the court to the jury to disregard and not to be governed by the objectionable remarks of the district attorney were no doubt obeyed by the jury. At any rate, we must so presume, and that whatever damaging effect said remarks might otherwise have had upon the rights of the accused was overcome by the timely instruction of the court to disregard them. *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; *People v. Molina*, 126 Cal. 507, 59 Pac. 34; *People v. Prather*, 134 Cal. 439, 66 Pac. 589, 863; *People v. McRoberts*, 1 Cal. App. 28, 81 Pac. 734; *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435.

[7, 8] It is next insisted that the court, erroneously and to the prejudice of the defendant, disallowed instruction V, as proposed by him. Said instruction related to the power vested in juries by section 264 of the Penal Code (Stats. 1913, p. 212), in cases arising under subdivision 1 of section 261 of said Code, to determine practically the nature and extent of the punishment which may be inflicted. By the terms of the former section, it is incumbent upon the jury, where the prosecution is based upon subdivision 1 of section 261, to determine whether the defendant, if convicted, shall be punished by imprisonment in the county jail or the state prison. The rejected instruction explained the law as it is declared in those sections of the Code, and proceeded to declare that it was the duty of the jury to consider all the circumstances of the present case with a view to a just determination of which mode of punishment authorized by said section 261 "will best conserve the interest of society and the interest of the defendant," in the event that they found the defendant guilty. The instruction also had something to say about

the policy of the law being opposed to the infliction of "unusual or severe punishment," etc., which statement could have no just place in the court's charge; it being argumentative in character. The instruction was properly refused. The court, in its charge, told the jury of the power and duty resting upon them by virtue of the provisions of section 264 of the Penal Code in the matter of designating the prison in which the defendant should be incarcerated in case of his conviction of the crime charged (the crime charged here being based on subdivision 1 of said section 261), and the jury, heeding that instruction, by their verdict, designated the state prison as the place of punishment. The court, furthermore, very clearly explained to the jury their general duty as such, and told them that a verdict of conviction could be reached only upon their being convinced, after a fair and impartial consideration of all the evidence, of the guilt of the accused beyond a reasonable doubt.

[9] The last point made by the defendant calling for special notice is that the verdict is devoid of sufficient support; but this claim is wholly without merit, as an examination of the evidence will readily disclose. The crime was committed at about the hour of 9 o'clock on the evening of May 29, 1914. The prosecutrix, at the time of the assault upon her, was under the age of 18 years, having been born in the month of November, 1896. She testified that, at about the hour named, while she was on the way from her home to a grocery store and while walking over a path which passes through a large park, in the city of Eureka, known as "Sequoia Park," she saw a man (who turned out to be the defendant) coming toward her. "As he got up to me," she continued, "he flashed a light in my face, and I turned to run, and he grabbed me. I beat him, and he got me down and held me and chloroformed me, and when I came to he was dragging me out in the road by the park, and dragged me quite a ways, and whenever I did anything he put the chloroform to my nose, and took me over by the park over beyond the road going through the park. * * * He tied a handkerchief over my mouth and put a gag in my mouth to keep me from hallooing. That was after he dragged me and in the road quite a ways, and dragged me off the county road. * * * He said if I would not go he would make me go. * * * He took me over the stile and around next to the fence. He did not take me down the road but a little ways, then he took off and left the road, the county road, and took me into the woods." She proceeded to say that he finally forced her to a lonely spot in the woods, a considerable distance from the road, made her lie down upon the ground, and then had sexual relations with her. After the defendant had finished his relations with the girl, she returned to her home, reaching there at about a quarter to 11 o'clock. She there-

upon immediately made complaint to her mother of the treatment she had received at the hands of the defendant.

The mother of the prosecutrix testified that the latter arrived at her home at about 11 o'clock on the night of May 29, 1914; that the young woman's hair was nearly torn from her head—

"and she was dirt all over; her shoes were full of dirt, and she seemed to be just wrecked all over. * * * There was not a hairpin left in her hair. Her teeth were chattering like she had the worst chill that could be; * * * she was nervous and excited. * * * She made complaint to me that something had happened to her. * * * I examined her underclothing; * * * they were badly soiled. * * * I detected strong odor of chloroform; * * * I am familiar with the odor of chloroform; * * * I followed nursing for 10 years; * * * her lips were scorched all across here [showing]. * * * I picked her up off the floor where she fell beside my bedside, and she told me what had happened; * * * she was in such a bad condition, so weak in her excitement, that I went and helped her get to bed. * * * She had a chill—a nervous chill—after I put her to bed. * * * I telephoned to the police that night; her and I went to the telephone together, just across the yard to Mrs. Walker's. * * * She herself [the prosecutrix] gave [to the police] a description of the man. * * * Mrs. Walker was present when we telephoned to the police."

The witness Snodgrass was confined in the city jail of Eureka a short while after the defendant's arrest, and there he met and conversed with the latter, with whom he was acquainted, and who, while not admitting that he had sexual relations with the prosecutrix, said to the witness that he had met her on the night of the assault. The defendant requested the witness to go to his (defendant's) room, in the Brooklyn House, and secure and destroy some bottles containing chloroform which were in said room. The witness went to the room as requested and searched for the bottles, but was unable to find them. Later the defendant gave the witness a more specific description of the place in the room where the bottles were situated and, on returning to the room, accompanied by an officer, and again looking for the bottles, found them, the officer then being present. They contained chloroform.

The chief of police of Eureka testified that, upon searching the room of the defendant, shortly after the latter's arrest, he found a searchlight. The chief also testified that he was with and saw the witness Snodgrass locate the bottles of chloroform which the latter found in the defendant's room.

C. L. Koker testified that, after the arrest of the defendant, he held a conversation with him in the county jail; that the accused admitted in said conversation that he met the prosecutrix in the dark and flashed the light on her. Subsequently, in another conversation, the defendant remarked to the witness that "if the chloroform was found, it was all off with him, and if the chloroform was not found, he had a chance."

The witness Lee testified that the defend-

ant admitted to him that he had had sexual intercourse with the prosecutrix. He further admitted to the witness that he had sent Snodgrass to his (defendant's) room to get and dispose of the chloroform, and requested Lee to find out whether Snodgrass had done as he (defendant) had directed him to do. Lee further said that defendant requested him to "try and get this girl to go for a ride with me, and get a confession from her that she was over 18 years old."

Thus, in substance, we have presented the testimony which stands as the support to the verdict, and that it is ample support there is no substantial reason for doubting. It appears to be true and, indeed, it may be conceded, that the story of the prosecutrix is characterized by some inconsistencies or contradictions. These, however, bear particularly upon the question whether the defendant employed force in the perpetration of the crime. But, the prosecutrix being under the age of consent, it is manifestly immaterial whether the defendant used force in the accomplishment of the act or not. The mere act of having sexual relation with a female under the age of legal consent itself constitutes the crime charged, and it still remains a crime even though it be shown that the female actually consented to the act. Besides, contradictions arising in the testimony of a witness constitute considerations with which appellate courts cannot concern themselves unless it clearly appears that such contradictions impart to the whole story of the witness such inherent infirmities as will render the entire material portions of his testimony palpably improbable or unbelievable.

Some of the rulings of the court upon the evidence are criticized, but we have found nothing in the few assignments under this head which calls for special consideration.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

169 Cal. 787

HARRISON v. ARMOUR et al. (L. A. 3360.)
(Supreme Court of California. April 5, 1915.)

1. CORPORATIONS — 228 — UNPAID STOCK — RIGHTS OF CREDITORS.

The amount due on corporate stock issued when not fully paid up is deemed money due the corporation, and judgment creditors of the corporation may resort to such fund.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 874, 878; Dec. Dig. — 228.]

2. CORPORATIONS — 232 — STOCKHOLDERS' LIABILITY — RIGHTS OF CREDITORS.

Where stock is sold for money, and the purchase price is less than the par value, the difference between the par value and the amount paid is the measure of the stockholders' liability to judgment creditors of the corporation; but, where stock is exchanged for property, the valuation of the property fixed by the parties is conclusive, unless fraudulent, and, if fraudulent, the actual value of the property will control.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. — 232.]

3. CORPORATIONS — 232 — STOCKHOLDERS' LIABILITY — PATENT RIGHT AS CONSIDERATION.

Where corporate stock was exchanged for exclusive patent rights of unascertained value, nothing more being shown, the stock will be considered fully paid as to judgment creditors of the corporation, and neither the fact that the term "fully paid" was not used in the transaction between the parties or in the certificate of stock, or the fact that prior to the exchange the corporation had authorized cash sales of stock at one-quarter par value, would be proof that the stock was not fully paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. — 232.]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordweil, Judge.

Action by C. W. Harrison, doing business as the Harrison Machine Works, against R. M. Armour, R. W. Kemp, and others. From a judgment for plaintiff, defendants Armour and Kemp appeal. Reversed, and cause remanded for new trial.

James P. Clark, C. A. Post, and H. S. Clewett, all of Los Angeles, for appellants. J. B. McLaughlin, of Los Angeles, for respondent.

SLOSS, J. This is an action by a judgment creditor of a corporation, to subject to the payment of his claim the unpaid subscriptions of various stockholders.

The complaint alleged the incorporation, in June, 1907, of Marine Power & Electric Company, the recovery by the plaintiff on July 7, 1911, of a judgment against said corporation for \$1,127.35, and costs, the return of the execution unsatisfied, and the non-payment of the judgment. It alleged further that the capital stock of the corporation was divided into shares of the par value of \$1 each, and that the various defendants had subscribed for, and were the own-

ers of, certain numbers of shares for which no more than 25 cents per share had been paid; the balance of 75 cents per share being still unpaid and subject to the payment of plaintiff's judgment. Of the various defendants, R. M. Armour was alleged to be the owner of 11,000 shares and R. W. Kemp of 6,000 shares. The judgment went in favor of the plaintiff against all the defendants. Armour and Kemp appeal from the judgment. As they are the only appellants, the situation of the other defendants need not engage our further attention.

The two appellants answered jointly. They denied, among other things, that any sum remained unpaid on account of their stock. The court found in favor of the plaintiff on all the issues; the finding on the immediate point just referred to being that Armour was the owner of 11,000 shares of stock, for which no more than 25 cents per share had been paid, and upon which there was unpaid and subject to the payment of the corporate debts and of plaintiff's judgment the sum of \$8,250. With respect to Kemp the finding is similar, except that the number of shares owned by him was 6,000 shares, and the balance of the subscription price found to be unpaid was \$4,500. These findings, so far as they relate to the amount paid in on the stock, are attacked as unsustained by the evidence. We think the objection is well founded.

The Marine Power & Electric Company was organized in June, 1907, with a nominal capital stock of \$1,000,000, divided into 1,000,000 shares of the par value of \$1 each. Some two months theretofore a corporation known as the Bancroft-Compton Realty Company had been organized. The last-named corporation had secured from the government of the United States and other governments patents for a device to utilize the power of ocean waves. On June 8, 1907, its directors, at a meeting regularly held, adopted a resolution that the Bancroft-Compton Realty Company enter into negotiations with the Marine Power & Electric Company "whereby they receive 60,000 shares of the Marine Power & Electric Company's stock, in payment for the sole rights to use the said Bancroft-Compton Realty Company's wave motor in the five counties, viz., Los Angeles, Orange, San Diego, San Bernardino, and Riverside, and, furthermore, that they receive 5 per cent. of the gross income of all plants erected by the said Marine Power & Electric Company within the five above named counties." This proposal was made to the directors of the Marine Power & Electric Company, and was by them accepted. Pursuant thereto a written contract between the two corporations was executed on July 10, 1907. This agreement provides that Bancroft-Compton Realty Company, "in consideration of the transfer to it of 60,000 shares of the capital stock of the said Marine Power

& Electric Company, and in consideration of the said Marine Power & Electric Company agreeing with the said Bancroft-Compton Realty Company to pay to the said Bancroft-Compton Realty Company 5 per cent. of the gross income of any plant or plants that may be erected under the said patents by the said Marine Power & Electric Company," agrees to assign, sell, and transfer to the Marine Power & Electric Company the exclusive right to use the said patents in the five counties above mentioned.

Pursuant to this contract certificates for 60,000 shares were issued to the Bancroft-Compton Realty Company, and that corporation divided up these shares among its own stockholders in certain proportions. It was under this distribution that Armour received his 11,000 shares and Kemp the 6,000 owned by him. No evidence whatever was offered to show the value of the rights thus transferred in return for the 60,000 shares of stock. It appeared, however, that at a meeting held on the 8th day of June, 1907, the board of directors of the Marine Power & Electric Company had adopted a resolution providing that a block of 100,000 shares of the company's stock be offered for sale at 25 cents per share, "or increased in price at any time by direction of the board of directors" for the purpose of erecting a commercial plant. This was two days prior to the meeting at which the offer of the Bancroft-Compton Realty Company was accepted by the directors of the Marine Power & Electric Company. Pursuant to this authorization a number of sales of stock at 25 cents per share in cash were made to various persons.

[1] It is thoroughly settled in this state and in other jurisdictions that, "where the stock of a corporation is issued without being fully paid up, the amount remaining unpaid is, so far as its creditors are concerned, deemed to be money due to the corporation from its stockholders," and resort to such fund may be had by such creditors. *Herron Co. v. Shaw*, 165 Cal. 668, 133 Pac. 488.

[2] The doctrine has been applied in two classes of cases. Where the stock was sold for money and the purchase price was less than the par value of the stock, the difference between the par value and the amount actually paid is the measure of the stockholder's liability. A typical instance of this kind was presented in the leading case of *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143, where \$20 per share in cash had been paid on shares of the par value of \$100. There are, however, many cases in which the stock is not sold for cash, but is issued in return for real or personal property having no defined value. In such cases the rule is that, where the corporation and stockholder have agreed upon a given valuation for the property transferred, such val-

uation is binding and conclusive, unless it is fraudulent in purpose or effect. But, if the parties have put upon the property a valuation in excess of what they knew or believed to be its true value, this is a constructive fraud upon the creditors, and the stock will be deemed paid only to the extent of the actual value of the property received in exchange for it. *Herron Co. v. Shaw*, supra.

[3] In this case we think the plaintiff and the court below fell into error in confusing these two classes of cases. There was no attempt to show that the patent rights transferred to the corporation were overvalued, knowingly or otherwise. So far as appears, they may, at the time of the transaction, have been worth \$60,000, the amount of the par value of the stock issued in exchange for them, or more. The theory of the court below seems to have been, not that property worth less than \$60,000 was taken at \$60,000, but that the property—i. e., the patent rights—were turned into the corporation as a 25 per cent. payment on account of the stock; the respective boards of directors agreeing, expressly or impliedly, that said rights should be taken at a valuation of \$15,000, or 25 per cent. of the par value of the stock issued in exchange for them. We see nothing in the record to justify this view. The transaction between the two corporations was one whereby certain property, of unascertained value, was turned over to the Marine Power & Electric Company in exchange for 60,000 shares of its stock. The natural and ordinary interpretation of such a transaction is that the property is taken in payment for the given number of shares, and, in the absence of anything showing the fixing of a smaller valuation upon the property, it must be deemed to be transferred and taken as payment of the par value of the shares. In other words, the two corporations plainly intended to issue the stock as fully paid. It is true that neither the resolutions adopted by the respective boards of directors, nor the contract itself, contained the term "fully paid stock." But this is unimportant; there being nothing to show that there was any attempt to fix a valuation which would make it less than fully paid. Nor do we attach any significance to the fact that the certificates of stock did not describe the shares as fully paid. It is a very common practice to issue certificates containing nothing to show whether the stock is fully or part paid. No inference against full payment is to be drawn from the silence of the certificate. On the contrary, where the case involved the rights of purchasers from the original subscribers, it has been held that the presumption arising from a certificate in this form, if there be any presumption, is that the stock is fully paid for. 1 *Cook on Corp.* (6th Ed.) § 50; *Johnson v. Lullman*, 15 Mo. App. 55.

The circumstance upon which the respondent places his main reliance is that, prior to the agreement for the issuance of the 60,000 shares, the directors of the Marine Power & Electric Company had authorized the sale of 100,000 shares at 25 cents per share. But the 60,000 shares issued in return for the patent rights were no part of the stock thus authorized to be sold. The sale of the 100,000 shares was to be made for the purpose of erecting a plant, and the resolution authorizing it evidently contemplated sales for cash. The fact that cash sales were made at 25 cents per share is no proof that an issue of stock in exchange for patent rights was intended to be or was at the same rate. The two transactions are essentially different, and the nature of each must be determined from its own facts.

Under the allegations of the complaint, it would have been open to the plaintiff to prove that the patent rights, although turned in at a valuation of \$60,000, were, and were known or believed by the parties to be, worth much less. *Herron Co. v. Shaw*, supra. But no such proof was offered. In its absence there is no adequate support for the finding that only 25 cents per share had been paid on the stock held by appellants.

The judgment is reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

170 Cal. 1

BROWN v. BROWN. (Sac. 2121.)

(Supreme Court of California. April 7, 1915.)

1. DIVORCE ⇐170—INTERLOCUTORY DECREE—PROPERTY—EFFECT ON COMMUNITY PROPERTY.

Under Civ. Code, §§ 131, 132, providing for interlocutory and final decrees in divorce actions, an interlocutory decree, with respect to the rights of husband and wife in the property of one another, does not sever the marriage relation, which subsists in that respect until the final decree is pronounced.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 552, 553; Dec. Dig. ⇐170.]

2. DIVORCE ⇐322—FINAL DECREE—PROPERTY—EFFECT ON COMMUNITY PROPERTY.

Under Civ. Code, § 146, providing that, if a final decree for divorce be rendered for extreme cruelty or adultery, the community property shall be assigned to the respective parties in such proportions as the court may deem just, and that, if the decree be rendered on any other ground, the community property shall be equally divided, where the final decree of divorce makes no disposition of the property, the parties become tenants in common, and, if the cause of divorce was not cruelty or adultery, each will thereafter be owner of an undivided one-half, without further order of the court; but, if the decree was for either of such causes, the respective interests of the parties in the community property are subject to the determination in a subsequent proceeding.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 822-825; Dec. Dig. ⇐322.]

3. DIVORCE ⚭322—INTERLOCUTORY DECREE — PROPERTY SUBSEQUENTLY ACQUIRED — STATUS.

Under Civ. Code, §§ 131, 132, providing for interlocutory and final decrees in divorce actions, property acquired by a husband otherwise than by gift, devise, or descent before or after interlocutory decree, but before final decree, becomes community property.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 822-825; Dec. Dig. ⚭322.]

4. DIVORCE ⚭322—FINAL DECREE—EFFECT ON COMMUNITY PROPERTY.

Where the complaint in a divorce action alleges that there is no community property, an interlocutory, and eventually a final, decree for the wife being entered thereon by default, the former wife, on death of the husband intestate, has no rights in realty which was his property before the divorce suit; such a judgment or decree being, in effect, a contract between the parties that it shall finally adjudicate everything embraced in the allegations of the complaint.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 822-825; Dec. Dig. ⚭322.]

5. DIVORCE ⚭322—FINAL DECREE—EFFECT ON COMMUNITY PROPERTY ACQUIRED DURING PENDENCY OF SUIT.

Where the complaint in a divorce action alleged that there was no community property, an interlocutory, and eventually a final, decree being entered thereon by default for the wife, she, upon death of the husband intestate, became tenant in common with his administrator in realty which he had acquired after the interlocutory, but before the final, decree; since there was no issue tendered in the action concerning the specific property for the decree to adjudicate.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 822-825; Dec. Dig. ⚭322.]

6. HUSBAND AND WIFE ⚭279—SEPARATION AGREEMENT—RESCISSION.

Where a wife, by separation agreement, purported to release her rights in the community property, and to declare subsequently acquired property the separate property of the person acquiring it, after the execution of the agreement, the parties becoming reconciled and living together as husband and wife for several months, orally agreeing to set aside and annul such separation agreement, it was effectually canceled; the oral agreement having been executed.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1054, 1056-1060; Dec. Dig. ⚭279.]

Department 1. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Ruby D. Brown against Eva S. Brown, as administratrix. Judgment for plaintiff, and defendant appeals. Affirmed.

Harris & March (H. C. Beach, of San Francisco, of counsel), for appellant. J. C. Sims and Myer Jacobs, both of San Francisco (T. E. Pawlicki, of San Francisco, of counsel), for respondent.

SHAW, J. The object of the plaintiff's action herein is to establish her title as tenant in common in 800 acres of land of which John S. Brown died seised, and to be let into possession thereof in common with the defendant, who is the administratrix of the es-

tate of said decedent. The court below made findings and gave judgment in favor of the plaintiff. The defendant appeals from the judgment, and claims that it is not sustained by the findings.

The plaintiff and the decedent, John S. Brown, intermarried on May 1, 1903, and remained in the relation of husband and wife until June 25, 1909, when the marriage was dissolved by a final decree of divorce in the superior court of San Francisco. The interlocutory decree on which the final decree was founded was entered on June 22, 1908. John S. Brown acquired the land in controversy by conveyances made to him on December 31, 1908. It was not acquired either by gift, devise, or descent. This, it will be noted, was after the interlocutory decree of divorce and before the final decree.

[1, 2] The plaintiff's claim is based in part on certain rules of law which have been settled by former decisions of this court and which it is proper here to state. With respect to the rights of a husband and wife, respectively, in the property of the other, an interlocutory decree of divorce, given under the provisions of sections 131 and 132 of the Civil Code, does not sever the marriage relation, and they remain in that relation until the final decree of divorce is pronounced. Estate of Dargie, 162 Cal. 51, 121 Pac. 320; Pereira v. Pereira, 156 Cal. 9, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; Grannis v. Superior Court, 146 Cal. 250, 79 Pac. 891, 106 Am. St. Rep. 23. The theory of these cases seems to be that the provision for interlocutory decrees and the subsequent delay of one year before the entry of a final decree was intended to operate as a method of prolonging the action, so as to prevent the divorce from being hastily accomplished, and that the interlocutory decree, so far as the termination of the marriage relation is concerned at least, is a mere step in the proceedings. Where the final decree of divorce makes no disposition of the community property, the parties become tenants in common of such property. If the cause of divorce was neither cruelty nor adultery, each will thereafter be the owner of an undivided one-half of the community property without further order of the court, but, if given for either of said causes, the respective interests of the parties in the community property left undisposed of is subject to the determination of a court of competent jurisdiction in a subsequent action or proceeding. Civ. Code, § 146, subds. 1, 2; De Godey v. Godey, 39 Cal. 162; Biggi v. Biggi, 98 Cal. 38, 32 Pac. 803, 35 Am. St. Rep. 141; Kirschner v. Dietrich, 110 Cal. 505, 42 Pac. 1064. The divorce in this case was rendered upon the ground of willful neglect on the part of the husband.

[3] That property acquired by the husband otherwise than by gift, devise, or descent after the action is begun and before the final

decree is community property is manifest from a consideration of the law defining such property and the effect of sections 131 and 132 of the Civil Code. The office of the interlocutory decree, under section 131, is merely that of "declaring that the party in whose favor the court decides is entitled to a divorce." This stands for a year. In the meantime neither party, alone, may dismiss the action. After the year the final decree may be given granting the divorce, and it is at that time that the Code specifies (section 132), that the court may give "such other and further relief as may be necessary for the complete disposition of the action." As we have seen, the marriage status remains until the final decree. Such property acquired after the interlocutory decree and before final decree is acquired "after marriage" and before its termination, and is therefore community property. Civ. Code, §§ 163, 164. There is nothing anywhere in the statute that will justify any distinction, in this respect, between property acquired before the suit is begun and that acquired afterward during the existence of the marriage relation, or to sanction the theory that the interlocutory decree affects the character of property acquired afterward, and not disposed of thereby.

Under the rules just stated, we think it must be conceded that the plaintiff is seised of an undivided one-half of this property, unless it shall appear that the matter was adjudicated otherwise by the decree of divorce. For the consideration of this question a further statement of facts is necessary.

[4, 5] The action for divorce was begun on May 23, 1908. The complaint alleged "that there is no community property," and that Brown was worth about \$500, was in receipt of a professional income of \$250 a month, and was able to support the plaintiff. There was no prayer for alimony or for an allowance for the support of the plaintiff. The defendant, Brown, was duly served with summons and complaint, and made default in the action, whereupon the court, upon evidence produced in support of the allegations of the complaint, made the interlocutory decree as above stated. This decree recited that all the allegations of the complaint were sustained by the testimony and were true; it adjudged that the plaintiff was entitled to a divorce, and declared that at the time of the final decree the court should "grant such other and further relief as may be necessary to a complete disposition of this action." It did not mention the subject of community property or property rights of any kind. No other or further pleadings were filed, and at the expiration of the year the final decree was made upon the motion of Ruby D. Brown and upon the records and papers in the case. It adjudged the dissolution of the marriage, and made no order, direction, or even mention of property or other rights.

It is earnestly contended by the respondent that the final decree is of no force whatever upon the right of the plaintiff in the property of the husband. In this we think the plaintiff is mistaken. Where a defendant is served with a summons and complaint stating the facts upon which he is required to act, and he makes default, he is presumed to admit all the facts which are well pleaded in the complaint. The judgment which follows upon this sort of admission is, in contemplation of law, a complete adjudication of all the rights of the parties embraced in the prayer for relief and arising from the facts stated in the complaint, including the facts in his favor as well as those against him. The defendant here is presumed to have acceded to the proposition embraced in the complaint and to have consented that plaintiff should obtain the relief therein prayed for, upon the conditions and facts set forth in the complaint. The proceeding is equivalent to a statement by Brown to plaintiff that he did not object to a divorce for the cause alleged, based upon the theory that there was no community property existing at the time the action was begun. When judgment is rendered upon such a complaint and default, it becomes, in effect, a contract between the parties that the judgment shall be final with respect to everything properly embraced within the allegations of the complaint and in the prayer for relief. 1 Freeman on Judgments, § 330; Hoh v. Hoh, 84 Wis. 378, 54 N. W. 731. Although the final decree is silent as to property, it nevertheless operates as an adjudication that at the time the action was begun there was no community property. Thompson v. McKay, 41 Cal. 227; Champion v. Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126.

This proposition, however, does not determine the case. The plaintiff does not here seek an interest in community property existing when the action for divorce was begun; she asserts an interest in that which came into existence after the interlocutory decree therein was given. The general rule that a judgment is conclusive, not only as to that which is actually determined, but also as to every other matter which the parties might have litigated in the action, is not always applicable literally. Mr. Freeman on this subject says:

"It may be that the plaintiff might have united other causes of action with that set out in his complaint, or that the defendant might have interposed counterclaims, cross-bills, and equitable defenses, or *either of the parties may have acquired new rights pending the litigation*, which might, by permission of the court, have been pleaded by supplemental complaint or answer, and therefore might have been litigated in the action. But, as long as those several matters are not tendered as issues in the action, they are not affected by it." (Italics ours.)

And further:

"Thus in an action to recover real estate, the defendant cannot put in evidence a title acquired pendente lite, unless he has pleaded it

by a supplemental answer (see *Bagley v. Ward*, 37 Cal. 129 [99 Am. Dec. 256]); and therefore, where he had not so pleaded it, he is not concluded from asserting it in a subsequent action." 1 Freeman on Judgments, § 249.

Pertinent to this point is the following from section 329 of the same volume:

"It is well settled that the issues in a case ordinarily refer to the beginning of the suit, and that matters occurring during its pendency are not in issue, and cannot be received in evidence, unless under some supplemental pleading filed by permission of the court. So far as the plaintiff is concerned, no doubt he is not estopped from asserting any title acquired after the commencement of the action, because he must generally recover upon the cause of action held by him at that time, and cannot be aided by rights of action arising afterwards."

These principles have been followed in this state. Thus in *Maddux v. County Bank*, 129 Cal. 665, 62 Pac. 264, 79 Am. St. Rep. 143, the defendant in a foreclosure judgment was allowed, by a subsequent action, to recover money which the foreclosure plaintiff had received from collateral held by it as security for the mortgage debt, where it appeared that the money had been so received after the action of foreclosure was begun and before the foreclosure judgment, and had not been then credited so as to reduce the judgment, and that the defendant had not appeared and pleaded the same as part payment. In *People's Bank v. Hodgdon*, 64 Cal. 97, 27 Pac. 938, the defendant, against whom a judgment in ejectment had been rendered in a former action between the parties, the title having been there put in issue, was permitted to assert a title acquired by her after the issues were framed in the former action and two years before the judgment against her therein. See, also, *People v. Holladay*, 68 Cal. 443, 9 Pac. 655; *Id.*, 93 Cal. 245, 29 Pac. 54, 27 Am. St. Rep. 186; *Valentine v. Mahoney*, 37 Cal. 396; *Hentig v. Redden*, 26 Am. St. Rep. 97, note.

Upon the same principle we think it is clear that the judgment of divorce will not prevent plaintiff from claiming an interest in community property acquired after the beginning of the action and before the final judgment, if there was no issue tendered in that action concerning such property. The record shows that no adjudication was made in that case barring the rights of the wife in the property here in controversy. It follows that the court below properly decided that the plaintiff was entitled to an undivided one-half of the property.

[6] With regard to the separation agreement made by Brown and wife in 1906, which purported to release her rights in the community and to declare subsequently acquired property the separate property of the person acquiring it, and which it is claimed bars the present action of plaintiff, we need only say that the findings declare that some four months after its execution the parties agreed to become, and were, reconciled; that they

thenceforth for several months lived and cohabited together as husband and wife; and that, in pursuance of the agreement to so live, they further orally agreed to, and did, set aside and annul said agreement. This was an executed oral agreement, and it was a sufficient cancellation of the previous written agreement of separation. Civ. Code, § 1698; *Pearsall v. Henry*, 153 Cal. 325, 95 Pac. 154, 159. Furthermore, it has been said that the reconciliation coupled with cohabitation in pursuance thereof operates to avoid the agreement for separation. *Wells v. Stout*, 9 Cal. 498; *Sargent v. Sargent*, 106 Cal. 546, 39 Pac. 931. This, however, it is not necessary to decide.

We perceive no ground for the contention that the plaintiff is estopped by laches.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.

170 Cal. 8

BROWN v. BROWN. (Sac. 2122.)

(Supreme Court of California. April 7, 1915.)

DIVORCE §172—FINAL DECREE—EFFECT ON COMMUNITY PROPERTY.

Where the complaint in a divorce action alleged that there was no community property, a final decree being entered thereon by default, the former wife, upon the death of the husband intestate, had no rights in an insurance policy which had, in fact, become his property before the action for divorce; such judgment being a final adjudication of everything properly embraced in the allegations of the complaint and the prayer for relief.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 559-561; Dec. Dig. §172.]

Department 1. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Ruby D. Brown against Eva S. Brown, as administratrix. Judgment for plaintiff, and defendant appeals. Reversed.

Harris & March (H. C. Beach, of counsel), for appellant. J. C. Sims and Myer Jacobs, both of San Francisco (T. E. Pawlicki, of San Francisco, of counsel), for respondent.

SHAW, J. This action, in all except two particulars, is the same as the action of *Brown v. Brown*, 147 Pac. 1168 (Sac. 2122), this day decided. We refer to that action for a more particular statement of the facts. The appeal is by the defendant from the judgment in favor of the plaintiff, declaring that the plaintiff was entitled to a division of the proceeds of a life insurance policy belonging to the estate of John S. Brown, deceased.

The only difference between this case and the other case above mentioned is that here the property is personal property, while there it was real estate, and here it consists of an insurance policy which had become the

property of Brown before the action for divorce was begun. In consequence of the date of its acquisition by Brown, said policy, if it was community property, was in existence as such at the time the action for divorce was begun. Upon the principles laid down in case No. 2121, aforesaid, it would follow that the judgment of divorce, based upon the complaint declaring that there was no community property, is a conclusive determination against the plaintiff that this property is not community property, and by said judgment she is estopped from claiming any interest whatever in this part of the estate of Brown.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.

169 Cal. 772

ESCONDIDO MUTUAL WATER CO. v.
CITY OF ESCONDIDO.
(L. A. 3446.)

(Supreme Court of California. April 2, 1915.)

1. WATERS AND WATER COURSES ⇐200—
PUBLIC WATER SUPPLY—MUTUAL IRRIGATION COMPANY.

A mutual irrigation company, which never voluntarily furnished water to a city or its inhabitants except the proportionate share to which it was entitled by virtue of its ownership of stock in the corporation, did not assume the public duty of supplying water to the city for municipal purposes, so as to be required to continue to perform that duty in accordance with the needs of the city.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. ⇐200.]

2. WATERS AND WATER COURSES ⇐200—
PUBLIC WATER SUPPLY—MUTUAL IRRIGATION COMPANY.

A mutual irrigation company, which acquired, with the consent of a city, from a water works company, the right to the water which that company had formerly used to supply the city, and which thereafter was devoted to the purposes of the irrigation company, did not thereby take upon itself the duty of supplying the city with water, since the right of the city to the continued use of the water was abandoned by its consent to the transfer.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. ⇐200.]

3. WATERS AND WATER COURSES ⇐200—MUTUAL IRRIGATION COMPANY — CITY AS STOCKHOLDER.

Where a city purchased stock in a mutual irrigation company which had bought the water rights of a waterworks company which previously furnished water to the city, it thereby contracted that it was entitled to receive only the amount of water represented by its stock, and it cannot claim that the company was bound to continue to supply it with sufficient water for its needs.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. ⇐200.]

4. WATERS AND WATER COURSES ⇐200—MUTUAL IRRIGATION COMPANY — CITY AS STOCKHOLDER—ULTRA VIRES PURCHASE.

If the purchase of the stock was ultra vires, that would not entitle the city to demand

a continuance of the former service, but would only show that it was not entitled to receive any water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. ⇐200.]

Department 2. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the Escondido Mutual Water Company against the City of Escondido. Judgment for the plaintiff, and defendant appeals. Affirmed.

A. M. Thompson, of Escondido, and J. C. Hizar, of San Diego, for appellant. Wright & Winnek, of San Diego, for respondent.

HENSHAW, J. Plaintiff pleaded that it is a mutual water company, organized under the laws of the state of California; that the defendant, at the time of plaintiff's organization, subscribed for, purchased, and ever since has been the owner of a given number of shares of its capital stock; that, by virtue of the law of its creation and by virtue of its by-laws, it was plaintiff's duty to apportion the water which it controlled and allot it to its stockholders in the proportion which their shares of stock bore to the total issued stock of the company; that it so did and notified defendant of the amount of water to which the latter would be entitled for the year beginning on the 1st day of May, 1911; that by August, 1911, the defendant had used and consumed all of the water which it was entitled to receive from plaintiff; that plaintiff notified defendant of this fact, and further informed defendant that it was entitled to receive no more water unless it secured the right to additional water by the purchase of additional stock. Defendant refused to consider this suggestion, and plaintiff caused defendant's supply of water to be shut off. Whereupon defendant, through its town marshal, turned on the supply and continued to use additional water, in violation of the law and of the rights of plaintiff. Plaintiff, as a mutual water company, secures, impounds, and distributes water to its stockholders ratably and at cost. By the law of its creation it is not a corporation organized for profit, and this illegal and unwarranted taking by defendant of plaintiff's water is to the great injury of plaintiff's other stockholders, the trustee for all of whom plaintiff is. Plaintiff prayed for an injunction to restrain these illegal acts. The complaint was verified. Defendant answered by denial. It admitted and pleaded that it did own the shares of stock of plaintiff which plaintiff asserted that it owned, but denied that it owned them in any other way "except as a mere incident to the land held by said city for public purposes, and that said stock is appurtenant to the land, so held by the city of Escondido." Affirmatively it alleged:

"That the Land & Town Company of Escondido constructed the water system in the city of Escondido. That thereafter the Escondido irrigation district purchased said system, and that said Escondido irrigation district purchased water and constructed a reservoir, all of which water was held in trust for distribution in the district of which the city of Escondido is a part. That said water so impounded was sold to the inhabitants of said district. That thereafter the plaintiff became the purchaser of the holdings of the Escondido irrigation district. That said water so obtained by plaintiff is subject to all of the conditions impressed by the laws of the state of California thereon. That the said plaintiff has continued to furnish water to numerous parties in the city of Escondido in the same manner in which the same was furnished and under all of the conditions as the same was furnished by the Escondido irrigation district. That the city of Escondido, exercising its functions as a municipal corporation, constructed a sewer system. That after said sewer system was constructed said city applied to the plaintiff for water to flush said sewer system. That thereupon the said plaintiff connected said sewer system with the pipes of plaintiff and has continued ever since to furnish water to plaintiff for said sewer system. That as compensation for said water so furnished by plaintiff the city of Escondido has paid all bills presented by said water company for such water so furnished, and the bills for such service have been presented since the filing of this suit and paid by the city of Escondido to the 30th day of November, 1911. That the city of Escondido owns no shares of the capital stock of the plaintiff corporation in connection with said sewer system, or in any manner connected therewith. That the city of Escondido does own certain shares of stock in the plaintiff corporation which were delivered to the city of Escondido in connection with certain real estate owned by said city, and not otherwise."

The court found all of the allegations of the complaint true. Touching the affirmative defense of defendant it found:

"That plaintiff did, during the year 189-, acquire the reservoir and distributing system now owned by it from the Escondido irrigation district. That at all times prior to the transfer of said reservoir and distributing system to the Escondido Mutual Water Company the said Escondido irrigation district was engaged in the diversion, storing, and distribution of water as an irrigation district under the laws of the state of California, and was at no time engaged in the diversion, collection, storing, and distribution of water as a public service corporation; that, at all times since the organization of the Escondido Mutual Water Company and the transfer to it of the reservoir and distributing system referred to in said complaint and answer, said Mutual Water Company has diverted, stored, and distributed water to the city of Escondido and its inhabitants under its by-laws, rules, and regulations, for cost only and not for profit. That the said city of Escondido, defendant herein, has not purchased water from the plaintiff for its sewer system, and that said defendant, the city of Escondido, has used only the water which was apportioned to it by the Escondido Mutual Water Company, by the resolution referred to in its complaint, making the annual apportionment of water for the year 1911 and ending April 30, 1912, and such additional water as said defendant took from plaintiff's system without plaintiff's consent."

In addition to these findings, it was stipulated:

"That in 1886 the Escondido Land & Town Company laid certain pipes in the city of Escondido, or the then town of Escondido, and that through that pipe line, or pipe lines, it sup-

plied water to the inhabitants of the town from wells located near the city. That some years later, to wit, about the year 1895, the Escondido irrigation system was organized under what was then known as the Wright Irrigation Act, now known as the Bridgeford Act, and that subsequent to its organization it took over the wells and pipe line that had been laid by the Land & Town Company. That the Escondido irrigation district filed upon and appropriated and diverted and impounded water from the San Luis Rey river and distributed water to the inhabitants of the Escondido irrigation district through its aqueducts and from its reservoir located about six miles from the city of Escondido until the year 1905. That during that year, under proceedings brought by the Escondido irrigation district, under the act of 1903, known as an act to provide for the dissolution of irrigation districts, the Escondido irrigation district was dissolved by a decree of court, from which no appeal was taken. That the Escondido Mutual Water Company was formed the same year by authority of the same act, being the act of the Legislature providing for the dissolution of irrigation districts, passed in the year 1903, for the express purpose of taking over the franchises, distributing system, and all of the assets of the Escondido irrigation district. That a sale was made by the Escondido irrigation district of its franchises and all its assets, including the distributing system, and all the pipe line which has been constructed by the Land & Town Company, to the Escondido Mutual Water Company. That that sale was approved by the court, and thereafter the distributing system, franchises, and all of the property became the property of the Escondido Mutual Water Company. The city of Escondido was part of the Escondido irrigation district and is now within the territory supplied with water by the Escondido Mutual Water Company."

[1] Appellant's primary and principal contention is that respondent is charged with the public duty of supplying to appellant such water as it may require for municipal purposes. In short, that respondent is a corporation which has undertaken to perform this particular character of public service and may be compelled to continue to do so in accordance with the needs of the municipality up to the capacity of respondent's ability to supply water. Under this general head, appellant's argument is twofold, one branch of it being that plaintiff has voluntarily undertaken the duty of furnishing defendant with water for its inhabitants and for municipal purposes, such as the flushing of its sewers, and having engaged in this public enterprise, under familiar principles, will be compelled to continue in the performance of the duty so long as it controls the water supply devoted to that use. This contention, however, may be disposed of by a brief reference to the findings, which are abundantly supported and which establish that the only water which the plaintiff ever voluntarily furnished to defendant was the proportionate share of water to which it was entitled by virtue of its relationship to plaintiff as one of its stockholders, and that all excess of water which defendant may have received was taken from plaintiff by defendant by force and against plaintiff's protest. Certainly no such right as that contended for can arise under this state of facts.

[2] The second branch of the argument is to the effect that as the Escondido Land & Town Company had laid certain pipes through which the water was carried for the supplying of the inhabitants of the town of Escondido, and as by mesne conveyance the plaintiff has acquired the water rights, franchise, pipes, and pipe line of this company, this acquisition was subject always to the public use impressed upon these properties and franchises of the Escondido Land & Town Company. Or, in other words, that it became the continuing duty of the Escondido irrigation district, which first acquired these properties, and so in turn plaintiff's, which acquired the properties of the Escondido irrigation system, to perform the public service which the Escondido Land & Town Company had taken upon itself to discharge. Here, again, it may be pointed out that the findings negative this argument, for it is distinctly found that the Escondido irrigation district "was at no time engaged in the diversion, collection, storing, and distribution of water as a public service corporation," and that it stored and distributed water to the inhabitants and landowners in accordance with the law governing the use of waters controlled by such irrigation district.

It would be sufficient here to point out that a public use in waters may cease and determine, and that this may be accomplished by consent of all parties in interest, or by operation of law. It is to be borne in mind that it is only the use of water appropriated for sale, rental, or distribution which is a public use under the constitution (article 14, § 1), and while it is true that when any water has been so devoted to a public use, the public, and each individual member thereof as a part of the public, has a right to the continued use of that water, so that the use may not be changed to the injury of those entitled to rely upon its continuance, and, if abandoned by the purveyors of the use, may be taken over to the end that the use may be continued, it by no means follows, as said in *Fellows v. City of Los Angeles*, 151 Cal. 52, 90 Pac. 137, that the public use impressed upon any particular water supply may not be abandoned. A simple illustration will make clear our meaning. A man has developed water from wells and springs upon his own land and has devoted that water to the public service of a nearby town. He is using the water for rental, distribution, and sale. He has impressed it with this public use. Should he undertake to sell his supply, the purchaser would buy it with the burden of this use attached. Should he sell his lands, the purchaser of the lands, if he acquired the water by that purchase, would take them under the same burden. But the time comes when the municipality acquires a separate and independent supply, and itself engages in the business of furnishing its inhabitants as well

as itself with water. It and its inhabitants absolutely discontinue the use of the other supply. The owner or controller of it finds that he can no longer dispose of it by rental, distribution and sale. Can it be doubted that he is entitled to apply this water to beneficial purposes upon his own land, and that the public use, with which theretofore it had been impressed, has absolutely ceased? So in this case, while there is no direct finding upon the question, every inference to be drawn from the findings made is that there was such or a similar abandonment upon the part of the town of Escondido of the right to such water as the Escondido Land & Town Company had been supplying. This inference, we say, necessarily follows from the specific finding that the irrigation district was at no time engaged in the distribution of water as a public service corporation. And this finding, coupled with the evidentiary fact that the Escondido Land & Town Company secured water from wells and that the wells for years had been abandoned, confirms the view we have just stated.

[3] But it is not necessary even to go so far. It certainly is manifest from the findings that the city of Escondido and the Escondido Mutual Water Company entered into a contractual adjustment of the matter, which adjustment was evidenced by the city becoming a stockholder of the plaintiff; that the result of this was that the city agreed to take water from the plaintiff under the mutual plan, by which plan alone the plaintiff could legally furnish water. The quantum of water to which it was entitled was governed by the law of plaintiff's creation and by the by-laws under that law which it had adopted. It is idle for appellant to contend that because it had been receiving water under this arrangement plaintiff had dedicated to defendant's use all of the water which defendant's growing needs might require, to the last drop which it might be able to impound.

[4] Equally futile is appellant's argument that its acquisition of this water stock for the indicated purposes was *ultra vires*. Appellant uses this argument in an effort to show that, as it had no right to acquire the stock, so it had no right to take the water as a stockholder, and therefore it was taking the water for public service and the water was impressed with the public use. But the logical conclusion, if force is to be given to appellant's argument that the acquisition of this stock was *ultra vires* and void, is that plaintiff is under no legal compulsion to supply defendant with any water whatsoever—a logical and legal result far from that which defendant seeks.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

169 Cal. 800

PRICE v. OCCIDENTAL LIFE INS. CO.

(Sac. 2116.)

(Supreme Court of California. April 6, 1915.)

1. INSURANCE — 646 — ACTIONS ON POLICIES — BURDEN OF PROOF.

In an action on a policy insuring against bodily injuries effected through external, violent, and accidental means, plaintiff was bound to allege and prove, as a part of her case, that the death of insured resulted from accident, and it was not incumbent on defendant to negative accident, as it was not relying upon any exception, forfeiture, breach of warranty, or other affirmative ground of defense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. — 646.]

2. TRIAL — 404 — FINDINGS — FACTS OR CONCLUSIONS.

In an action on a policy insuring against injuries effected through external, violent, and accidental means, a finding that insured's death did not result from accidental causes was one of fact and not a mere conclusion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. — 404.]

3. TRIAL — 404 — FINDINGS — INCONSISTENCY — CONSTRUCTION.

The findings of the trial court must be liberally construed in support of the judgment and reconciled, if possible, so as to prevent conflict upon material points, and if, without transgressing the bounds of fairness and reason, any state of facts is conceivable upon which all of the findings would be true, it must be assumed that such state of facts was shown; the evidence not being before the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. — 404.]

4. INSURANCE — 449 — ACCIDENT INSURANCE — CONSTRUCTION — "ACCIDENT."

An "accident," within a policy insuring against injuries effected through external, violent, and accidental means, is a casualty, something out of the usual course of events, and which happens suddenly and unexpectedly and without any design on the part of the person injured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1162; Dec. Dig. — 449.]

For other definitions, see Words and Phrases, First and Second Series, Accident.]

5. TRIAL — 398 — FINDINGS — INCONSISTENCY — CONSTRUCTION.

While the fact that a person insured against injuries effected through external, violent, and accidental means was killed by a bullet from a firearm, discharged by another person, would, standing alone, justify, if not require, the inference that the killing was accidental, this inference might be overcome by other evidence, since if the killing was the result of an encounter with deadly weapons, and if insured himself invited and brought on such conflict, the death would not be accidental; and hence findings that insured was killed by a bullet from a revolver discharged by another person, and that his death did not result from accidental causes, were not in irreconcilable conflict and supported a judgment for the insurance company.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 946, 947; Dec. Dig. — 398.]

In Bank. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by Agnes M. Price against the Occidental Life Insurance Company. Judgment,

for defendant, and plaintiff appeals. Affirmed.

Robert L. Hargrove, of Madera, for appellant. Chamberlain & Page and Raleigh E. Rhodes, of Madera, and Benjamin E. Page, of Los Angeles, for respondent.

SLOSS, J. The plaintiff appeals from a judgment in favor of defendant in an action on a policy of accident insurance. The evidence is not before us, and we are called upon to determine the one question, whether the findings of fact support the judgment.

By the policy, William A. Price, the husband of plaintiff, was insured in the principal sum of \$2,500, "against bodily injuries not intentionally self-inflicted, sustained by the insured while sane, and effected directly and independently of all other causes through external, violent, and accidental means (suicide, sane or insane, not included)." The policy was made payable, in case of death, to the plaintiff.

The complaint set up a cause of action based on the death of Price. The findings which raise the question to be decided are as follows:

"That on the 5th day of July, 1910, * * * said William A. Price * * * sustained bodily injuries from a bullet then and there striking and entering his body, from a revolver then and there discharged by the hands of one Frank Kates, by reason whereof the said William A. Price then and there died. The court finds that the death of the said William A. Price did not result directly and independently of all other causes from bodily injuries effected through external, violent, and accidental means. That the death of said William A. Price did not result from accidental causes."

The contention of the appellant is that the specific findings regarding the cause and manner of Price's death conclusively establish that the death resulted from violent, external, and accidental means. The further finding that death did not result from accidental means is asserted to be a mere conclusion, and a conclusion at variance with the specific facts found.

[1, 2] The plaintiff was bound to establish, as a part of her case, that death resulted from accident. It was not incumbent on the defendant to negative accident. The insuring company was not relying upon any exception, forfeiture, breach of warranty, or other affirmative ground of defense. The contract was one which insured against death resulting from injuries "effected directly * * * through external, violent, and accidental means." In order to recover, the plaintiff was bound to allege and prove an injury of the kind covered by the contract; i. e., one effected through external, violent, and accidental means. 1 Cyc. 289; *Carnes v. Iowa State Ass'n*, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306; *Nat. Mas. Ass'n v. Shryock*, 73 Fed. 775, 20 C. C. A. 3; *Jenkins v. Pac. Mut. L. Ins. Co.*, 131 Cal. 121, 63 Pac.

180. Whether or not Price's death resulted from accidental means was a material issue presented by the pleadings, and the finding on this issue was one of fact.

[3-5] The findings made by the trial court must, under our settled rule, be given a liberal construction in support of the judgment, and are, if possible, to be reconciled so as to prevent any conflict upon material points. *Ames v. City of San Diego*, 101 Cal. 390, 35 Pac. 1005; *Murray v. Tulare Irr. Co.*, 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; *Krasky v. Wollpert*, 134 Cal. 338, 66 Pac. 309; *Peo. H. Sav. Bk. v. Rickard*, 139 Cal. 285, 73 Pac. 858. If we can, without transgressing the bounds of fairness and reason, conceive of any state of facts upon which all of the findings would be true, we are bound to assume that this state of facts was shown. The term "accident" is defined in *Richards v. Trav. Ins. Co.*, 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455, as "a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured." The fact that the insured was killed by a bullet from a firearm discharged by another person would, standing alone, justify, if not require, the inference that the killing was, as to the insured, accidental. *Jenkin v. Mut. L. Ins. Co.*, 131 Cal. 121, 63 Pac. 180. But this is an inference which may be overcome by other evidence. If it should appear that the killing had been the result of an encounter with deadly weapons, and that the deceased had himself invited and brought on such conflict, the fatal result would not have been accidental, so far as he was concerned. A situation of this kind was presented in *Taliaferro v. Trav. Prot. Ass'n*, 80 Fed. 368, 25 C. C. A. 494. There the court, in upholding a directed verdict in favor of the insurance company, said:

"Where a person thus invites another to a deadly encounter, and does so voluntarily, his death, if he sustains a mortal wound, cannot be regarded as accidental, by any definition of that term which has heretofore been adopted. It might as well be claimed that death is accidental when a man intentionally throws himself across a railroad track in front of an approaching train, or leaps from a high precipice, or swallows a deadly poison. It is possible that death may not result from either of these acts, but death is the result which would naturally be expected, and, if such is the result, it is not accidental."

The case is directly in point, and we think its reasoning is convincing. *Lovelace v. Trav. Prot. Ass'n*, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638, relied on by appellant, is not in conflict. There the deceased had engaged in a quarrel, in the course of which he was killed, but it did not appear that he drew a weapon, or that he knew his opponent was armed. It was very properly held that the killing was "accidental," because the circumstances did not show that the insured "voluntarily assumed

the risk of death." Here, however, in the absence of the evidence produced below, we must take the facts to be that Price did voluntarily assume the risk of death. If he did, the findings are reconcilable, and support the judgment.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

169 Cal. 786

PEOPLE ex rel. HERSHEY et al. v. RECLAMATION DIST. NO. 108. (Sac. 2289.)

(Supreme Court of California. April 5, 1915.)

QUO WARRANTO 62—APPEAL—PARTIES—ATTORNEY GENERAL.

An appeal from judgment in quo warranto proceedings could not be taken by the relators alone "because they are parties in interest and because the Attorney General declines to take an appeal in the name of the state," since the relators, in such proceedings, which may be brought and maintained only by the Attorney General in the name of the people, are not parties.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 73; Dec. Dig. 62.]

In Bank. Appeal from Superior Court, Yolo County; N. W. Hawkins, Judge.

Quo warranto by the People, on the relation of Ella L. Hershey and others, against Reclamation District No. 108. Judgment for defendant, and relators alone appeal. Defendant's motion to dismiss appeal granted.

Black & Clark, of San Francisco, for appellant. Devlin & Devlin, of Sacramento, for respondent.

PER CURIAM. In this action (quo warranto) instituted by the people of the state of California upon the relation of appellants, the relators alone are attempting to appeal from a judgment for defendant given upon sustaining a demurrer to the complaint. The notice of appeal states that they take the appeal "because they are parties in interest and because the Attorney General declines to take an appeal in the name of the state." Under our law such an action may be brought and maintained only by the Attorney General in the name of the people of the state, and the relators are not "parties" to the action. An attempt to appeal by them alone is necessarily ineffectual for any purpose.

The motion to dismiss the appeal is granted.

26 Cal. App. 661

RANDISI v. SIMONE et al. (Civ. 1590.) (District Court of Appeal, Second District, California. Feb. 26, 1915.)

1. APPEAL AND ERROR 934—FINDINGS—JUDGMENT—REVIEW.

Findings must be construed to uphold the judgment, and when, from the facts found, other facts may be inferred which will support the

judgment, such inference will be deemed to have been made by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. ¶¶ 934.]

2. BILLS AND NOTES ¶94—CONSIDERATION—SUFFICIENCY — COMPROMISE OF DOUBTFUL CLAIM.

A compromise of a doubtful claim asserted in good faith is a consideration for a new promise, and for a note evidencing the new promise.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-181, 185-189, 192, 193, 196-198, 200, 202-207, 212; Dec. Dig. ¶¶ 94.]

3. BILLS AND NOTES ¶92—CONSIDERATION—SUFFICIENCY — COMPROMISE OF DOUBTFUL CLAIM.

Where plaintiff accused defendants, as factors charged with the sale of goods, with acting in bad faith, and on being threatened with suit, based on their action in the matter, an adjustment of the controversy was had, whereby defendants bought the goods and gave a note for the price, title to the goods passed to defendants on the giving of the note, which was supported by sufficient consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-205, 208-212; Dec. Dig. ¶¶ 92.]

Appeal from Superior Court, Los Angeles County; M. T. Farmer, Judge.

Action by Mariano Randisi against V. B. Simone and another. From a judgment for plaintiff, defendants appeal. Affirmed.

MacGowen & Haas, of Los Angeles, for appellants. Joseph Smith and Carroll E. King, both of Los Angeles, for respondent.

SHAW, J. Action to recover upon a promissory note made and delivered to plaintiff by defendants. Judgment went for plaintiff, from which defendants appeal upon the judgment roll.

The note was given in renewal of a prior note made to plaintiff by defendants, which note, as appears from the findings, was given under circumstances as follows: Some months before the making thereof, plaintiff and defendants agreed that the former should, in June, 1911, ship, consigned to the latter in New York City, a car load of wine, which plaintiff then had in the city of Los Angeles, and which defendants would sell; it being agreed that as compensation for their service in effecting such sale they should retain all the proceeds thereof in excess of \$13 per barrel; that by reason of the wine being of an inferior quality defendants were unable to readily sell the same; that thereupon defendants paid the shipping charges and stored the wine, and two months later, on their return to Los Angeles, informed plaintiff of their inability to make the sale and of the fact that they had stored the same. Thereupon plaintiff charged them with bad faith and threatened them with a suit, but stated "that, if they would sign a note for \$900, he would make for them within three months thereafter \$3,000"; "that

thereupon said defendants signed a note for \$900, dated September 11, 1911, due one year after date, and delivered the same to said plaintiff; that said oral promise was made in September, 1911, and that the said note so dated September 11, 1911, was so given partly in reliance of this promise, partly to avoid a suit, and partly as a bond of security for the car load of wine which then stood in defendants' name in New York City; that thereafter, in December of 1911, defendants sold said wine so stored in New York City for an amount hardly sufficient to pay costs of shipping and storage of the same; and that said plaintiff never has made for said defendants the said sum of \$3,000 in accordance with said promise."

[1, 2] Appellants attack the findings, insisting that they do not support the judgment. It is a rule of construction that findings will be so construed as to uphold, rather than to defeat, the judgment; and when, from facts found by the court, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. The compromise of a doubtful claim asserted in good faith constitutes a sufficient consideration for a new promise. Whether or not defendants' conduct with reference to and the handling of the wine had been such as to justify plaintiff, in good faith, in believing he had a cause of action against them, is not specifically found. Since, however, plaintiff did assert a claim upon which he threatened to sue them, which, if made in good faith, the surrender thereof would constitute a sufficient consideration for the note, such finding will be deemed implied.

[3] It is immaterial that other matters than the compromise of this claim may have entered into the consideration for the giving of the note. "The law does not weigh the quantum of the consideration." Whelan v. Swain, 132 Cal. 389, 64 Pac. 560. Construing the findings, as we must, most favorably in support of the judgment, it appears therefrom that the plaintiff accused defendants, as factors charged with the sale of the wine, with acting in bad faith, and upon being threatened with suit based upon their action in the matter, an adjustment of the controversy was had, whereby defendants bought the wine, for the purchase price of which they gave their note for \$900. This view is borne out by the fact that, in December following the date of the original note, they sold the wine without regard to the price fixed therefor by plaintiff in the original contract, and made no accounting to him of the proceeds. We think it sufficiently appears from the findings that upon the giving of the note the title to the wine passed to defendants, who thereafter disposed of it as their own; neither plaintiff asserting nor defendants recognizing in him any right or interest therein.

So far as concerns the promise of plaintiff to make \$3,000 within three months for defendants, it is to be noted that when they gave their renewal note the time had long since passed for the performance of such promise, and it may well be claimed that, if defendants relied upon such unfulfilled promise as a defense to the note, they should have asserted such claim when called upon to renew the original note; otherwise be deemed to have waived it.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 659

PEOPLE v. TRAICHOFF. (Cr. 566.)

(District Court of Appeal, First District, California. Feb. 26, 1915.)

1. HOMICIDE $\hookrightarrow$ 282 — SUFFICIENCY OF EVIDENCE—PREMEDITATION.

In a prosecution for murder, evidence held sufficient to take to the jury the question whether the defendant acted with premeditation, so as to be guilty of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 574; Dec. Dig. $\hookrightarrow$ 282.]

2. HOMICIDE $\hookrightarrow$ 22—FIRST DEGREE MURDER—PREMEDITATION.

For a homicide to be premeditated, so as to be first degree murder, there need be no appreciable time between the intent to kill and the killing, if the act be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35-38; Dec. Dig. $\hookrightarrow$ 22.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Chris. Traichoff was convicted of murder in the first degree, and he appeals. Affirmed.

Henry B. Lister and D. J. Fitzsimmons, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and F. L. Guarena, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was charged with the crime of murder and convicted of murder in the first degree, with recommendation of life imprisonment, and sentenced accordingly. The appeal is from the judgment and from the order of the court denying the defendant's motions in arrest of judgment and for a new trial.

[1] Defendant concedes that the evidence in the case shows that the defendant killed the deceased without sufficient provocation and with malice, but claims that there was no evidence to show premeditation, and hence asserts that a verdict of murder in the second degree is all that the evidence in this case will support.

The deceased was a married woman, whom defendant had met a short time prior to the homicide in Portland, Or., from whence he brought her to San Francisco, where they lived together until he shot her. One of the

witnesses testified that the defendant stated to him that the reason he shot the deceased was that she was going to leave him; that he had spent about \$700 on her; and that she had left him before. A friend of the couple, who was visiting them just prior to the shooting, stated that they had had a quarrel over the defendant's refusal to get the deceased some needles; that the deceased swore at the defendant, stating that she was going to leave him, and proceeded to pack her trunk, whereupon the defendant said that he would leave, too, opened his suit case, and took out a revolver, whereupon the witness left the room. Just as he was closing the door he heard a shot. The autopsy surgeon testified that six bullets had been fired into the body of the deceased.

[2] There need be no appreciable space of time between the intent to kill and the act of killing. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer; and, if such is the case, the killing is murder in the first degree (People v. Williams, 43 Cal. 344; People v. Pool, 27 Cal. 585; People v. Cotta, 49 Cal. 166; People v. Jamarillo, 57 Cal. 111); and the question of whether or not the defendant in this case acted with deliberation or premeditation in the act of killing was, under the circumstances just narrated, clearly a question of fact for the jury.

The judgment and orders are affirmed.

26 Cal. App. 634

MUNCY v. THOMPSON. (Civ. 1600.)

(District Court of Appeal, Second District, California. Feb. 24, 1915.)

1. BROKERS $\hookrightarrow$ 43—EMPLOYMENT—WRITTEN AUTHORIZATION.

An owner executing an instrument reciting that he desires to make an exchange of real estate for property owned by a third person on terms prescribed, and that he authorizes an agent to act as his agent in negotiating an exchange and pay him a commission as per verbal agreement on his effecting an exchange, thereby authorizes the agent, in writing, to negotiate the exchange, and failure to specify the commission does not render the instrument void, under Civ. Code, § 1624, subd. 6, for, in the absence of any agreement as to commission, the agent may recover reasonable compensation or compensation fixed by verbal agreement.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. $\hookrightarrow$ 43.]

2. CONTRACTS $\hookrightarrow$ 94—EXECUTION—FRAUD.

A party signing a contract without reading it is not entitled to have the same set aside for fraud, where the adverse party made no representations as to the contents of the instrument.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. $\hookrightarrow$ 94.]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by R. E. Muncy against William Thompson. From a judgment for plaintiff, defendant appeals. Affirmed.

Stahl & Sayles, of Los Angeles, for appellant. Tanner, Odell, Odell & Taft and S. W. Odell, all of Los Angeles, for respondent.

SHAW, J. Action by a real estate broker to recover commissions for negotiating a sale by exchange of defendant's real estate. Defendant appeals from a judgment entered in favor of plaintiff.

It appears that defendant, by written instrument, expressed a desire to make an exchange of certain real estate therein described and owned by him for certain property owned by one L. H. Webb; the terms and conditions of the exchange proposed being set forth in said writing, which further contained the following provisions:

"R. E. Muncy is hereby authorized to act as my agent in negotiating an exchange, and I agree that if I shall secure an acceptance of the proposition to exchange the above-described property on the above terms. * * * And it is further agreed with said R. E. Muncy that when he has secured an acceptance of the proposition to exchange the above-described property on the above terms, will then pay the sum of commissions as per verbal agreement, ... dollars, as commissions for such services. * * * [Signed] Wm. Thompson."

Plaintiff procured Webb's acceptance, and, with some slight modification of the contract made by the parties thereto, the exchange was consummated.

[1] The written instrument, construed according to the plain import of its language, clearly shows that defendant authorized plaintiff to negotiate the exchange. The authorization being in writing, the fact that it did not specify the commission to be paid for the service rendered did not subject it to the objection that it was void under the provisions of subdivision 6, § 1624, Civil Code. In the absence of any agreement as to commission, the agent, if authorized in writing to negotiate a sale of real estate, is entitled to a reasonable compensation for his services. Here it was agreed that plaintiff should receive the commission as per verbal agreement, which verbal agreement was clearly and properly established by parol evidence.

[2] In his answer defendant alleged that his signature to the instrument was procured by means of fraud and misrepresentations of plaintiff. The court, upon abundant evidence, found these allegations to be untrue; indeed, the only evidence in support of the allegations is that of defendant, who testified that he signed the instrument when he did not have his eyeglasses with him and did not know whether or not it contained the provision as to the payment of commissions. The document was presented to him by plaintiff, who, so far as shown, made no representations whatever as to its contents, and defendant makes no claim that he was unable to read without glasses. At most, his evidence merely shows his own negligence in signing a contract without first acquainting himself with its terms and conditions. Such

fact does not entitle him to set aside a contract upon the grounds of fraud and misrepresentation.

The appeal is wholly without merit, and the judgment is therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 689

MORTON et ux. v. SHANNON. (Civ. 1472.) (District Court of Appeal, First District, California. March 3, 1915. Rehearing Denied by Supreme Court April 29, 1915.)

1. JUDGMENT ⇨143 — DISCRETION OF THE COURT — SETTING ASIDE DEFAULT JUDGMENT.

Under Code Civ. Proc. § 473, authorizing the court, on application therefor within a reasonable time, to relieve a party from a judgment taken against him through inadvertence or excusable neglect, the superior court's denial of defendant's motion to vacate a default judgment against him, on conflicting evidence as to his illness when served with the summons and complaint, which judgment was not entered until four days after the time to plead had elapsed, and which motion was not filed until six days after defendant's notice of the default, was not an abuse of its discretion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. ⇨143.]

2. PLEADING ⇨46 — DESIGNATION AND DESCRIPTION OF PARTIES—SUFFICIENCY.

In an action for goods sold and delivered, in which the caption of the complaint described plaintiffs as husband and wife, such designation was merely descriptio personae, and, in the absence of a demurrer, the reference to them in the complaint as "the above-named plaintiffs" made the caption part of the complaint proper, so that it was not defective for want of allegation that the plaintiffs were married.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 101-103; Dec. Dig. ⇨46.]

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Frank H. Morton and wife against W. W. Shannon. Judgment for plaintiffs, by default, and, from an order denying his motion to vacate and set aside the judgment, defendant appeals. Judgment and order affirmed.

Wm. Hoff Cook and Charles Stewart, both of San Francisco, for appellant. C. A. Henning, of San Francisco, for respondents.

PER CURIAM, This is an appeal from an order denying defendant's motion to vacate and set aside a default judgment entered in favor of the plaintiffs, and also from the judgment itself.

The complaint states a cause of action in the form of a common count for certain goods sold and delivered, alleging a reasonable value of \$501.25, and prays for interest and costs of suit.

[1] As to whether or not a default should be set aside upon motion made under the terms of section 473 is a matter that rests

so largely in the discretion of the trial court that its action in such a proceeding will not be disturbed on appeal unless it shall be made clearly to appear that there was an abuse of discretion. True it is that the Supreme Court of this state has said, by way of advice to trial courts, that their discretion is better exercised when it tends to bring about a decision of the cause upon its merits; still the rule itself as just announced has never been relaxed. To repeat:

"Unless the record clearly shows that the trial court has abused its discretion, its order, whether it be to grant or deny the application, will be affirmed." *Ingrim v. Epperson*, 137 Cal. 370, 70 Pac. 165; *Alferitz v. Cahen*, 145 Cal. 397, 78 Pac. 878.

Testing the record on this appeal by the rule announced, we are constrained to hold that the order of the trial court must be affirmed.

According to one of the affidavits filed on behalf of the appellant, he was sick on the 3d day of October, 1913, the day he was served with a copy of the summons and complaint; and he was delirious and out of his mind from that date until the 17th day of the same month, the day on which his default was entered. This affidavit was not corroborated by the affidavit of a physician, or by any one, except the defendant's brother, who says that on the 16th day of October the defendant appeared to be in a dazed condition of mind. In an affidavit of the process server, a disinterested party, he averred that the defendant was not ill on the day he was served with summons and complaint, and that he appeared to be in a normal condition of mind. The trial court must have accepted this testimony of the process server as true, in which event he must have withheld credence from the affidavit filed on behalf of the defendant just referred to.

This is not a case of "snap judgment," as suggested by appellant, for his default was not taken until four days after the time to plead had elapsed, and it was several days after that, and six days according to his own version of the matter, after he had knowledge of the default, before notice of motion to vacate the same was served and filed, so that his own conduct in the premises seems to lend weight to the averment by the process server that the defendant, when served with summons, stated that he would do nothing, meaning perhaps, as plaintiff argues, that defendant intended to suffer a default to be taken against him, for at no time did he dispute receiving the goods, and he now raises a defense which although, in view of the object of the statute under which such defense is made, may be considered meritorious, is still largely technical in character.

[2] As to the appeal from the judgment, the appellant asserts that the judgment is not sustained by the judgment roll, for the reason that while the caption of the com-

plaint states the plaintiffs as Frank H. Morton and Margaret Morton, husband and wife, there is no allegation in the complaint itself that the plaintiffs are married. A case can easily be imagined where an allegation of marriage would be necessary; but this is not one of that character of cases where any rights arising by reason of the marriage relation are involved. The plaintiffs both sue and are described in the caption as being husband and wife; and in a case of this kind the words are purely descriptio personæ. *Wright v. Burroughs*, 61 Vt. 390, 18 Atl. 311; *Chicago Clock Co. v. Tobin*, 123 Cal. 377, 55 Pac. 1007; *Fallon v. Brittan*, 84 Cal. 511, 24 Pac. 381; *Fay v. Stubenrauch*, 141 Cal. 573, 75 Pac. 174. Aside from this, however, the body of the complaint referred to the plaintiffs as "the above-named plaintiffs," and, in the absence of a demurrer, we think this reference was sufficient to make the caption part of the complaint proper.

The judgment and order are affirmed.

26 Cal. App. 676

SABIN v. SMITH. (Civ. 1451.)

(District Court of Appeal. First District, California. Feb. 27, 1915.)

1. ANIMALS ⇐96 — KILLING TRESPASSING ANIMALS—DOG WORRYING CHICKENS.

In Civ. Code, § 3341, making the owner of any dog that shall kill or worry any sheep, goat, or poultry liable in damages, subdivision 2 of which provides that any person who finds any dog, not on the premises of its owner, worrying or killing sheep or goats may kill the dog without liability to its owner, the second subdivision authorizes any one not the owner of sheep to kill the dog as a public nuisance and does not by exclusion take from the owner of poultry his common-law right to defend them against the attack of a dog in their own inclosure, to the extent of killing the dog if necessary.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 375-379; Dec. Dig. ⇐96.]

2. ANIMALS ⇐1 — NATURE OF PROPERTY — DOGS.

At common law, dogs, if not the subject of larceny, were property for many other purposes; and while modern law has recognized greater property rights in dogs it still treats them with less regard than more useful and less dangerous animals.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 1-4; Dec. Dig. ⇐1.]

3. ANIMALS ⇐96 — KILLING TRESPASSING ANIMALS—RELATIVE VALUE.

The fact that a dog which was worrying chickens in their own inclosure was pedigreed and worth more than the chickens does not make the owner of the chickens liable for the killing of the dog, especially where it was not shown how many chickens there were in the inclosure that the dog might attack nor that the owner of the chickens knew that the dog was pedigreed.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 375-379; Dec. Dig. ⇐96.]

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Irene Sabin against S. M. Smith. Judgment for the defendant, and plaintiff appeals. Affirmed.

Schwartz & Powell, of Oakland, for appellant. Rogers, Bloomingdale & Free, of San Jose, for respondent.

KERRIGAN, J. The plaintiff was the owner of a Russian wolfhound which was killed by the defendant. This action was brought to recover the sum of \$350, the alleged value of the hound, and for the further sum of \$1,000 as exemplary damages.

It is the claim of the plaintiff that the killing was wrongful, unlawful, and malicious. Defendant, answering, denies that his act was malicious, and alleged that the hound in question was one of a pack of savage and ferocious dogs which was a common and a public nuisance, and at the time of the killing the said pack had trespassed upon the defendant's premises, entered an inclosure set apart for his poultry, and chased and worried such poultry; that the said dogs were driven away, but shortly thereafter the dog mentioned in the complaint and another member of the pack returned, and renewed their attack upon the defendant's poultry, pulling the feathers therefrom and mutilating one of the chickens so that it had to be killed; that thereupon the defendant, in order to protect his poultry, shot at said dogs to drive them away and prevent further depredations upon his flock, and in so doing killed one of the dogs.

The evidence without conflict supports the defendant's contention, and the trial court found that under these circumstances the defendant was justified in killing said dog, and accordingly gave judgment in his favor.

Plaintiff does not deny the truth of the evidence presented by the defendant, but insists that such facts do not constitute a defense to her action, and assigns the rulings of the trial court in the admission of this testimony as error requiring a reversal of the judgment. It is her contention that section 3341 of the Civil Code is in itself conclusive upon the subject; and that the obvious intention of the Legislature, as revealed by the language of the act, was to omit poultry in the enumeration of animals for the worrying, wounding, or killing of which a dog might be killed, and to confine the owner of such poultry to the more tardy action for damages at law.

[1] The section invoked by the plaintiff reads as follows:

"The owner, possessor, or harbinger of any dog or other animal, that shall kill, worry, or wound any sheep, angora goat, or cashmere goat, or poultry, shall be liable to the owner of the same for the damages and costs of suit, to be recovered in any court of competent jurisdiction:

"1. In the prosecution of actions under the provisions of this chapter, it shall not be necessary for the plaintiff to show that the owner, possessor, or harbinger of such dog or other animal, had knowledge of the fact that such dog

or other animal would kill, wound or worry sheep, goats, or poultry.

"2. Any person on finding any dog or dogs, or other animal, not on the premises of the owner or possessor of such dog or dogs, or other animal, worrying, wounding, or killing any sheep, angora or cashmere goats, may, at the time of finding such dog or dogs, or other animal, kill the same, and the owner or owners thereof shall sustain no action for damages against any person so killing such dog or dogs, or other animal."

In support of her contention, it is the claim of the plaintiff that the Legislature, by specifying in the second subdivision of the section the words "sheep, angora and cashmere goats," intended to and did thereby exclude poultry from the enumeration of animals for the worrying or killing of which a dog might be destroyed.

This contention cannot be maintained. The first subdivision of the section providing for the prosecution of actions simply dispenses with the proof of knowledge on the part of the owner of the vicious habits of his animal, a burden that was imposed in a certain character of actions against such owners at the common law. The second subdivision authorizes any person to destroy as a public nuisance any dog found in any place outside the premises of the owner, worrying or killing sheep or goats, whether such sheep or goats belonged to the person killing the dog or not—a right that did not exist at the common law. The natural right has always existed in one to defend his fowls upon his own premises from the attack of trespassing dogs. 2 Cooley on Torts (3d Ed.) 702. There is nothing contained in either of the subdivisions of the statute which in any way limits or takes away this right. The section was not intended to, nor does it, abridge the common-law right of a person to defend his domestic animals against the attacks of dogs, or to kill such dogs when the circumstances warrant the belief that his property is in peril. At the common law the justification for the killing was complete when it appeared that the dog was engaged in worrying and terrifying domestic animals in their own lawful inclosure, and where the necessity of the killing in order to protect the property was apparent.

[2] The argument of counsel that dogs were not property at the common law and were afforded small consideration, and that the legislation here invoked was enacted for their further protection, is without merit. While the status of the dog before the law is *sui generis*, and in the early common law the property in them was of an imperfect and peculiar character, still they were considered property for many purposes. True they were not the subject of larceny; but this was for the reason that such crime was punishable by death, and it was not considered proper that a man should die for the larceny of a dog. Except in the case of larceny a dog was property at the common law, and the owner had his remedy by civil action for an

injury to or loss or destruction of the same. See the exhaustive note on property in dogs in *Hamby v. Samson*, 67 Am. St. Rep. 285.

In some states attempts have been made to recognize a full and complete property in dogs; but in those jurisdictions the reasons given for such recognition are more or less sentimental. From earliest childhood we have listened to the tales of the faithfulness of dogs as portrayed in fable and song, and their fidelity has ever made them the constant companions of men. Nor are we wanting in champions for their defense among our brother judges, for we see them referred to as being responsible for the changing of modern history, and the preservers of exhausted travelers caught in the storms which sweep over the crests and sides of the Alps. *Mullaly v. People*, 86 N. Y. 365. Again we find *Wilkes, J.*, in *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 318, 45 S. W. 790, 40 L. R. A. 518, 66 Am. St. Rep. 754, describing them as "the negro's associate, and often his only property, the poor man's friend and the rich man's companion, the protection of women and children, hearthstones, and hen-roosts."

While not attempting to detract nor in any manner minimize the loyal traits possessed by this favorite animal, it remains the fact that although under our modern law the owner of a dog has a property in it not recognized by the common law, still by the American courts the dog is held to less legal regard and protection than more harmless and useful domestic animals, and is subject to a more strict control and regulation as to the mode of its keeping and use. Persons engaged in the raising of sheep or goats are especially subject to loss from the predatory and wolfish instincts of dogs; and for this reason statutes for their special protection similar to our own have been enacted in most of the states regulating this nuisance under the exercise of the police power. Most of these states have seen proper to place all sheep-killing dogs in the category of public nuisances, which the owner of sheep may abate summarily. Those statutes however are not intended to abridge the common law, but rather to extend the right to destroy an animal for the protection of property. The Code section above referred to does not confer upon the owner of sheep or fowls any power to kill a dog that such owner did not possess at common law, nor does it in any manner abridge his right. On the contrary, the section expressly provides cumulative remedies that did not ordinarily generally exist. By providing for such cumulative remedies with reference to sheep, the statute cannot be said to deprive the owner of fowls of the right to destroy a dog that is engaged in worrying and killing them while in their own lawful inclosure, and where the necessity for the killing is apparent, in order to protect such fowls.

[3] The claim that the dog killed was possessed of a pedigree and had a greater relative value than the fowls injured, and that therefore the killing was unwarranted, is without merit. The right to kill a dog found trespassing and endangering property is not affected by the relative value of the dog and the property being injured. *Simmonds v. Holmes*, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253. Besides, it does not appear from the record that the defendant knew that the hound was possessed of a pedigree, nor does it show the number of chickens owned by defendant and subjected to the dog's ferocity. It can hardly be contended that the defendant was bound to stand by and mentally calculate the value of the chickens destroyed, and await action until such value approximately equaled that of the dog.

For the reasons indicated the judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

26 Cal. App. 644

ROBINSON v. ANDERSON, City Clerk.
(Civ. 1654.)

(District Court of Appeal, Second District, California. Feb. 24, 1915.)

1. MUNICIPAL CORPORATIONS — 159 — OFFICERS—RECALL—PETITION—NUMBER OF SIGNATURES — "LAST PRECEDING MUNICIPAL ELECTION."

Under St. Ex. Sess. 1911, p. 128, providing that a petition for the recall of municipal officers shall be signed by voters equal in number to one-fourth of the votes cast for all candidates for the office which the incumbent sought to be removed occupies at the "last preceding municipal election" at which such officer was voted for, the election to be considered in determining the number of petitioners for recall of certain trustees is the last regular municipal election at which the officers sought to be recalled were voted for, not a subsequent election at which other trustees were voted for.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 350-356; Dec. Dig. § 159.]

2. MUNICIPAL CORPORATIONS — 159 — OFFICERS—RECALL—PETITION—NUMBER OF SIGNATURES.

The percentage of voters to determine whether such petition has the required number of signatures is to be computed on the total number of ballots cast at the election, not on the basis of the total number of votes cast for all candidates for trustees, where there were three trustees to be elected, and the voters could vote for three, two, or one of such candidates.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 350-356; Dec. Dig. § 159.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Phil S. Robinson against W. A. Anderson, City Clerk and ex officio Clerk of the Board of Trustees of the City of Redondo Beach. Judgment for the plaintiff, and defendant appeals. Affirmed.

Frank L. Perry, of Los Angeles, for appellant. Oscar L. Horn and W. A. Alderson, both of Los Angeles, for respondent.

JAMES, J. Defendant, who is the city clerk of the city of Redondo Beach, a municipal corporation, appeals from a judgment directing mandate to issue against him to compel him to certify that certain petitions filed in his office invoking the right of recall against three of the trustees of said city were sufficient.

The matter is presented on the judgment roll; judgment having gone against the appellant after a demurrer interposed by him to the petition had been overruled and he had declined to make further answer. From the statement of facts shown in the petition it appears that on the 19th day of June, 1914, three separate recall petitions were filed with appellant, asking that a recall election be held for the purpose of recalling the three trustees, named, respectively, Elmer T. Thompson, Oliver N. Tomlinson, and William J. Hess. The form of the petitions was attached as an exhibit, and from that form it appears that the petitions were regular and of sufficient substance in their general statement of facts and verification thereof. It further appears that appellant examined said petitions, and certified that they were insufficient. It reasonably appears also that the decision of appellant as to the insufficiency of the petitions was based upon an alleged lack of sufficient signatures of qualified voters attached thereto. The trustees whose recall was sought to be accomplished were elected on the 13th of April, 1912, at a regular municipal election. Subsequently, on April 13, 1914, another regular municipal election was held at which other trustees were elected. The certificate of appellant as attached to the petitions shows the total number of votes cast at both of these elections. In support of the position of appellant it is claimed: First, that the law requires at least enough signatures of qualified electors to appear on the recall petitions to equal one-fourth of the total vote cast for the office of city trustees at the last preceding regular municipal election; and, secondly, that the law requires that the percentage should be based upon the total vote cast for the office of city trustee, and that, where there is more than one office to be filled and more than two candidates for such office, the total vote cast for each separate candidate should be added together, and the percentage computed upon that total sum.

[1] The statute under which the electors instituting the recall proceedings were attempting to act is found in the Extra Session Statutes of 1911, at page 128. In fixing the number of signatures required to be secured to recall petitions against municipal officers, it is there provided that:

"The petition shall be signed by qualified voters equal in number to at least twenty-five per

cent. of the entire vote cast within such city or town for all candidates for the office which the incumbent sought to be removed occupies, at the last preceding regular municipal election at which such officer was voted for."

We construe this provision to mean that the election referred to is the regular municipal election preceding the date of the attempted recall at which the officers sought to be recalled were voted for. While the language used is not entirely clear, it would seem to be within the reason and intent of the statute that the proportion of signatures required which would set in motion the recall should be based upon the vote cast at the regular election at which the officer was elected, rather than a subsequent election for other trustee offices, not including that which the officer in question occupies. The statute must be given effect rather than have applied to it a construction which will nullify the apparent intent of the Legislature, if such can be done.

[2] Because of the fact that more than one officer of the same kind was elected at the same election (the electors voting for a candidate for one or all of such offices, as they might see fit), the only reasonable rule to apply to the requirement that the percentage of signatures should be based upon a total of the entire vote cast for all candidates for the office is to declare that that percentage should be computed, taking the total number of ballots cast at the election, that, assuming he received the votes of all persons voting at the election, being the largest number that possibly could have been cast "for the office which the incumbent sought to be removed occupies." By this construction the statute may be made operative and its purposes accomplished. As the recall petitions filed were sufficient under the measure of requirement which we have here outlined, it follows that the judgment of the superior court in ordering mandate to issue was properly made.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 641

CHAS. R. McCORMICK LUMBER CO. v.
HIGHLAND SCHOOL DIST. OF SAN DIEGO COUNTY et al. (Civ. 1640.)

(District Court of Appeal, Second District, California. Feb. 24, 1915.)

1. SCHOOLS AND SCHOOL DISTRICTS — §86 — BUILDING CONTRACTS—LIABILITY.

Irregularities of notices calling a meeting of electors of a school district to vote on the question of erecting a school building arising from the failure to post the notices for the time prescribed by Pol. Code, § 1617, subd. 20, and irregularities of notice of bids for the building because not sufficiently published may not be relied on by the district receiving and appropriating the benefit of the labor and materials supplied by the contractor to erect the building, to defeat an action for the reasonable value thereof not exceeding the contract price.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 203-205; Dec. Dig. §86.]

2. MUNICIPAL CORPORATIONS — 248 — CONTRACTS—ESTOPPEL.

Where a contract on which a recovery is sought is without the power of the municipality to make, the municipality is not estopped to deny liability; but, where authority exists to make the contract, but the proceedings precedent thereto have been informally taken, it is estopped.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 684-686; Dec. Dig. — 248.]

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Charles R. McCormick Lumber Company against the Highland School District of the County of San Diego and others, as trustees of the Highland School District of the County of San Diego. From an order granting a motion of plaintiff* for new trial, defendants appeal. Affirmed.

James E. O'Keefe and C. H. Van Winkle, both of San Diego, for appellants. Luce & Luce, of San Diego, for respondent.

JAMES, J. This is an appeal from an order granting the motion of plaintiff for a new trial. The action was brought to recover the sum of \$1,201.20, and plaintiff set out ten separate causes of action in its complaint. The appellant Highland school district is a small district in the county of San Diego, and, desiring to build a schoolhouse, a meeting of the electors was called by the posting of notices, and afterwards held, and the trustees were instructed to proceed to acquire a site for the building and to build the schoolhouse. The notices calling the meeting of the electors were not posted for the requisite length of time (as prescribed by subdivision 20 of section 1617, Political Code), nor was there sufficient publication of notice calling for bids, as another subdivision of the same section provides for. However, the board of trustees did proceed to make a contract for the erection of the school building, and the building was completed, and thereafter used for the purposes for which it was erected by the district for a long period of time. Installment warrants were issued to the contractor in payment of the total sum agreed to be paid under the terms of the contract made with him. Payment being refused on the warrants, an assignment was made thereof to the plaintiff herein.

[1] At the trial, after the plaintiff had introduced its evidence, a motion for judgment of nonsuit was made which the court granted as to all of the causes of action set out in the complaint, except those causes of action based upon three of the warrants issued by the trustees, and amounting to the sum of \$172.99. These warrants covered matters not included in the contract for the construction of the building. After judgment in plaintiff's favor for the latter amount, a motion for a new trial was made.

It appears that the motion for judgment of nonsuit was granted by the trial judge on the ground of the irregularities occurring in the matter of the notices calling the meeting of the electors and asking for the submission of bids. On the motion for a new trial the grounds specified again brought the same matter before the court, and the motion was granted awarding to the plaintiff a new trial. The question presented is as to whether, admitting the informalities of notice in the calling of the meeting and advertising for bids for the construction of the building, the school district, having received and appropriated the benefit of the labor and materials supplied by the contractor, is estopped from maintaining a defense based upon the irregularities noted. We think, under the circumstances of this case, the contractor, or his assignee, was entitled to recover.

[2] Substantially, the authorities indicate no different rule in applying the doctrine of estoppel to the acts of individuals or private corporations than is proper to be applied to the acts of municipal corporations. There is, however, a distinction suggested, and it is this: That where the contract or agreement upon which recovery is sought is one wholly without the scope of the power of the municipality to make—in other words, is *ultra vires*—then there can be no estoppel; but, where the authority exists to make the contract, but the proceedings precedent thereto have been informally taken only, then the rule of estoppel may be made to operate against a municipality as completely as it would against an individual under the same circumstances. Abbott on Municipal Corporations, vol. 1, § 259. Approval of the general rule as applicable to municipal corporations is given by the decisions in *Argenti v. City of San Francisco*, 16 Cal. 255; *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 Pac. 189; *Escondido Lumber, H. & G. Co. v. H. J. Baldwin*, 2 Cal. App. 606, 84 Pac. 284. This rule of estoppel warranted the respondent in insisting upon recovery of the reasonable value of the material furnished and services rendered by its assignor, not exceeding, we think, however, the total amount agreed upon to be paid.

The order granting a new trial is affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 647

PEOPLE v. DAVIS. (Cr. 360.)

(District Court of Appeal, Second District, California. Feb. 25, 1915. Rehearing Denied by Supreme Court April 26, 1915.)

1. HOMICIDE — 234 — EVIDENCE — SUFFICIENCY.

Circumstantial evidence in a murder case held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 482-493; Dec. Dig. — 234.]

2. CRIMINAL LAW ⚡938—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Refusal of new trial in a homicide case is not error, there being no conclusive showing that with reasonable diligence the evidence could not have been produced at the trial, and it being cumulative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2315, 2317; Dec. Dig. ⚡938.]

3. CRIMINAL LAW ⚡719—ARGUMENT—MISSTATEMENT.

Misstatement of evidence by the district attorney is not alone error; it being for the jury to rely on their own recollection of it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. ⚡719.]

4. CRIMINAL LAW ⚡730—ARGUMENT—MISSTATEMENT—ACTION BY COURT.

That the court, being asked to instruct the jury to disregard a misstatement of the evidence by the district attorney, replied that the general instructions would cover the matter was enough; such instructions telling them that neither the opinions of counsel nor any statement of fact by them or the court was to be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. ⚡730.]

5. CRIMINAL LAW ⚡703—OPENING STATEMENT OF DISTRICT ATTORNEY.

That the district attorney in his opening statement recited, as things that he expected to prove, matters which he failed to support by evidence is not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1659; Dec. Dig. ⚡703.]

6. WITNESSES ⚡277—CROSS-EXAMINATION—SCOPE.

Cross-examination of defendant by the district attorney, bringing out no matter which was not in direct response to his examination in chief, is proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. ⚡277.]

7. CRIMINAL LAW ⚡720—ARGUMENT OF DISTRICT ATTORNEY — JUSTIFICATION IN EVIDENCE.

The district attorney was justified in arguing that defendant offered to settle for \$200 his policy on deceased's life, it being in evidence that an attorney, with whom defendant went to the insurance company, in his presence, said to the agent that all defendant wanted was practically \$200, the amount deceased owed him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. ⚡720.]

8. HOMICIDE ⚡174—EVIDENCE—REMOTENESS.

That deceased's nephew, consulting with an attorney as to his estate, left out of a list of his heirs, sons and daughters, is too remote a circumstance to be evidence that, as claimed by defendant, the nephew committed the murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. ⚡174.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Wilson E. Davis was convicted of murder, and appeals. Affirmed.

Walton J. Wood, Public Defender, David R. Faries, Asst. Public Defender, and Charles J. Kelly, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of murder and sentenced to be imprisoned in the state prison for the remainder of his natural life. An appeal has been taken from the judgment and from an order denying a motion for a new trial. The person alleged to have been the subject of the homicide was one William G. Wheeler.

The proof against appellant was wholly that adduced from circumstantial evidence. Deceased was a man between the ages of 45 and 50 years, and was engaged with the appellant, who is an old man over the age of 73 years, in conducting, in a small way, a photograph business at the town of Sawtelle in Los Angeles county. It appeared in the evidence that appellant first met the deceased at Long Beach, and there the two became very friendly, with the result that they arranged to go to Sawtelle and engage in the business mentioned together. They took up their residence at the latter place some time in November, 1913. So far as the evidence shows, the men continued together amicably up to the time of the death of Wheeler. On the morning of January 1, 1914, at about the hour of 5 o'clock, the small frame building in which the two men lived was discovered to be on fire. At the time the fire was first noticed it had made great progress and the interior of the building was already well burned. The fire was not checked, and it shortly reduced the house to ashes, and in the embers thereof was found the charred and burned body of the deceased. The body was then badly mutilated by the fire, both arms and both legs having been burned away. Appellant was not in the building at the time of the fire, but was discovered at the scene about the hour of 10 o'clock. His demeanor was described by some witnesses as being "nervous," and it was discovered that his mustache and eyebrows had been singed as though by fire. When accosted, and when an inquiry was made of him as to how it happened that his mustache and eyebrows had been burned, he stated that on the day before, while he and the deceased were preparing their meal, a defective gasoline stove flared up and caused the singeing which had been noticed. He further stated, so the testimony runs, that he had been at Garvanza the night before, and had not returned to Sawtelle until after the building had been burned.

Testimony was introduced showing that in December, immediately preceding the death of Wheeler, appellant had appeared at the office of a life and accident insurance company and had there requested information as to different kinds of policies which might be issued, and had finally taken away with him an application blank, which he later returned. He had stated to the insurance agent that he wished to take out the policy on the life of Wheeler, and asked whether he could be made the beneficiary in the pol-

icy. The agent replied to him, so the former testified, stating that no one but close relatives were allowed to become beneficiaries in accident policies, but that it might be made in favor of the insured's estate. Appellant, about the 25th of December of the year mentioned, returned the application blank, a portion of which he had filled in, that portion furnishing details as to the name, age, weight, etc., of Wheeler. The agent completed the application and later issued a policy on the life of Wheeler for the amount of \$3,500, which was forwarded to appellant at Sawtelle. Appellant had stated to this agent that he desired to act as broker in the matter and to receive a commission, which privilege was accorded him. Early in the same month appellant took out a policy of fire insurance on the contents of the building occupied by himself and Wheeler. About 10 days after the fire occurred, appellant appeared at the office of the accident insurance company with an attorney for the purpose of endeavoring to collect money on the policy which had been taken out on the life of Wheeler. The agent testified that appellant stated that he had come to collect on the policy; that Wheeler had been burned up in the house at Sawtelle, the policy burning with him; that Davis then said that Wheeler owed him \$200, but when it was called to his attention that he had stated when the application was made that Wheeler owed him about \$3,000, he changed his statement and said, "Yes; that's right." There was testimony furnished by the operatives of an electric car which left Los Angeles some time between 4 and 5 o'clock on the morning of January 1st, to the effect that a man answering the description of appellant rode from Los Angeles to Sawtelle on that morning, and that the car arrived at the latter place at about 10 minutes before 5 o'clock. It was shown with reasonable certainty that the fire was in progress at 5 o'clock, and it was also shown that the operatives of the car were probably mistaken as to the time they arrived at Sawtelle that morning, and that in fact the car referred to did not arrive at the place mentioned until a time considerably after the hour of 5 o'clock. It was proved without contradiction that defendant had registered at a hotel in Los Angeles on the night of December 31st at about 7 or 8 o'clock. No person other than himself gave any testimony as to when appellant left that hotel. He himself testified that he remained there all night, and that when he returned on the car to Sawtelle the next morning the house he had occupied had been entirely destroyed by the fire. He testified that a woman remained with him in the hotel that night, but he could neither give her name nor tell where she lived, and did not produce her to corroborate his statements. The jury evidently concluded, either that the defendant had killed Wheeler before he left Sawtelle on the afternoon of December 31st, or

that he had returned some time during the night and murdered the man and arranged for the fire to burn down the house. It was shown that appellant had purchased five gallons of coal oil shortly before the fire and a like quantity some days prior to that time. This circumstance was but a small one, as it was shown that the men had used both gasoline and oil stoves in their building.

To give some point to one of the theories of the prosecution that Wheeler had been struck on the head, a physician, who made an examination of the skull of the deceased about two weeks or more after the tragedy had occurred, testified that he found in the posterior portion of the skull about an ounce of colored liquid which he was of the opinion was blood, and which he believed had been deposited there through a hemorrhage of one of the blood vessels of the brain. He said, however, that he could not say that the skull had been fractured, but testified that the skull had been so badly burned, especially in the frontal portion thereof, that it crumbled in his hands when he attempted to remove it in the usual way of surgeons. He was asked whether it were not possible that this blood had oozed from the brain during the time it had had an opportunity to decompose, and he stated that that condition was not indicated, because if such had been the case, the blood would not have appeared in one spot only.

At the time of his arrest there was found in the possession of appellant two promissory notes; one payable to appellant, and apparently signed by the deceased Wheeler for the sum of \$988, and another for the sum of \$2,000 to which no signature was attached. There was testimony of a witness, who appeared as a handwriting expert, to the effect that, in his opinion, the signature of Wheeler on the promissory note for \$988 was in the handwriting of Davis. This, in brief, was the evidence upon which the conviction of appellant was secured. There was some other testimony, as to statements made by appellant after the fire, which had some pertinency to the charge under investigation, which statements were, in the main, given in the way of explanation or refutation of hints made to appellant as to the opinion of different persons regarding the cause of the fire, or in answer to interrogatories put by such persons. None of these statements, however, so made by appellant, amounted to an admission of his connection with the alleged murder. Both men had been seen on the afternoon of December 31st at Sawtelle, and, so far as appears, both acted in the ordinary and usual way. On the part of the defense, appellant testified that the promissory notes had been drawn in good faith; that Wheeler signed the \$988 note which covered an amount owing to appellant by Wheeler; that the \$2,000 represented the price of some mining claims which Wheeler had agreed to purchase from ap-

pellant. In explaining why the last note was unsigned, appellant testified that he had drawn both notes; that Wheeler had signed the \$988 note and had printed his name in red ink on the \$2,000 note. The printing and the red ink being unsatisfactory to appellant, he had torn the note up and had asked Wheeler why he did not write his name, as there was plenty of ink. Appellant said that he later wrote another \$2,000 note, which it was his purpose to have Wheeler sign.

The jury in the case had the right to consider all of the testimony, introduced on behalf of the prosecution in proof of circumstances, to be true, and to draw all natural and logical inferences and deductions that might be drawn therefrom. So considering the evidence, they had the right to conclude that appellant, intending to profit by the death of Wheeler and the burning of the house, had taken out the insurance upon the life of Wheeler and upon the contents of the building; that he had murdered Wheeler either before he (appellant) left Sawtelle for Los Angeles on the evening of December 31st, or that he had returned to Sawtelle after having visited Los Angeles, and committed the murder. Appellant produced no testimony in corroboration of his statement as to when he left the hotel where he registered on the evening of December 31st. He appeared at the scene of the fire at about 10 o'clock. The testimony of the prosecution tending to show that he went to Sawtelle on the paper train between 4 and 5 o'clock on the morning of January 1st could not reasonably have had influence with the jury as indicating that the murder was committed after appellant's arrival at Sawtelle, for the fact seems to have been quite definitely established that the fire was in progress at the time that the car arrived at the town where deceased and appellant lived. As it appeared that Wheeler on the day preceding the tragedy was in his customary health, so far as could be observed, the jury had the right, considering all of the circumstances, to conclude that he must have been killed before the house was fired. The public defender, who presented the case for appellant to the jury in a very capable manner, has here filed a brief in which he has summarized the points on which he relies for reversal and supported them with able argument.

[1] At the outset and before considering the various contentions advanced, it may be admitted that had the jury brought in a different verdict and one more favorable to the appellant, it could not reasonably have been said that such verdict was unjustified or unsupported. Neither can it be said, on the other hand, that viewing the chain of circumstances, all of which tended to show defendant's connection with the crime committed, the jury's verdict in fixing the responsibility for the tragedy upon this appellant was not warranted by the evidence.

[2] The motion for a new trial was based

in part upon a claim of newly discovered evidence. A number of affidavits presented the testimony which it was claimed could be produced upon a new trial. Examining each of these affidavits, it cannot be said, in the first place, that the showing was such as to compel the conclusion of the trial judge that all of the testimony could not have, with reasonable diligence, been procured at the trial. Further than this, such testimony, then alleged to be available, was in its nature cumulative to the testimony given on behalf of appellant at the trial, and designed to be used in contradiction of the assertions of witnesses who had testified. Such being the character of the proposed testimony, the refusal of the court to grant a new trial on account of it was not error. *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136; *People v. Holmes*, 126 Cal. 462, 58 Pac. 917.

[3, 4] Alleged misconduct of the district attorney constitutes one of the grounds for error as claimed by appellant. The district attorney in one instance did misquote testimony. He stated that a witness had testified that the defendant had said that his mustache and eyebrows had been burned before the fire while he and Wheeler were getting dinner, and that a third person named Brashear was there. The district attorney in his argument inquired why the defense had not produced Brashear. It was true that the witness referred to had not testified that the defendant had said that Brashear was there. However, the jury had heard the testimony, and their duty was not to take the statement of either counsel as to what the evidence was or what testimony had been given, but to rely upon their own recollection as to that matter. When counsel objected to this erroneous statement and asked the court to instruct the jury to disregard it, the trial judge replied that the general instructions would cover the matter. In these instructions the court did tell the jury that the opinions of counsel were not to be considered, nor any statements of fact made by them nor by the judge of the court. In other words, they were told in sufficiently plain language that they should take the testimony as given by the witnesses and form their conclusions therefrom as to the facts. This erroneous statement of the district attorney is not like the one referred to by appellant as having been sufficient to justify a reversal in the case of *People v. Smith*, 121 Cal. 355, 53 Pac. 802. In that case the court confirmed the statement of the district attorney by agreeing that the latter had expressed the facts of the subject then being discussed. In this case the court gave no approval of the erroneous statement of the district attorney; on the contrary, he lent the weight of his instructions to the appellant's side by cautioning the jury regarding their duty in considering the evidence.

[5] The contention that the district attorney in his opening statement promised to prove things which he failed to support by

the evidence does not amount to reversible error. Such preliminary statements, as was this one, are always qualified with the announcement that counsel are "expecting to prove" the things which they enumerate. The instructions to the jury were that they should only consider matters in evidence before them. As to any of the charges of misconduct, where it may appear that the prosecuting officer overstated or misstated any of the matters complained of, his action in so doing bears not the color of willfulness nor a purpose to deceive or mislead the jury.

[6, 7] It is further claimed that the district attorney improperly questioned the appellant in an endeavor to prove that the latter had previously been convicted of a felony. We have examined carefully the testimony on this branch of the case, and we find no matter brought out therein on the cross-questioning of appellant which was not in direct response to his examination as made by appellant's own counsel. The district attorney was justified in arguing to the jury that defendant had offered to settle his claim on the accident policy for the sum of \$200. It was shown in evidence that appellant visited the insurance agency after the fire, and that appellant's attorney (not either of counsel in this case), in defendant's presence, made the remark to the agent that "all that the defendant wanted was practically \$200, which was the amount which his partner was indebted to him." Other items as to alleged misconduct in the argument of the district attorney do not require specific mention as, in the view we take of them, they did not constitute such misconduct as would create prejudicial error.

[8] One of the efforts of appellant in making out his defense was to attempt to establish that one Cook, an alleged nephew of deceased Wheeler, had acted in a suspicious manner at the time of and after the fire. This was in the endeavor to show to the jury a likelihood that Cook had committed the crime with which appellant was charged. It having appeared that an attorney named Ritchey had been consulted by Cook after the death of Wheeler with regard to Wheeler's estate, on cross-examination Ritchey was asked whether Cook had not given the witness a list of the heirs of Wheeler, and left out the names of sons and daughters of Wheeler. This question was objected to by the people, and the objection was sustained. As the Attorney General argues, the objection was properly sustained on the ground that it was not cross-examination; and the ruling of the court, refusing to allow the witness to be recalled for direct examination on behalf of appellant, was not error, as the circumstance sought to be elicited was so remote, as constituting any evidence that Cook had committed the crime with which appellant was charged, as to be inadmissible.

Exceedingly close scrutiny has been given

to the voluminous record presented upon this appeal, not only because of the fact that appellant was convicted of the most serious crime of murder, but because of the further fact that his conviction rested upon proof only of circumstances which his counsel has so earnestly contended were not sufficient to justify the verdict. The case presented, in brief, is one where we must conclude that if the jury believed the testimony introduced by the prosecution, they were warranted in finding appellant guilty as charged. That they did so believe that testimony, notwithstanding the fact that there was contradictory evidence, must be implied from the verdict which they returned in the case.

No reversible error appearing, the judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 632

HAMLIN v. BARNHART. (Civ. 1542.)

(District Court of Appeal, Second District, California. Feb. 24, 1915.)

1. EXCHANGE OF PROPERTY ⇐3—EXECUTORY CONTRACT — CONSIDERATION — CONDITIONAL PROMISE.

Where a contract for the exchange of property contained an agreement by plaintiff to make the exchange in case he could borrow a certain amount on the property he was to receive, that promise was not sufficient consideration for the promise of defendant, since plaintiff, by imposing impossible conditions as to maturity or interest, could prevent the securing of a loan, and there was therefore no mutuality in the promises.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 7; Dec. Dig. ⇐3.]

2. EXCHANGE OF PROPERTY ⇐3—CONTRACT—OFFER—REVOCATION.

An offer for the exchange of property can be revoked by the offerer giving notice to the agent of the other party, before the offer was accepted, that she would not proceed with the agreement.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 7; Dec. Dig. ⇐3.]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Ralph Hamlin against Jessie R. Barnhart. Judgment for defendant, and plaintiff appeals. Affirmed.

John F. Poole, of Los Angeles, for appellant. F. W. Shelley, of Pasadena, for respondent.

JAMES, J. The trial judge, viewing an alleged contract made between the parties to this action, which contemplated an exchange of real properties and the payment by respondent of a large sum of money, concluded that there was no sufficient consideration rendered, or agreed to be rendered, by appellant, and that therefore respondent was not bound. This was the controlling issue then submitted, and its determination will direct the decision to be rendered on this ap-

peal, which is taken from the judgment and from an order denying defendant's motion for a new trial.

[1] We agree with the conclusion reached by the superior court. The alleged contract for the breach of which damages were sought to be recovered, after reciting conditions respecting the properties of the parties and the terms imposed, contains the following clauses:

"The party of the first part agrees to this exchange in case he can borrow four thousand five hundred (4500) dollars on property at 357 So. Mentor avenue, Pasadena, California. The party of the first part has ten days in which to secure the above loan."

Respondent, three days after signing the agreement mentioned, orally notified the agent who was acting in the matter that she would not carry out the proposed exchange. On the same day, and after the agent had received this notification of respondent, but before this notification had been communicated to appellant, the latter notified the same agent that he was willing to proceed with the exchange of properties.

The right of respondent to withdraw from the agreement seems clear. There was no mutuality of consideration provided for. On the one hand, it was proposed to bind respondent in absolute terms to perform on her part, while appellant's performance was made conditional. He was to perform only in case he could borrow \$4,500 on respondent's property, and impliedly the agreement was that this loan should be upon whatever conditions he might choose to impose as to duration of loan term, rate of interest, etc. In the event of his default, respondent had no remedy as against his caprice. The agreement of the parties imported no obligation on appellant's part which respondent could enforce. "If a promise does not offer any enforceable legal right or forbearance it is not a consideration. This principle is sometimes expressed in the rule that promises, in order to be a valid consideration each for the other, must be mutual. * * * Where the parties assume to make a contract in which a promise is the consideration for a promise, and analysis shows that one of the promises does not impose any legal duty upon the party making it, such promise is not a consideration for the other promise." 1 Page on Contracts, §§ 302-304. It will be of no service to multiply citations to this fundamental rule governing the making of contracts. Having construed the contract as imposing no definite obligation on appellant to perform (a construction which his own words expressly declare to have been the one intended), there is no room left for further argument to the point that the alleged contract lacked mutuality of obligation or of consideration, which means the same thing.

[2] Treated as a mere offer to exchange, the proposal was revocable by respondent at

any time before accepted by appellant. Respondent did notify the agent of appellant, before there was any offer to accept made by appellant, that she would not proceed under the alleged agreement.

For the reasons stated, the judgment and order of the court should be sustained.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 681

TAYLOR v. NELSON. (Civ. 1441.)

(District Court of Appeal, First District, California. March 1, 1915.)

1. PARTNERSHIP ⇐22—RELATION—EVIDENCE.

An agreement under which plaintiff was to and did pay \$1,000 down on account of the price of certain land, and was to pay the further sum of \$2,500, and the defendant the sum of \$3,500, whereupon defendant would secure a loan upon the property of \$8,000, making the whole purchase price \$15,000, which defendant refused to carry out, was not a consummated partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 1, 7, 8; Dec. Dig. ⇐22.]

2. PARTNERSHIP ⇐105—BREACH OF AGREEMENT—ACTION—FORM.

In such case it was not necessary to sue in equity for a dissolution and accounting, but the plaintiff had an action for breach of the contract.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 168; Dec. Dig. ⇐105.]

3. BROKERS ⇐102—FRAUD ON PRINCIPAL—PURCHASE BY BROKER.

Where defendant was authorized by his principal to sell real property for \$15,000 on a certain commission, his contract with plaintiff, whereby they were to purchase the property at that price, was not in fraud of the principal so as to invalidate the contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 146; Dec. Dig. ⇐102.]

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Frank J. Taylor against J. M. Nelson. Judgment for plaintiff, and defendant appeals. Affirmed.

C. C. Coolidge, J. B. Peckham, and R. C. McComish, all of San Jose, for appellant. E. M. Rosenthal, of San Jose, for respondent.

PER CURIAM. The complaint alleges that the defendant and the plaintiff entered into an agreement, by the terms of which the plaintiff was to pay, and did pay, \$1,000 down on account of the purchase price of a certain piece of real estate in Santa Clara county; that later plaintiff was to pay the sum of \$2,500, and the defendant the sum of \$3,500, whereupon the said defendant would secure a loan on the property of \$8,000, making the whole purchase price, to wit, \$15,000; that on and prior to May 1, 1912, the date fixed in the agreement of purchase and sale for the payment of the balance of the purchase price, plaintiff requested the defendant to carry out his part of the contract, but the

defendant refused to do so, and repudiated the whole transaction. This suit is for damages to recover the sum of \$1,000 for breach of the contract, plus a small item not questioned if the plaintiff is found to be entitled to recover a judgment in this action.

[1, 2] The transaction here involved is not, as asserted by defendant, a partnership transaction requiring, for the adjustment of the difficulties between the parties a suit in equity for dissolution and accounting. It is true, according to the allegation of the complaint and the findings of the court, that the parties contemplated a partnership. While, in view of the arrangements between the parties, it may be said that a partnership was initiated by the plaintiff's payment of \$1,000, it certainly cannot be said, the defendant having failed to carry out his part of the contract, and having repudiated the same, that the partnership was ever launched, created, or consummated. Hence it follows that the present action for breach of the contract will lie. *Powell v. Maguire*, 43 Cal. 11; *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689; 30 Cyc. 358-465; 15 Cyclopaedia of Pleading and Practice, 1045; *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 18 Sup. Ct. 114, 42 L. Ed. 547.

[3] We also think that the next point made by the defendant cannot be maintained. If the plaintiff, when he entered into the contract with the defendant, knew that the interests of the defendant and his principal, the owner of the land, were antagonistic, and that the owner did not know that the defendant was interested in the purchase of the land, then the contract perhaps would be void not only as between the defendant and the owner (*Rauer's Law & Collection Co. v. Bradbury*, 3 Cal. App. 256, 84 Pac. 1007), but also as to the plaintiff; for then it might be said that the plaintiff was a party to a transaction which was a fraud upon the owner, in which event, of course, the plaintiff could not recover. But in this case, according to the evidence accepted by the trial court, the \$15,000 was to be the full price demanded by the owner for the property. In other words, the defendant was not vested with the exercise of any discretion in the matter, nor was he to get as much as he could for the property; he was simply authorized to sell it on a certain commission for a specified amount. Under these circumstances it certainly cannot be held that the plaintiff was guilty of any deceit or fraud. Furthermore, it is plain, according to the version of the case adopted by the trial court, that the plaintiff was innocent of any contemplated

wrong towards the owner of the property; and this was the view of the owner of the property, for, when she heard from the parties here what had occurred, she said, referring to herself and the plaintiff, "We have both been imposed upon by Mr. Nelson" (the defendant), and, not caring "to see Mr. Taylor (plaintiff) lose his money," agreed that if he would return the abstract of the property which had been furnished him, and if he would pay \$57.50, the amount of a bill which had been incurred by her at the instance of the purchasers of the property, she would waive any right she might have "to compel him to go on with the deal, and leave him to fight out the matter of the \$1,000 with Nelson."

Incidentally, perhaps, it ought to be said that the defendant claimed the \$1,000 on the theory that he produced a purchaser who was willing and able to purchase the property, and that a contract for the purchase was entered into between them. The trial court sustained an objection to a question put to the plaintiff on cross-examination which perhaps ought to have been allowed; but from all the circumstances of the case it is plain, assuming the ruling was error, that it was entirely harmless.

The judgment and order appealed from are affirmed.

MEMORANDUM DECISIONS

169 Cal. 544

Ex parte LAPIQUE. (Cr. 1923.) (Supreme Court of California. March 5, 1915.) In Bank. Application for writ of habeas corpus by John Lapique against the sheriff of Los Angeles county for his discharge under a judgment finding him guilty of contempt. Denied. See, also, 146 Pac. 690. John Lapique, of Orange, in pro. per.

PER CURIAM. The petitioner is in the custody of the sheriff of Los Angeles county under a commitment based upon a judgment finding him guilty of contempt of court, imposing a fine of \$500 therefor, and providing that in default of payment of said fine he be imprisoned in the county jail of Los Angeles for a period in the proportion of one day for each \$2 of such fine, or until such fine be otherwise satisfied. He has heretofore applied to the District Court of Appeal of the Second District for discharge on habeas corpus, and was by said court remanded to custody. In so remanding him the said district court of appeal filed a written opinion, which is reported in 146 Pac. 690. A consideration of the matters set forth in his petition addressed to this court has satisfied us that the opinion of said District Court of Appeal sufficiently disposes of the claims made by him for discharge. In view of our decisions referred to in the said opinion of the District Court of Appeal, no sufficient cause appears entitling petitioner to be discharged from custody. The application for a writ of habeas corpus is denied.

26 Cal. App. 631

Ex parte WHITE. (Cr. 302.) (District Court of Appeal, Third District, California. Feb. 23, 1915.) In the matter of the application of James White for writ of habeas corpus. Writ denied. A. H. Carpenter, of Stockton, for petitioner.

PER CURIAM. Petitioner is imprisoned by the sheriff of San Joaquin county by virtue of an information, filed in the superior court of said county, charging him with the commission of the crime of grand larceny. Petitioner claims that he was committed by the magistrate without probable cause, and has sent with his petition a certified copy of the evidence taken before the committing magistrate. We have given the evidence careful examination, and are satisfied that it is sufficient to justify the magistrate in issuing the commitment. The writ is denied.



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169 Cal. 793

RECLAMATION DIST. NO. 730 v. HERSHEY et al. (Sac. 2141.)

(Supreme Court of California. April 5, 1915.
Rehearing Denied May 4, 1915.)1. DRAINS ⚡73—RECLAMATION DISTRICT—
NEW WORK—PLAN AND REPORT.

The engineer's report under the designation of "Improvement of Old Levees and Construction of New Levees," concluding that a part of the work before recommended had been done at a cost of \$21,248.24 in excess of the estimates contained in the original plan of reclamation, and that to complete the work would require the further sum of \$44,725.76, not advising the trustees or any person as to the particular work for which the expense had been incurred, and in view of other parts of the report giving the location, elevation, and dimensions of the levee work, with the data from which the cubical contents of the completed work and the number of yards necessary to bring it up to standard, might be estimated, in the absence of any statute requiring the report and the adopted plan to specify by metes and bounds where the actual work of raising the levee has been performed, was not so defective as to invalidate the district's assessment upon defendant's land therein.

[Ed. Note.—For other cases, see Drains, Dec. Dig. ⚡73.]

2. DRAINS ⚡78—RECLAMATION DISTRICT—
PLAN OF WORK—MODIFICATION—STATUTES.

Pol. Code, §§ 3455, 3459, do not require a statement of the work done or to be done under each of the modified plans of reclamation, but only a statement of the necessary cost, and if the original assessment is insufficient, and further assessments are required, exacts merely a statement of the work done or to be done and its estimated cost. *Held*, that the continuance of a general plan in its entirety, with necessary changes, and the construction of a new levee, the location and dimensions of which levee, with the acquisition of the necessary right of way, were given without separate estimates of the cost thereof, or of the levee itself, did not invalidate the district assessment, merely because the cost of the work was not segregated into its items.

[Ed. Note.—For other cases, see Drains, Dec. Dig. ⚡78.]

Department 2. Appeal from Superior Court, Yolo County; W. M. Finch, Judge.

Action by Reclamation District No. 730 against Ella L. Hershey and others. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 162 Cal. 401, 122 Pac. 1074.

Hudson Grant, of Woodland, and G. Clark and Black & Clark, all of San Francisco, for appellants. Arthur C. Huston and Harry L. Huston, both of Woodland, for respondent.

HENSHAW, J. This action was prosecuted by plaintiff to foreclose a lien upon the lands of defendants under a reclamation district assessment imposed upon those lands. Plaintiff was given judgment, and from that judgment, and from the order denying defendants' motion for a new trial, defendants have appealed.

In 1909 the original plan of reclamation of this district was reported to the board of supervisors of Yolo county, was adopted, and an assessment levied in conformity therewith. This assessment was contested by these appellants, and in Reclamation District v. Hershey, 160 Cal. 692, 117 Pac. 904, their appeal from the adverse judgment of the trial court was considered and denied.

Plaintiff reclamation district is bounded on the north and east by the Sacramento river, on the south by an east and west line, and on the west by the right of way of a railroad company. In the northwesterly corner of the district is a part of the town of Knight's Landing; the town extending northwesterly. The waters against which the district was organized to protect itself were those of the Sacramento river proper and those of Cache creek, a tributary of the river, lying westerly of the district. The severe floods of 1909 showed the inadequacy of the protective works which had been constructed under the original plan of reclamation. Thus the southern levee, it was thought, would be a sufficient protection against flood waters in that locality, but proved not to be so. A ridge known as Knight's Landing ridge, it was thought, would be a natural protection to the district on the northwest. This Knight's Landing ridge is a natural ridge extending from the high land on the west to the westerly bank of the Sacramento river northwesterly from the town of Knight's Landing. It separates the lower portion of Colusa basin from the upper portion of Yolo basin, in the latter of which basins the reclamation district is situated. But flood waters flowed over this ridge, compelling the construction of a levee upon this high ground. By this unprecedented flood of 1909 the trustees of the district learned that it was the part of wisdom, if not of necessity, to modify and enlarge their scheme of reclamation to protect the lands of the district. Therefore the board of trustees of the district, on April 5, 1909, adopted a modification of the

original plan by increasing the size and dimensions of the back or south levee which served to protect the lands of the district from the flood waters of Cache creek, and further, to guard against the unexpected flow of waters over Knight's Landing ridge, they adopted on April 19th another modification calling for the construction of a levee on that ridge. After the adoption of the modification of April 5th, work was done by the district to bring the south levee up to the standard of the modified plan. No work upon this was done until after the adoption of the modified plan. On the 13th day of November, 1909, the engineer of the district made his report, specifying the work necessary to be done, in addition to that called for by the original plan, to effect a thorough reclamation of the lands. In this report reference was made to the modification of the original plan adopted by the board of trustees on April 5th and 19th, and the report was framed in conformity with the modified plans adopted by the trustees of the district upon the dates mentioned. The engineer's report, under the designation of "Improvement of Old Levees and Construction of New Levees" discusses and describes with elaborate care the additions to be made to the levee system and gives detailed specifications of the proposed new levee on Knight's Landing ridge. Separate estimates of the cost of the different branches of the work are made and stated, and this is followed by a recapitulation in which the amount of work done and to be done is segregated and separately stated; the cost of the amount done being segregated from the cost of the amount to be done. All formal actions in the matter of the assessment here in question were regularly taken.

[1] The objections of appellants to the assessment are extremely technical. Thus, appellants say that the engineer's report under the designation of "Improvement of Old Levees and Construction of New Levees" concludes as follows:

"That a portion of said work hereinbefore recommended has been done at a cost of \$24,248.24 in excess of the estimates contained in the original plans of reclamation; that to complete said work will require the further sum of \$44,725.76."

And appellants insist:

"That this statement does not describe the work, the doing of which has cost the district \$24,248.24."

It is said that the vital defect in the report is that it does not advise the board of trustees, or any other person, what particular work has been done for which this expense has been incurred, and Reclamation District v. Bonbini, 158 Cal. 197, 110 Pac. 577, is relied upon to support appellants' position. What the Bonbini Case declared and very particularly declared was:

"That the law contemplates the adoption by the trustees of a clear and definite plan of all new work not embraced in the original and other previous plans already filed, before any assessment is levied therefor, so that all concern-

ed, including the landowners who pay the tax, may have means of ascertaining the specific purposes of the assessment, the real value of the proposed work, and the benefit that will be derived therefrom."

When the whole of the engineer's report is considered, and not the fragmentary portion of it quoted and relied on by appellants, it is seen that in that report the location, elevation, and dimensions of the levee work are carefully given, with the data from which the cubical contents of the completed levee may be estimated and the number of cubic yards in place and to be put in place to bring the levee up to standard. It is in this connection that the report states that a portion of this work (that is, the work of bringing the levee up to standard) has been done at a cost of \$24,000 in excess of the estimate contained in the original plan of reclamation, and that the further sum of \$44,000 is required to complete the work. The report of the engineer is full, elaborate, and understandable, and in the particular under consideration affords all the information which the law requires, and much more than was afforded in the Bonbini Case by a specification held to be sufficient; that specification being merely:

"To extend the head levee for about three-fourths of a mile and raise the present head levee on an average of two feet, the estimated cost of same is \$5,500."

Here the one purpose is the raising of the levees. The expenses arising and to arise have been accurately and separately stated. In the Hershey Case, 160 Cal. 692, 117 Pac. 904, *supra*, in the petition for rehearing, this court was asked to condemn the original plan of this district upon the ground that there was no separate estimate of the cost of raising and strengthening of the existing levees, and by denial of the petition this court held the objection to be untenable. And finally upon this point it may be said that there is nothing in the law requiring the report and the adopted plan by metes and bounds to specify where the actual work of raising the levee has been performed. The location and dimensions of the original levee have been specified, as well as the dimensions and locations of the raised and strengthened levee, and inspection upon the ground will fully answer the purpose of showing where and to what extent the new and unpaid for work has been done. In the Bonbini Case the report stated:

"To cause drainage ditches to be dug throughout the district and pumping plants to be installed, the estimated costs of which are \$25,000."

Here was an inclusion in the one estimate of the cost of digging ditches and establishing pumping plants, and nothing was stated from which knowledge could be obtained of the amounts to be expended for each of these separate purposes. But in the plan before us the maps show the location of the ditches by scale and dimensions. The plan refers to the

drainage ditches, giving a specific estimate of cost of deepening, widening, and repairing them.

[2] Appellants would have us hold that each of the modifications of the original plan of reclamation constituted a wholly separate, distinct, and independent plan of reclamation. Such, however, is not the fact, as the foregoing statement shows. The general plan still continued in its entirety, with necessary changes principally in the nature of strengthening the original works and enlarging the drainage ditches, made advisable, if not necessary, by the experience of the flood of 1909. The statute does not require a statement of the work done or to be done under each of the modified plans of reclamation, but only a statement of the cost of the work necessary for the reclamation of the land in pursuance of any of the plans. If the original assessment is insufficient and further assessments are thus from time to time required, the law exacts merely a statement of the work done or to be done and its estimated cost. Pol. Code, §§ 3455, 3459. It would unduly and unnecessarily prolong this discussion to further consider in detail each of the technical objects here presented, and it must suffice to say that they are completely answered by the decisions of this court in Reclamation District v. Clark, 155 Cal. 345, 100 Pac. 1091, Reclamation District v. Hershey, *supra*, and Reclamation District v. Diepenbrock, 143 Pac. 763.

The original plan did not provide for the levee along Knight's Landing ridge; this being found necessary for the protection of the district after the experience of the flood of 1909. The modified plan calls for such levee. Its location, with the acquisition of the necessary right of way, are given, and its dimensions, with the statement that it is to be constructed seven feet above high water in the Colusa basin for the years 1908 and 1909. There is no separate estimate given of the cost of acquiring the right of way for this proposed new levee nor for the construction of the levee itself; the estimate in this respect being embraced in a lump sum for the acquisition of the rights of way of all levees, and another aggregate sum for the construction thereof. But the answer to this objection is that section 3455 of the Political Code does not require that such segregation should be made, and in not requiring it permits an aggregate estimate of the cost of separate phases of the work. Therefore this court would not overthrow such an assessment merely because the cost of work of the same character was not segregated into its items, but, if it ever overthrew an assessment for this reason, it would be in a case where such an estimate manifestly was injurious to the property owner, and that is not the case here presented.

In conclusion, and after a careful review of the record in this case, we deem it proper to say that there is established upon the part

of the trustees of this district a painstaking, faithful, and successful effort to comply with the law. This not alone in the matter of the plans and of the assessments, but in the disposition of the moneys. Reports were filed with the board of supervisors showing in detail the financial condition of the district, the moneys disbursed, and the work done. In addition there was introduced in evidence an account book kept by the secretary showing the purpose for which the money represented by every warrant was expended. The result of this has been of great benefit. Practically no land within the district was farmed at the time that this reclamation work was undertaken. To-day the levees have been raised above the high-water mark, pumping plants installed, and the drainage system improved. This has been followed by a very great increase in cultivable and cultivated land and in a corresponding increase in their value. We are not unmindful of the fact that proceedings leading to such assessments are in their nature in invitum, and that the property owner is entitled to have the courts scrutinize these proceedings with proper care. But this does not mean that an individual property owner may defeat an assessment by showing some minor ministerial or administrative defect upon a doubtful proposition in no wise involving any substantial right, and thus by excessive litigious astuteness secure benefits for his land for which either his neighbors will be compelled to pay or for which he ultimately will himself be compelled to pay under a new assessment.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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AMERICAN NAT. BANK OF SAN FRANCISCO v. DONNELLAN et al.

(Sac. 2137.)

(Supreme Court of California. April 9, 1915.
Rehearing Denied May 7, 1915.)

1. TRIAL ⚡3—TRIAL BY COURT—SUBMISSION OF EQUITABLE ISSUES TO JURY.

Where the answer charging fraud in the procurement of a guaranty sued on was sufficient to entitle defendants to complete relief without the cross-complaint raising the same issues, it was not error to submit the whole case to the jury before disposing of the equitable issues raised by the cross-complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 6, 7; Dec. Dig. ⚡3.]

2. APPEAL AND ERROR ⚡934—PRESUMPTIONS—JUDGMENT.

It is only when a judgment rests on some particular finding for its validity and support that the lack of sufficient evidence to support such finding or the contradictoriness between two findings treating of the same essential matter will necessitate a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. ⚡934.]

3. APPEAL AND ERROR ⚡1071 — HARMLESS ERROR—FINDINGS.

Where findings as to fraud in the procurement of a guaranty are clear, full, and explicit, and are themselves sufficient to support the judgment, uncertainty in other finding will be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. ⚡1071.]

4. PLEADING ⚡93—INCONSISTENT DEFENSES.

Inconsistent defenses being allowed by Code Civ. Proc. § 441, one sued on a guaranty may show that the contract was procured by fraud, and, as a separate defense, that, if valid, no liability had arisen under it by reason of the fact that no indebtedness had been incurred covered by its terms.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 189, 190; Dec. Dig. ⚡93.]

5. APPEAL AND ERROR ⚡1071 — HARMLESS ERROR—FINDINGS.

The court having found that the guaranty sued on was procured by fraud, contradictoriness in findings as to whether the debt secured was an individual debt, or that of a corporation through which the debtor conducted his business, was not material.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. ⚡1071.]

6. GUARANTY ⚡25—FRAUD—EVIDENCE.

Evidence held to sustain findings that a guaranty was procured by fraud.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 102-104; Dec. Dig. ⚡25.]

7. GUARANTY ⚡20—VALIDITY—FRAUD.

Misrepresentations by bank president soliciting a guaranty as to the business of its debtor, the guarantor's son, and concealment of the son's debt to the bank from stock gambling losses equaling the amount of the guaranty, are sufficient to void the contract.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 22; Dec. Dig. ⚡20.]

Department 2. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by the American National Bank of San Francisco against J. W. Donnellan and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Gavin McNab, R. P. Henshall, and Geo. W. Mordecai, all of San Francisco (Kleinsorge & McKisick, of Sacramento, of counsel), for appellant. Devlin & Devlin, of Sacramento, for respondents.

HENSHAW, J. Upon January 21, 1909, J. W. Donnellan and Marion J. Donnellan, his wife, executed to plaintiff their contract, jointly and severally guaranteeing to plaintiff "the payment of any and all sums of money * * * which is now or may hereafter become due or owing" by their son, Kenneth Donnellan, to plaintiff up to the amount of \$30,000, with interest. Upon this contract of guaranty this action was brought, alleging an indebtedness upon the part of Kenneth Donnellan to the bank in the sum of \$37,605.83. Defendants set up several defenses: That the guaranty was without consideration; that Kenneth Donnellan was not in-

debted to the plaintiff; that the note of Kenneth Donnellan in the complaint described was not given for an indebtedness of Kenneth Donnellan, and was given without consideration; that plaintiff has security ample for all of the alleged indebtedness; that no advances were ever made to Kenneth Donnellan on the faith of the guaranty; that fraud, deceit, and misrepresentation were practiced upon the defendants in the securing of the guaranty. Defendants further pleaded by way of cross-complaint, charging that their guaranty was void for fraud practiced in its procurement, and asking that it be so decreed, and that the plaintiff bank be compelled to surrender it for cancellation. Plaintiff, in turn, besides answering the cross-complaint, amended its complaint, charging, in effect, that Kenneth Donnellan cloaked his personal transactions under the name of the Kenneth Donnellan Company, a corporation, which was owned and controlled by him; that prior to the \$30,000 guaranty charged upon in the complaint the same defendants had executed a \$10,000 guaranty to secure past and prospective debts of Kenneth Donnellan, and that upon the execution of the second guaranty plaintiff surrendered to defendants the first guaranty.

A jury was called in, special issues were submitted, and the jury made its findings thereon. The jury also returned a general verdict in favor of the defendants. Because of the equitable defense of fraud and the cross-complaint seeking affirmative relief for fraud, the court itself made its own findings, adopting as a part of them the findings on the special issues which had been submitted to the jury. These findings, summarized, are that there was no consideration for either of the guaranties of the defendants; that no consideration was ever advanced to Kenneth Donnellan by reason of the guaranty of \$30,000; that the promissory note of Kenneth Donnellan for \$37,605.83 set forth in the complaint evidenced the joint indebtedness of the Kenneth Donnellan Company, a corporation, and E. J. Broberg, assistant cashier of plaintiff, and, in addition, an indebtedness of \$1,000 upon the joint promissory note of Kenneth Donnellan and Marion J. Donnellan, his mother; that there was no forbearance to sue on account of any asserted indebtedness of Kenneth Donnellan as a consideration for the \$30,000 guaranty; that the contract of guaranty was given by the defendants at the solicitation of plaintiff's president, under the following circumstances:

"That P. E. Bowles, the president of the plaintiff, did, prior to the execution of the contract of guaranty set out in plaintiff's complaint, and attached as an exhibit thereto, suggest, assert, and declare to J. W. Donnellan that the only business that Kenneth Donnellan had transacted with the plaintiff prior to the date of said guaranty was having said bank collect drafts with stock attached thereto; that said business was extensive, and it was advisable for the said bank to have a paper in the form of a guaranty so that the bank examiner

would be satisfied in case any loss should occur, which loss would be small and the possibility remote; that said assertion, suggestion, and declaration of the said P. E. Bowles to said defendant J. W. Donnellan was false and untrue, in this, that prior to the 21st day of January, 1909, a speculation in mining stocks was being carried on with E. J. Broberg, who at said time was an officer of the said bank, with Kenneth Donnellan Company, a corporation; that at the time said declarations and assertions were made by the said P. E. Bowles, president of the said plaintiff bank, to the defendant J. W. Donnellan, he knew that said transactions had been carried on in the bank, and that great losses had been made; that the loss due at said time was at least the sum of \$30,000.

"That for the purpose of deceiving and cheating the said defendant J. W. Donnellan and his codefendant Marion J. Donnellan, he (the said Bowles) did represent and declare to the said J. W. Donnellan, prior to the making of said guaranty, that no other business had been carried on by said Kenneth Donnellan with said bank except the collection of drafts with stock attached; that for the purpose of lulling said defendant into a sense of security and of preventing him from making any investigation or ascertaining the truth, he (the said P. E. Bowles) did, prior to the making of said guaranty, persuade and induce one Kenneth Donnellan, who knew all of said facts, not to communicate said facts to the said J. W. Donnellan; that the said Kenneth Donnellan is the son of said J. W. Donnellan.

"That P. E. Bowles, as president of said bank, by artifice, deceit, and fraud induced the said Kenneth Donnellan to abstain from seeing his father on the day that said defendant J. W. Donnellan came from Sacramento to San Francisco to meet the said P. E. Bowles, which said meeting resulted in the guaranty set out in plaintiff's complaint; that the said defendant J. W. Donnellan was induced to come to San Francisco by a telephone received from one E. J. Broberg some time in the month of January, 1909, prior to the making of the guaranty aforesaid.

"That, for the purpose of inducing the said Kenneth Donnellan not to inform his father of the truth or to inform him of the losses the bank had sustained as aforesaid, he (the said P. E. Bowles) promised the said Kenneth Donnellan that he would give to the said Kenneth Donnellan sufficient business, as a stockbroker, from said bank and from other institutions controlled by said P. E. Bowles that would be sufficient to pay off such indebtedness within one year from date, and he also promised the said Kenneth Donnellan that he would give him sufficient business to enable the whole of said indebtedness to be paid; that the said P. E. Bowles made said promises without the intention of performing them, or any of them, and made said promises for the purpose of inducing the said Kenneth Donnellan to refrain from informing his father of the truth and of informing him that said loss had already been occasioned;" that the guaranty of \$30,000 thus secured on the 21st day of January, 1909, was preceded by a \$10,000 guaranty secured in December, 1908; that the false representations and concealments in the securing of the \$10,000 guaranty of 1908 were substantially the same as those employed in securing the guaranty of January, 1909, saying that they were made by Broberg, the assistant cashier of the bank, on behalf of the bank, instead of by its president; that Kenneth Donnellan did not own all of the stock of the Kenneth Donnellan Company; that Kenneth Donnellan was not engaged in business individually under the form, guise, or cloak of the Kenneth Donnellan Company; that the defendants did not know, nor did either of them know, that Kenneth Donnellan was engaged in business for himself under the name of

Kenneth Donnellan Company, and that such was not the fact.

The court concluded that there was no consideration to the defendants, or either of them, for the guaranty; that the indebtedness described in the complaint was not the indebtedness of Kenneth Donnellan, save and except the \$1,000 not covered by the guaranty; that both guaranties were procured by fraud and deceit; that plaintiff should recover nothing; and that defendants were entitled to have the \$30,000 guaranty delivered up to be canceled. Judgment was entered accordingly, and plaintiff appeals from that judgment, bringing up the evidence for review under a bill of exceptions.

[1] Appellant's first complaint is a general one; namely, that the court erred in submitting the whole case to the jury before disposing of the equitable issues raised by the cross-complaint. At the most, however, this complaint amounts to but a technical objection to the order of proof. Defendants might have rested their defense by charging the fraud in their answer, without a cross-complaint. *Field v. Austin*, 131 Cal. 379, 63 Pac. 692. Having been brought into court to respond to their guaranty, their answer that it had been procured by fraud, if successfully established, would have given them full and complete relief. It would have effectuated an avoidance and cancellation of the contract by judicial decree as completely as it would have been canceled under their prayer for affirmative relief in their cross-complaint. But, conceding the general rule that equitable defenses are first to be disposed of, and that the merits of an equitable cross-complaint should first have been determined before the submission to a jury of the issues raised in the action at law, yet this irregularity, at the most, was but an irregularity in no way affecting the substantial rights of appellant; for even upon these equitable issues of fraud it was quite proper for the court to have impaneled the jury, to have submitted the issues to that jury, and to have been advised by the determinations which the jury made upon those issues, adopting or rejecting them, as they appealed to the conscience of the chancellor. And this, in fact, was precisely what the court here did in adopting the findings of the jury, and in supplementing those findings with others which it made, addressed both to the legal and equitable considerations in the case.

[2, 3] Appellant next contends that certain findings must be disregarded because of their uncertainty; those findings in this respect being like the attempted findings condemned by this court in such cases as *Ladd v. Durkin*, 51 Cal. 277; *Harlan v. Ely*, 55 Cal. 340; and *Goodnow v. Griswold*, 68 Cal. 599, 9 Pac. 837. And next the contention is made that the findings themselves are in very vital respects contradictory and self-destructive. To both of these contentions it may be answered,

first, in general terms, that it is only when a judgment rests upon some particular finding for its validity and support that the lack of sufficient evidence to support such finding, or the contradictoriness between two findings, treating of the same essential matter, will necessitate a reversal of the case; or, in other words, however unsupported, however lame, however inconclusive, any number of the findings may be, if in any case there be one clear, sustained, and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be here concluded that the court did rest its judgment upon that finding, or those findings, and the others may and will be disregarded. *Thayer v. Tyler*, 147 Pac. 979. So here we need not follow counsel through his argument as to the ambiguity and uncertainty which attaches to such a finding as "that the allegations of plaintiff's complaint, except as admitted by the answer or as found herein, are untrue"; for the findings of the court upon the question of the fraud in the procurement of the contract of guaranty are clear, full, and explicit, and are in and of themselves entirely sufficient to support the judgment. Such being indisputably the case, it matters not whether, in law or in fact, Kenneth Donnellan was or was not indebted to plaintiff. His indebtedness, under the finding that the guaranty was procured by fraud, was not protected nor secured by that guaranty, and the issue of his indebtedness is thus eliminated from this case and left for determination between the bank and Kenneth Donnellan himself. Appellant's argument on the question of indebtedness proceeds upon the proposition that the court has found, in effect, that Kenneth Donnellan was not indebted to the bank at all, and that, not being indebted to the bank, there was no liability under the contract of guaranty, conceding that contract of guaranty to be valid. Such, in truth, is one phase of the court's finding and judgment.

[4] But appellant argues that this is wholly inconsistent with the findings of the court that plaintiff's officers fraudulently concealed from defendants the fact that Kenneth Donnellan was heavily indebted to the bank, and that, if Kenneth Donnellan was heavily indebted to the bank, it could not be true, as by the other findings declared, that he owed nothing to the bank, and, conversely, if he did owe nothing to the bank, the officers of the bank were guilty of no fraudulent misrepresentation or concealment, even if they declared that he was not so indebted. But the answer to this is that these defendants were entitled to set forth by their answer as many defenses, even inconsistent defenses, as they had. Civ. Code Proc. 441. They were thus entitled to show, if they could, that the contract of guaranty was procured by fraud, and therefore void. They were entitled to show as a separate defense, if they could, that, conceding the validity of the contract

of guaranty, no liability had arisen under it by reason of the fact that no indebtedness had been incurred by Kenneth Donnellan covered by its terms. It may be added that, of course, it is quite apparent that the differences between the litigants here arise over the proposition as to whether or not the indebtedness to the bank was the individual indebtedness of Kenneth Donnellan, or was the indebtedness of the Kenneth Donnellan Company; the admitted fact being that the guaranty was to protect against the debts of Kenneth Donnellan, and the evidence showing that all of these transactions by which the indebtedness arose were transactions by and in the name of the Kenneth Donnellan Company.

[5] Plaintiff on the trial (appellant here) vigorously contends that, under the principle that equity will look through form to substance, it must be declared that the Donnellan Company, of which Kenneth Donnellan owned all the stock, was a mere instrumentality through which he conducted his business to avoid the claims of creditors. Respondents, however, insist that Kenneth Donnellan did not own all the stock of the corporation; that it was not, therefore, his mere instrumentality; that they did not even know that the Kenneth Donnellan Company was doing business; that they never undertook to guarantee the debts of the Kenneth Donnellan Company; that, as guarantors favored by the law, they are entitled to stand upon the strict letter of their contract, and that the principle of equity invoked, while applicable in cases where it is sought to charge the principal debtor hiding behind the veil of his own corporation, has no applicability whatsoever to a contract of guaranty such as this, which runs to the debts of an individual and to the transactions of that individual, and not to the debts of the corporation nor to transactions of that corporation. The fact that the court adopted defendants' view of this matter goes far to explain away the asserted contradictoriness of the findings. But this consideration need not further be pursued, since the contradictoriness which appellant asserts, even if it exists, has no materiality, we repeat, if the guaranty was secured by fraud. Or, if it has materiality at all, it is only in argument as to the weight of the evidence touching the concealment of plaintiff's officers as to the indebtedness of Kenneth Donnellan to the bank, in view of the finding of the court that there was no such indebtedness. And upon this proposition we need only say that plaintiff contends that at the time the guaranty was given Kenneth Donnellan was personally indebted to the bank; that the contract of guaranty was fairly procured; and that it covered, and was meant to cover, this precise indebtedness. The duty of the guarantee, under the circumstances, does not depend upon the ultimate determination of the court as to whether or not a debt, or a debt in any given amount,

existed. It depends upon his knowledge and belief and the obligation upon him to disclose, or the right resting with him not to disclose, to the intending guarantor what that knowledge and belief is.

[6] So, necessarily, we are brought to a consideration of the all-essential findings of the fraud practiced upon the defendants in the procurement of their contract. The findings in this regard have been quoted, since they set forth these matters with particularity. Are these findings sustained? Indubitably they are. Further, it is found, and the evidence sustains the findings, that in January, and shortly prior to the execution of the contract of guaranty, the plaintiff's president had discovered that the bank had sustained a serious loss, though the exact amount could not be determined; that this loss was not sustained through the legitimate brokerage business of Kenneth Donnellan or the Kenneth Donnellan Company, which it was represented to these defendants was the only business that Kenneth Donnellan had with the bank; that these losses were stock gambling losses; that the assistant cashier, Broberg, was a "partner" and coadjutor and co-operator with Kenneth Donnellan in these stock gambling transactions; that Broberg was to share in the profits and losses of these transactions, and advanced the bank's money for these speculations; that the transactions were all eo nomine those of the Kenneth Donnellan Company, and on the books of that company were kept accounts in the name of Broberg, showing his interest in these transactions, though subsequently and at the request of Broberg, and when an investigation was imminent, his name was erased, and a fictitious name entered in place thereof. As to the first guaranty of \$10,000, which, it will be remembered, was surrendered and canceled when the later \$30,000 guaranty was given about a month later, it is shown that Broberg, as an officer of the bank, went to J. W. Donnellan and solicited from him and his wife this guaranty on behalf of the bank. He knew at the time that Kenneth Donnellan or the Kenneth Donnellan Company was indebted to the bank in an amount exceeding the guaranty sought, and not only concealed this knowledge, but represented that Kenneth Donnellan was doing a safe and lucrative business. He described the business as a purely brokerage business; that stocks were bought by Kenneth Donnellan upon the order of customers; that Kenneth Donnellan, not having the money to pay for the stocks, secured the money from the bank, the stocks being returned to the bank; that a draft was drawn against the purchaser; the bank received the money when the purchaser paid for and took the stock, and, if he failed so to do, the only possible loss to the bank was the depreciation of the stock which might result between the time it was bought by Donnellan and the time when, after repudia-

tion by the purchaser, it could be sold upon the market; that, in the nature of things, this prospective loss was negligible, but that there was a short interval of time during which the bank had put out this money and was without security to protect itself, and that the bank itself, or the bank commissioner, thought that some such security should be given, and the bank would accept this guaranty from the defendants, which they could give without risk. Such, in brief, was the evidence touching the giving of the first guaranty. The second guaranty was given under the active solicitation and procurement of the president of plaintiff, who had come to know the nature of these transactions and that the bank had sustained a heavy loss because of them. The president represented to J. W. Donnellan, the father of Kenneth, that he was very fond of his son and desired to continue business with him, describing the business which the son was doing, as had Broberg. He explained that the possibility of loss was extremely remote; that the son's business was increasing, and his transactions growing so large that a greater security than the \$10,000 guaranty was desirable. J. W. Donnellan did not know that his son had been speculating; did not know that any loss on account of speculation had been incurred; and as to pre-existing indebtedness knew only of the minor amount hereinbefore mentioned, which was subsequently discharged by payment. After giving the guaranty, he sought information touching the condition of his son's account with the bank, and could obtain none. Kenneth Donnellan testifies that, after the president discovered the bank's loss, he was sent for by the president and informed that the loss figured up in excess of \$31,000. He went repeatedly to the bank in the matter of his accounts, and the president suggested that he endeavor to secure a guaranty from his father to cover this indebtedness. He told the president that it would be useless for him to try to secure such a guaranty. The president then told him to refrain from speaking to his father about it, but to allow him (the president) to present the matter, because he thought he could do so in such a manner as not to alarm the father. The nature of Kenneth Donnellan's business having become known to the president of the bank, the bank's funds were no longer available to him, and after the date of the guaranty no money was ever advanced by the bank to him or the Kenneth Donnellan Company. Therefore the only indebtedness of Kenneth Donnellan or of the Kenneth Donnellan Company was that which had arisen, under the circumstances indicated, before the giving of the guaranty. Mrs. Donnellan executed the guaranty with her husband upon the representations made by him, which representations were as hereinbefore set forth. The president of the bank himself testified:

That, in requesting the \$30,000 guaranty from Mr. Donnellan, he did not inform him of the speculative business done by his son or the Donnellan Company, nor that there was a loss, or that there might be a loss; that "my purpose was to get from Col. Donnellan and his wife the larger guaranty. If Col. Donnellan had wanted to get any information from me he could have asked for it, and I would have responded to any inquiry made or have given him any statement he asked for. I certainly was not going to frighten him by saying that there was a big loss in the bank here, and I wanted him to give me a guaranty. Q. If you had told him that it probably would have frightened him, and he probably would not have given the guaranty? A. He is human. Q. And, being human, if he knew what you knew, he would not have given the guaranty? A. I didn't say that. His affection for his son—he was responsible largely for the business being in the bank, and he might say, it is on me for any losses."

Touching numerous statements testified positively to by Mr. Donnellan as having been made by the president during the course of their conversation—statements going to the safe nature of the brokerage business done by his son and the remote possibility of loss—when asked if he had made them, the witness failed to remember. It has been necessary thus to state the evidence because of the underlying question of law which, as has been previously intimated, controls the creditor under such circumstances, and the applicability of which law is, therefore, most important in determining whether or not fraud was perpetrated upon the defendants. Or, phrased differently, what was the legal duty of disclosure incumbent upon the president in soliciting this guaranty under the circumstances indicated? If he did in this matter all that the law requires; if he disclosed, so far as disclosure was incumbent upon him; if there was no suppression of which the defendants could with justice complain—then no fraud was committed in the procurement of the contract; and to this final underlying consideration we are thus brought.

[7] Two distinct elements enter into the fraud charged and found against the plaintiff: The first that of positive misrepresentation; the second that of concealment of facts and circumstances affecting the situation of the parties important for the intending guarantors to know, known to the plaintiff's president soliciting the guaranty and concealed by him. The first of these are the representations testified to by the defendant J. W. Donnellan to the effect that the plaintiff's president informed him that his son was doing a large and prosperous brokerage business, and conveying by implication, and by silence upon other matters, that this was all of the business which he was doing. The concealments were of the admitted facts that plaintiff's president did not disclose to him that the loss had already been incurred; that it had been incurred through stock gambling, in which an officer of the bank was jointly interested with his son; and that the loss was so large that it probably exceeded the

amount of the guaranty requested. Can it be debated whether or not these misrepresentations and this concealment, so found by the court, are sufficient to avoid the contract? The principles of equity and the adjudicated cases applying them return but one answer. The case, it is to be borne in mind, is not that where the surety or guarantor comes forward at the request of the debtor and simply offers to give the creditor a certain guaranty. In such cases the general holding is that no duty of disclosure is incumbent upon the creditor; since, without breach of any faith, he may assume that the debtor himself has informed the intending surety of all that the latter desires to know. His duty therefore is performed if he fully and fairly answers the questions put to him, and conceals nothing which he himself believes might influence the surety's conduct. Such was the case relied on by appellant of *Hamilton v. Watson*, 12 Clark & Finnelly, 107, where the House of Lords decided that:

"A surety is not of necessity entitled to receive, without inquiry from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and that party. If he requires to know any particular matter of which the party about to receive the security is informed, he must make it the subject of a distinct inquiry." (The quotation is from the syllabus.)

But the general principle of English jurisprudence, as well as American, is that laid down by the same House of Lords in *Railton v. Mathews*, 10 Clark & Finnelly, 934. The facts were that one had become a surety in a bond for the fidelity of a commission agent to his employers. After some time the employers discovered irregularities in the agent's accounts, and sued on the guaranty. The surety instituted his suit to avoid the bond on the ground of concealment by the employers of material circumstances affecting the agent's credit prior to the date of the bond; these circumstances being that the agent's accounts had been irregular, and that he had taken money of his employers. These circumstances, it was contended, if communicated to the surety, would have prevented him from undertaking his obligation. The judge directed the jury that:

"The concealment, to be undue, must be willful and intentional, with a view to the advantages the employers were thereby to gain."

The House of Lords held this instruction to be erroneous in point of law, and declared:

"Mere noncommunication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, is undue concealment, though not willful or intentional, or with a view to any advantage to himself."

(The quotations are again from the syllabus.)

That this is the governing principle in the American as well as in the English courts is abundantly established.

"The contract of surety imparts entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract." Story, Eq. Jur. § 324.

"If the creditor conceal any fact unknown to the proposed surety which, had he known it, would have deterred him from becoming surety, * * * it is a fraud upon him, and relieves him from obligation. Especially is this so where the obligation is entered into at the request of the person to whom the security is given." *Schoonover v. Osborne*, 108 Iowa, 453, 79 N. W. 263.

And without further quotations reference may be made to *De Colyar on Guaranties*, 369, 370; *Daniel, Negotiable Instruments*, § 1309; *Brand, Suretyship & Guaranty*, § 126; *Jungk v. Holbrook*, 15 Utah, 198, 49 Pac. 305, 62 Am. St. Rep. 921; *Hall v. Clopton*, 56 Miss. 555; *Gist v. Feitz*, 43 Neb. 238, 61 N. W. 621; *Doughty v. Savage*, 28 Conn. 146; *Wilmington, Columbia & Augusta R. R. Co. v. Ling*, 18 S. C. 116; *Springfield v. Park*, 3 Ind. App. 173, 29 N. E. 444; *Dinsmore, Trustee, v. Tidball*, 34 Ohio St. 411; *First Nat. Bank, etc., v. Terry (C. C.)* 135 Fed. 621; *Farmers' Nat. Bank v. Van Slyke*, 49 Hun, 7, 1 N. Y. Supp. 508; *Franklin Bank v. Cooper*, 36 Me. 180; *Harrison v. Lumbermon, etc., Ins. Co.*, 8 Mo. App. 37; *Benton Co. Sav. Bank v. Boddicker*, 105 Iowa, 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. Rep. 310; *State v. Sooy*, 39 N. J. Law, 135.

To sum up, then, defendants were solicited to give the guaranty by plaintiff's president. The latter knew that the amount of the guaranty was equaled by a pre-existing debt due to the bank from the stock gambling transactions of Kenneth Donnellan and their assistant cashier. He knew that J. W. Donnellan and his wife did not know this, and it was a material circumstance affecting the contract. The contract, in contemplation of the defendants, was one under which they would incur little or no risk out of the transactions of a legitimate brokerage business conducted by their son with plaintiff. The contract into which they were induced to enter was one whereby they agreed to pay \$30,000 already lost to the bank by the gambling operations of their son. Plaintiff's president did not inform them of this, for the avowed reason that he did not propose to tell J. W. Donnellan anything which might cause him not to sign the guaranty. The duty of disclosure rested with plaintiff's president, and he did not make it.

The finding is therefore supported, and the judgment appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

170 Cal. 52

In re LITTLE'S ESTATE.

WOMAN'S CHRISTIAN TEMPERANCE UNION FEDERATION OF LOS ANGELES
v. WOMAN'S CHRISTIAN TEMPERANCE UNION OF SOUTHERN CALIFORNIA
et al. (L. A. 3999.)

(Supreme Court of California. April 15, 1915.)

WILLS — 489 — EVIDENCE TO AID CONSTRUCTION—IDENTITY OF DEVISEE—STATUTE.

Where testator bequeathed a certain part of his estate to a body or society designated as "the Woman's Christian Temperance Union of Los Angeles," at which time there was an existing corporation known as "the Los Angeles Woman's Christian Temperance Union," and another known as "the Woman's Christian Temperance Union of Southern California," and another subsequently federated and incorporated as "the Woman's Christian Temperance Union Federation of Los Angeles," there was an ambiguity within Civ. Code, § 1340, providing that, where there is an imperfect description in a will or no person exactly answers the description, the mistake may be corrected by extrinsic evidence, and the testimony of the one who drew the will that testator informed him that he wanted to give a bequest to an organization owning and conducting the Temperance Temple on the hill at Broadway and Temple streets, and that witness, after inquiry as to its name, wrote the designation in the will, and that the society conducting the temple was "the Woman's Christian Temperance Union of Southern California," was admissible, and showed the testator's intent to bequeath the property to that corporation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1037-1046; Dec. Dig. 489.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rivers, Judge.

In the matter of the estate of Samuel W. Little. Contest between the Woman's Christian Temperance Union Federation of Los Angeles and the Woman's Christian Temperance Union of Southern California and others. Judgment for contestee Woman's Christian Temperance Union of Southern California, and contestant appeals. Affirmed.

James H. Blanchard and Will D. Gould, both of Los Angeles, for appellant. Elizabeth L. Kenney and Steward & Steward, all of Los Angeles, for respondent.

SHAW, J. Samuel W. Little in May, 1902, made his will bequeathing a certain part of his estate to a body or society which he designated in his will as "the Woman's Christian Temperance Union of Los Angeles." At that time, according to the evidence in the case, there was a corporation in existence having the corporate name of "the Los Angeles Woman's Christian Temperance Union." There was also another corporation in existence whose corporate name was "the Woman's Christian Temperance Union of Southern California," and an association or federation of societies which was known at that time by the name of the Union of Unions, but which subsequently became incorporated under the name of "the Woman's Christian Temperance Union Federation of Los Angeles."

Each of these three bodies, upon the distribution of the estate, applied for the legacy or bequest given to the Woman's Christian Temperance Union of Los Angeles. Each claimed to be the body designated by that description.

It is a mistake to say that the order of words in a corporate name is not important or may not be necessary in order to designate the body corporate intended. Very many illustrations might be given of that fact. For example, there is or has been a corporation known as the Southern California Railway Company and also a corporation known as the California Southern Railway Company, two distinct corporations distinguished only by the fact that the word "California" comes first in one and second in the other. It appears on the face of this record from the applications of the claimants alone, in connection with the will, that the designation "the Woman's Christian Temperance Union of Los Angeles" does not describe exactly either one of the corporations appearing to claim the legacy. The words "Los Angeles" come at the end of the designation, and thus distinguish it from the first-named corporation, and from the others as well. This of itself created an ambiguity. There were three corporations with names none of which correspond exactly to the designation given in the will, and the inquiry at once arose which one of these three came within the intention of the testator.

It comes exactly within the case provided for by section 1340 of the Civil Code; that is, a case where no person or property exactly answers the description. In that case the section provides that the omissions and mistakes must be corrected if the error appears either from the face of the will or from extrinsic evidence. In this case extrinsic evidence was introduced consisting of the testimony of Mr. Avery, who drew the will. He testified that Mr. Little informed him that he wanted to give a bequest to an organization which owned and conducted the Temperance Temple on the hill at Broadway and Temple streets; that he did not know the name himself; and that he then telephoned to the Temple, was answered by some one, inquired as to the correct name of the society that was conducting the Temple, and was informed that it was the Woman's Christian Temperance Union of Los Angeles. Thereupon he wrote in the will the words which made the legacy payable to the Woman's Christian Temperance Union of Los Angeles. Evidence was given in addition to the effect that the society for which he inquired, and which owned and conducted the Temperance Temple on Temple and Broadway, was not the Woman's Christian Temperance Union of Los Angeles, but that its correct name is the Woman's Christian Temperance Union of Southern California.

From this evidence the court decided that

the testator intended to give this legacy to the corporation described as the Woman's Christian Temperance Union of Southern California, but which is designated by the above name in the will—a mistake which could be corrected under section 1340.

There is some suggestion that evidence of this character is not admissible. The case of *Estate of Dominici*, 151 Cal. 181, 90 Pac. 448, is direct authority for the proposition that in case of an ambiguity of this kind the instructions of the testator given to the persons who drew the will at the time it is drawn and the occurrences that took place at that time may be proven to ascertain the person to whom the legacy is to be given and for the purpose of ascertaining the true intent of the will. In *Estate of Donnellan*, 164 Cal. 16, 127 Pac. 166, similar authority may be found. There are other cases to the same effect. It is the opinion of the court that under these decisions and under section 1340 the evidence was properly introduced, and that it is amply sufficient to sustain the finding of the court that the true intent was to give this bequest to the Woman's Christian Temperance Union of Southern California.

The order of distribution is affirmed, and it is ordered that the remittitur issue forthwith.

We concur: SLOSS, J.; LAWLOR, J.

170 Cal. 63

GHRIEST v. RAILROAD COMMISSION OF CALIFORNIA. (L. A. 3713.)

(Supreme Court of California. April 15, 1915.)

1. ELECTRICITY — 10½ — REGULATION — RAILROAD COMMISSION — ORDER — CONSTITUTIONALITY.

The action of the Railroad Commission, in ordering a certain light and power company to construct an electrical transmission line from one city served by it to another served only by petitioner for review, violated no constitutional right of such petitioner for review, although such power company would compete with him and injuriously affect his business.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. — 10½.]

2. ELECTRICITY — 10½ — REGULATION — RAILROAD COMMISSION — HEARING — NOTICE.

Where petitioner for review received insufficient notice of the hearing before the Railroad Commission, at which it was determined by such Commission to order a certain power company to construct a transmission line to the city, which the plaintiff alone had supplied, but was yet present at such hearing, he waived the insufficiency of the notice, in the absence of action in excess of jurisdiction on the part of the Commission.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. — 10½.]

3. ELECTRICITY — 10½ — REGULATION — RAILROAD COMMISSION — FAILURE TO OBSERVE RULES — STATUTE.

The mere failure by the Railroad Commission, in exercising its legitimate powers, by way of ordering a power company to extend its lines to a municipality formerly served solely by petitioner's company, to observe the rules

adopted by it relative to practice and procedure does not render its order in excess of jurisdiction, or one reached not regularly, pursuant to authority under Public Utilities Act (St. Ex. Sess. 1911, p. 48) § 53, providing that no informality in any proceeding shall invalidate any order or decision of the Commission.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. — 10½.]

In Bank. Application for writ of review by L. Ghriest against the Railroad Commission of the State of California. Denied.

Emmet H. Wilson, of Los Angeles, for petitioner.

PER CURIAM. This is an application for a writ of review wherein petitioner seeks to have reviewed and set aside an order made by the Railroad Commission, determining that public convenience and necessity require the construction, operation, and maintenance by the Pacific Light & Power corporation of an electrical transmission line from Dominguez in Los Angeles county to the city of Newport Beach, and the construction, operation, and maintenance of an electrical distributing system in the city of Newport Beach. The petitioner is, and for a long time has been, operating in said city an electrical generating plant and an electric distributing system, and the effect of the order of the Commission will be that the Pacific Light & Power corporation will enter into competition with him, and he will be injuriously affected by such competition.

The order complained of was one made under the provisions of section 50 of the Public Utilities Act (St. Ex. Sess. 1911, p. 43), which prohibit such a public utility as the Pacific Light & Power corporation from extending its service into a city, etc., theretofore served by a public utility of like character, without having first obtained from the Railroad Commission a determination that the present or future convenience and necessity requires or will require such extension.

[1-3] The scope of our inquiry regarding orders of the Railroad Commission was exhaustively discussed in the opinions in *Pacific Telephone & Telegraph Company v. Eshleman et al.*, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652. Under the views there expressed, it is clear that the petition here affords no warrant for the issuance of a writ. If it be conceded that we may, in such a proceeding, inquire whether any right of the petitioner under the Constitution of the United States is violated by the action of the Commission, notwithstanding there was no excess of jurisdiction on the part of the Commission, it is clear that no such violation is shown by the allegations of the petition. Even if we assume that petitioner was entitled to notice of the hearing and an opportunity to be heard, he was present at the hearing in response to what he now says was an insufficient notice, and, so far as appears, was

not denied the opportunity to be heard. It is not stated that he requested any postponement of the hearing. Nor can we see that any excess of jurisdiction on the part of the Commission is shown. The claim is that the application and procedure thereon did not conform in certain respects to the rules adopted by the Commission relative to such application and the hearings thereon. It is clear that it must be held that the mere failure of the Commission to observe rules adopted by it relative to practice and procedure does not render its order one in excess of its jurisdiction, or warrant us in holding that the Commission has not "regularly pursued its authority." Indeed, it is expressly provided in the Public Utilities Act that "no informality in any proceeding * * * shall invalidate" any order or decision, made by the Commission. Section 53.

The application for a writ is denied.

170 Cal. 48

Ex parte STEPHAN. (Cr. 1900.)

(Supreme Court of California. April 14, 1915.)

1. CONSTITUTIONAL LAW — 205 — STATUTES — 72 — UNIFORM OPERATION — PRIVILEGES AND IMMUNITIES — CLASSIFICATION — "PERSONAL PROPERTY BROKER."

St. 1909, p. 969, amended by St. 1911, p. 978, which by section 1 declares that one engaged in loaning or advancing money on the security of chattel mortgages, or personal property, or on security of a lien or assignment of, or power of attorney relating to, wages, shall be deemed a "personal property broker," sections 2 and 3 of which allow such brokers to charge and receive 2 per cent. a month, and section 5 of which requires such brokers, on making any loan or advancement, to give the borrower a memorandum showing the name of the lender, the nature of the security, etc., and which declares the failure to give such memorandum to be a misdemeanor, is not in conflict with Const. art. 1, § 11, declaring that all laws of a general nature shall have a uniform operation, nor with section 21, forbidding the granting of special privileges and immunities to any class of citizens, which on the same terms are not given to all, since such business is peculiar and well known and capable of classification.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. — 205; Statutes, Cent. Dig. § 72; Dec. Dig. — 72.]

2. STATUTES — 84 — GENERAL AND SPECIAL LAWS—REGULATION OF INTEREST.

Such act is not within the meaning of Const. art. 4, § 25, subd. 23, forbidding special laws "regulating the rate of interest on money."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 93; Dec. Dig. — 84.]

In Bank. Application by A. H. Stephan, for a writ of habeas corpus, directed against D. A. White, Chief of Police of the City and County of San Francisco. Writ discharged, and prisoner remanded to custody.

Olin L. Berry, of San Francisco, for petitioner. C. M. Fickert, Dist. Atty., and A. R. Cotton, Asst. Dist. Atty., both of San Francisco, for respondent.

SHAW, J. The petitioner was imprisoned on a charge of having violated the provisions of the act entitled "An act to define personal property brokers and regulate their charges and business," enacted April 16, 1909, and amended April 21, 1911. Stats. 1909, p. 969; Stats. 1911, p. 978. He asks a release from custody on the claim that the law is unconstitutional.

Section 1 of the law provides that every person "engaged in the business of loaning or advancing money" on the security of chattel mortgages or other contracts by which personal property is hypothecated as security for such loan and the use and possession thereof is not to be in the lender, or on the security of a lien upon, or assignment of, or power of attorney relating to "wages, salary, earnings, income or commissions," shall be deemed a "personal property broker." Sections 2 and 3 allow such brokers to charge and receive 2 per cent. per month as interest on the money loaned on such security, and provide that they shall not charge or receive more, either directly or under any pretext, as for costs, expenses, and the like. Section 5 requires such personal property broker, on making such loan or advancement, to give to the borrower a memorandum showing the name of the lender, the nature of the instruments taken as security, and certain other particulars of the transaction. It is further provided that contracts for such loans or advancements are void if a greater rate of interest or benefit than the statute allows is accepted therefor or provided for or agreed upon therein, and that a failure of the broker to give the memorandum required by section 5 is a misdemeanor punishable by fine or imprisonment, or both.

[1] The petitioner was charged with being engaged in the business aforesaid and with having made such a loan upon the security of a chattel mortgage, without giving to the borrower the memorandum aforesaid.

Section 11 of article 1 of the Constitution declares that "all laws of a general nature shall have a uniform operation." Section 21 of the article forbids the granting of special privileges or immunities to any citizen or class of citizens, which, upon the same terms, shall not be given to all. Under the rules now well established in this state, we think it is clear that this statute does not controvert these provisions. It is not a violation thereof for the Legislature to enact laws applying to persons throughout the state, but only to those of a specified class, provided the distinctions which mark the class are those which reasonably arise out of the nature of the things composing it and distinguish them from others not embraced within it in such a manner that the peculiar legislation is not arbitrary or unreasonable. The legislative judgment as to what is a sufficient distinction cannot be overthrown by the courts, unless it

is, beyond rational doubt, erroneous. No authority need be cited in support of these propositions. It follows also, as a corollary, that a decision holding such legislative judgment wrong in this respect with regard to one statute, upon the conditions relating to it, is not necessarily authority for a similar decision upon another statute, unless the facts and conditions are essentially the same in the one case as in the other. The decision in this particular is like any other decision on a question of fact—not a precedent, except for cases where the facts are the same.

The present case is not essentially different from *Ex parte Lichtenstein*, 67 Cal. 359, 7 Pac. 728, 56 Am. Rep. 713. In that case a penal law applying only to pawnbrokers was declared valid and constitutional on the ground that pawnbrokers constituted a class doing a peculiar business which the Legislature might justly consider required peculiar regulations. The business of pawnbroking is ancient, and its characteristics are, of course, well known. This is not true of personal property brokers. But we think it must now be conceded that, in the course of the development of modern civilization, the business of loaning money on chattel mortgages, or like instruments, and that of loaning or advancing money on assignments or other transfers of wages, earnings, and the like, as well, have become so well known and so capable of classification and recognition that the Legislature is entirely justified in describing them as a peculiar class and giving them the name of personal property brokers. Their business is as distinct in many respects from other classes of business as is that of a pawnbroker. Nor can it be denied that abuses have grown up in connection therewith which the Legislature might well deem to call for the regulations imposed by this law. This being the case, the limitation of the legislation to these classes alone does not destroy the uniformity of the law nor confer unlawful special privileges upon those persons not engaged in the business regulated.

[2] It is not a special law, within the meaning of subdivision 23, § 25, art. 4, of the Constitution, forbidding special laws "regulating the rate of interest on money." This proposition is settled by the decision in *Ex parte Lichtenstein*, supra, where the point was expressly decided with respect to the pawnbrokers act. No substantial difference can be seen between that act and the personal property brokers act, so far as the application of this constitutional provision is concerned.

We do not consider the decision in *Ex parte Sohneke*, 148 Cal. 262, 82 Pac. 956, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475, as in substantial conflict with these views. The classification there condemned was far more arbitrary and fanciful than that made by this act. There the

same kind of an act was punishable in different ways by one of the statutes declared invalid, according to the person who committed it. The other act declared invalid permitted loans upon mortgages of certain kinds of chattels without limitation as to the rate of interest, while forbidding loans upon such mortgages upon other chattels, except at a limited rate. This is apparently a distinction without a legal difference. There may be expressions in the opinion that are inconsistent with the views here given, but they are not essential to the decision, and should be disregarded.

The writ is discharged, and the prisoner is remanded to the custody of the respondent.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.: LORIGAN, J.

(169 Cal. 780)

BIDWELL v. LOS ANGELES & S. D. B. RY. CO. (L. A. 3430.)

(Supreme Court of California. April 3, 1915.)

1. STREET RAILROADS ⇨114 — COLLISION WITH AUTOMOBILE—EVIDENCE.

In an action for injuries from a collision between an automobile and a motor car backing over a crossing, evidence held to show negligence on the part of defendant, and not to show any contributory negligence of plaintiff.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. ⇨114.]

2. APPEAL AND ERROR ⇨1002 — REVIEW — CONFLICTING EVIDENCE.

A verdict on conflicting evidence cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⇨1002.]

3. STREET RAILROADS ⇨117 — FAILURE TO LOOK AND LISTEN—CONTRIBUTORY NEGLIGENCE.

In an action for injuries from a collision at a crossing with a motor car of a suburban railroad while running on a city street, the failure of plaintiff to look and listen before driving on the track was not, as a matter of law, negligence, since under such circumstances the railroad was a street railroad and the motor car a street car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. ⇨117.]

4. NEGLIGENCE ⇨122—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

The defense of contributory negligence is an affirmative one, and the burden of proving it rests on defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. ⇨122.]

5. EVIDENCE ⇨478—OPINION—INTOXICATION.

Plaintiff, suing for personal injuries, may testify that the two glasses of beer and the glass of wine which he had drunk before the accident did not have any perceptible intoxicating effect on him, and others who saw him at the time of the accident may state that he was not intoxicated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2242-2244; Dec. Dig. ⇨478.]

6. TRIAL $\hookrightarrow$ 296 — INSTRUCTIONS — CURE BY OTHER INSTRUCTIONS.

An instruction, in an action for injuries from a collision between an automobile and a motor car, that neither defendant nor plaintiff had the exclusive right to use the street at a crossing, and each was obliged to take precautions to avoid collision, is not error when taken in connection with another instruction, stating that a motor car would have the preference in crossing.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. $\hookrightarrow$ 296.]

7. STREET RAILROADS $\hookrightarrow$ 93—RIGHTS OF TRAVELERS—AUTOMOBILES.

The driver of an automobile and a motor car both have the lawful right to pass over a crossing, and reasonable care and precaution must be used by both to avoid a collision.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 195-200; Dec. Dig. $\hookrightarrow$ 93.]

8. TRIAL $\hookrightarrow$ 267 — INSTRUCTIONS — MODIFICATION.

An instruction that plaintiff would be guilty of contributory negligence proximately causing the accident if he failed to look for a car at a crossing is properly modified by leaving it to the jury to decide whether such negligence would be the proximate cause of the accident, where under the doctrine of last clear chance, such negligence might not have been the proximate cause.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. $\hookrightarrow$ 267.]

9. TRIAL $\hookrightarrow$ 260—INSTRUCTIONS COVERED.

Requested instructions fully covered by instructions given are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. $\hookrightarrow$ 260.]

Department 1. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Chester Bidwell against the Los Angeles & San Diego Beach Railway Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Leovy & Leovy, Geo. J. Leovy, and Thomas M. Leovy, all of San Diego, for appellant. James E. Wadham, Wadham & Cosgrove, and A. H. Sweet, all of San Diego, for respondent.

SHAW, J. The appeals of the defendant are from the judgment and from an order denying a new trial.

The action was to recover damages alleged to have been caused to plaintiff by the negligence of the defendant. The complaint alleges that the plaintiff was driving his automobile along India street in San Diego, at the intersection of that street with C street; that the defendant was operating a railroad upon a track laid along C street and crossing said intersection; that while plaintiff was crossing the said car line in his automobile, the defendant ran a motor car backward on said car line without lights thereon or therein, and so carelessly and negligently managed said car that it struck plaintiff's automobile, greatly damaged the same and causing serious bodily injuries to plaintiff. The

complaint is in two counts, one for the recovery of damages for the bodily injuries, the other for the damage to the automobile. The defendant pleaded contributory negligence of the plaintiff as an affirmative defense. The answer also denied the allegations of the complaint relating to the negligence of the defendant.

The defendant claims that the evidence is insufficient to prove that the defendant was negligent as alleged. The plaintiff testified, in effect, that as he was driving his automobile over the said crossing, along India street, crossing the said car track at right angles, the defendant's car struck the automobile and caused the injuries complained of; that it was a dark night, and that he did not see the car until it was within five feet of him; that the car had no headlight or rear light and was not lighted on the inside or at all; that the night was so dark that he could not see the car; that no gong or bell was sounded, or other warning given, by the persons in charge of the car or by any other person; that the lights on the automobile were lighted at the time; that the car, after striking the automobile, ran about 50 feet further along the track, pushing the automobile with it, before it came to a stop. It also appeared that its rear truck had then left the track, and that the car was backing along the track when the collision occurred. Two other persons who were riding in the automobile with Bidwell at the time of the accident, and a person who saw the accident while standing near the intersection, also testified, corroborating the plaintiff in all material particulars.

[1, 2] This evidence is sufficient to support the allegation that the defendant's negligence was the cause of the accident. There was evidence of witnesses produced by the defendant which flatly contradicted the direct testimony of plaintiff's witnesses concerning the absence of lights and the failure to sound the gong or bell. The finding of the jury upon this conflicting evidence cannot be reviewed on appeal. We must therefore hold that the evidence of the defendant's negligence was sufficient to support the verdict.

[3] It is also claimed that the evidence showed that the negligence of the plaintiff contributed to the injury. It is said on this point that it was the plaintiff's duty to look and listen before attempting to cross the defendant's car track, and that there is no evidence that he did either. The failure of a person to look or listen for an approaching car before crossing a street car track in a city is not always and under all circumstances an act of negligence. *Hamlin v. Pacific, etc., Co.*, 150 Cal. 779, 89 Pac. 1109; *Scott v. San Bernardino, etc., Co.*, 152 Cal. 610, 93 Pac. 677; *Lawyer v. Los Angeles, etc., Co.*, 161 Cal. 56, 118 Pac. 237; *Roberts v. Spokane, etc., Co.*, 23 Wash. 335, 63 Pac.

506, 54 L. R. A. 184; *Traver v. Spokane, etc., Co.*, 25 Wash. 237, 65 Pac. 284; 36 Cyc. 1554. The defendant was operating a railroad line carrying passengers between San Diego and La Jolla, one of its suburban resorts. The car in question was a so-called "motor car" propelled by a gasoline engine located at one end of the car in front of the space occupied by passengers. The defendant did not have the exclusive right to use C street in that part of its course. It was used in common by the defendant and other vehicles. In the manner in which the road was operated on that street, the railroad was a "street railroad," and the car was a "street car," as those terms are defined by the authorities, so far as the duties and obligations of its operators and persons about to cross the track, respectively, to use ordinary care was concerned. 36 Cyc. 1545. According to the authorities above cited, the failure of plaintiff to look and listen, if it is assumed that he did fail, was therefore not, as matter of law, negligence on his part, but at most a question to be determined by the jury. But aside from this question, the point is without merit.

[4] The defense of contributory negligence is an affirmative one, and the burden of proving it rests upon the defendant. The defendant cannot rely on the failure of the plaintiff to prove that he was not guilty of negligence, but must produce or show evidence to prove it. *Zibbell v. S. P. Co.*, 160 Cal. 241, 116 Pac. 513. The plaintiff, it is true, did not testify that he did look and listen to ascertain if a car was approaching before starting to cross the track, although his testimony is that he would have seen the car if it had been lighted, but on the other hand he did not testify that he did not look or listen, and the evidence does not show that he failed to do so. As the burden was on the defendant to prove such failure, it cannot be said that contributory negligence was established, or that the verdict was contrary to the evidence with respect to that subject.

[5] The testimony of the plaintiff that the two glasses of beer and the glass of wine which he had drunk during the afternoon and before the accident did not have any perceptible intoxicating effect on him, and the testimony of his two companions and of other persons who saw him at the time of the accident, stating that he was not intoxicated, was properly admitted. *People v. Monteith*, 73 Cal. 8, 14 Pac. 373; *People v. Sehorn*, 116 Cal. 511, 48 Pac. 495; *People v. Hill*, 123 Cal. 51, 55 Pac. 692.

[6] Instruction 5, to the effect that neither the defendant nor the plaintiff had the exclusive right to use the said streets at said intersection; that neither had a superior right to the other thereon, and that each would be obliged "to take reasonable precaution to avoid collision each with the other," when taken in connection with that part of instruction 7 which states that a motor

car would have the preference in crossing first at said intersection, was not erroneous. *Lawyer v. Los Angeles, etc., Co.*, supra; *Hamlin v. Pacific, etc., Co.*, supra; *Scott v. San Bernardino, etc., Co.*, supra.

[7] The part of instruction 7 declaring, in substance, that both the plaintiff and defendant had lawful right to pass over the intersection, and to "require reasonable care and caution of those traveling on the other road to avoid collision," is in harmony with the law given in the cases last above cited. It does not, as appellant seems to claim, declare that the plaintiff had the right to be negligent himself and charge the defendant with the consequences.

[8] The defendant requested the court to instruct the jury as follows:

"29a. Plaintiff has testified that at the time and prior to the accident, he knew of the crossing where the accident of this defendant occurred, and that the motor car of defendant ran thereon, and such evidence is uncontradicted. Under these circumstances it was his duty to look and listen before going upon the track of defendant, and if you find from the evidence that an ordinarily careful and prudent man in possession of all his faculties, had he looked and listened, would have become aware of the approach of said motor car and the danger of collision in time to have avoided said accident by the use of ordinary care and prudence, and that plaintiff failed to look or listen and went upon said crossing when it was too late for defendant's employé operating said motor car, by the use of ordinary care, to have avoided said accident (then plaintiff was guilty of contributory negligence proximately causing the accident and cannot recover)."

The court modified this instruction by striking out the portion included in parentheses, and inserting the following:

"Then plaintiff, was guilty of contributory negligence, and if you find that such negligence was the proximate cause of the accident, the plaintiff cannot recover"

—and as so modified the instruction was given and numbered 29. We think this modification was properly made. The plaintiff may have been guilty of contributory negligence, and yet, under the doctrine of the "last clear chance," such negligence might not have been the proximate cause of the accident. *Green v. Los Angeles T. Ry. Co.*, 143 Cal. 41, 76 Pac. 719, 101 Am. St. Rep. 68. That question was properly left for the jury to determine.

[9] Certain instructions, asked by the defendant and refused by the court, to the effect that if the plaintiff knew of the existence of the track crossing the street at that point, he should look and listen for a car approaching thereon, in so far as they correctly state the law, are fully covered by the instruction 29a above quoted.

We do not find any other point mentioned in the briefs that we consider worthy of notice.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.

(169 Cal. 370)

FEARON v. FODERA et al. (S. F. 6798.)

(Supreme Court of California. March 18, 1915.)

1. APPEAL AND ERROR ⇨414—NOTICE—ADVERSE PARTIES.

Defendants appealing from a judgment quieting title in plaintiff and awarding him certain damages against each defendant need not give notice of their appeal to a defendant against whom judgment was rendered by default, as he cannot be affected by reversal of the judgment against them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138; Dec. Dig. ⇨414.]

2. APPEAL AND ERROR ⇨414—NOTICE—ADVERSE PARTIES.

Defendants as to whom the judgment is silent, but who by their answers have disclaimed any interest in the land in suit, cannot be affected by reversal of judgment against other defendants, and therefore need not be served as adverse parties with notice of their appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138; Dec. Dig. ⇨414.]

3. APPEAL AND ERROR ⇨415—NEW TRIAL ⇨8 — NOTICE — PARTIES — JOINT TORT-FEASORS.

Under Code Civ. Proc. §§ 578, 579, providing that judgment may be for or against one or more of several defendants, one of several joint tort-feasors, against all of whom judgment has been rendered, may be granted a new trial without it being granted to the others, so that some of them, moving for new trial, need not serve on the others notice thereof, or, appealing from the denial thereof, notice of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2139; Dec. Dig. ⇨415; New Trial, Cent. Dig. § 11; Dec. Dig. ⇨8.]

4. NEW TRIAL ⇨137—NOTICE OF INTENTION.

Notice of intention, though in terms to move the court to vacate the judgment, instead of the decision, and to grant a new trial, is sufficient.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 277, 278; Dec. Dig. ⇨137.]

5. LIBEL AND SLANDER ⇨131—"SLANDER OF TITLE"—MALICE.

"Slander of title" being defamation of title to property by one who falsely and maliciously disparages it, thereby causing its owner some special pecuniary loss or damages, one taking a deed of property as security, merely carelessly relying on the grantor's false representation that he had an interest therein, is not liable for such slander; malice being lacking.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 390; Dec. Dig. ⇨131.]

For other definitions, see Words and Phrases, First and Second Series, Slander of Title.]

In Bank. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Joseph Fearon against Antonio Fodera and others. From a judgment for plaintiff, and from an order denying a new trial, certain defendants appeal. Reversed.

Lilienthal, McKinstry & Raymond, of San Francisco, for appellants. W. H. H. Hart, Devoto, Richardson & Devoto, T. C. Van Ness, Jr., and Ira S. Lillick, all of San Francisco, for respondent.

PER CURIAM. A hearing of the above-entitled cause was ordered before this court. After due consideration, we are satisfied with the opinion and decision of the Court of Appeal for the First District, by Presiding Justice Lennon, which is hereby adopted and made the decision of this court. It is as follows:

In this action the plaintiff sought and recovered a judgment quieting his title to certain lands in the county of Fresno, and awarding him damages as well against certain of the defendants for what in law is known as "slander of title." The complaint, in effect, charged that the defendants Antonio Fodera, Rose Fodera, J. J. Rauer, T. C. Tognazzini, and W. D. Shawhan had conspired to unlawfully incumber and cloud the plaintiff's title to the lands in question. In this behalf the complaint alleged substantially that the defendants Antonio Fodera and Rose Fodera, with the knowledge and connivance of all of the defendants mentioned, falsely represented that they had some claim upon the lands of plaintiff; that thereupon the defendants Antonio Fodera, Rose Fodera, and J. J. Rauer prepared what purported to be a deed, signed by the Fodera defendants, as grantors, describing and conveying to the defendants Tognazzini and Shawhan the lands of the plaintiff; that the defendant Rauer thereupon signed and acknowledged the deed mentioned as a witness to the execution thereof; that thereafter the Fodera defendants caused said deed to be recorded in the county of Fresno; and that the same has ever since constituted a cloud upon plaintiff's title to the land described therein. In substance and effect, the complaint further alleged that the purpose of the Fodera defendants in making said deed was to create a lien upon the common interests which the defendants De Long and the M. K. & T. Oil Company might have had in the lands described in the deed, when, in truth and in fact, the Fodera defendants well knew and had notice that the lands described in the deed were the property of the plaintiff, and not of the defendants De Long and the M. K. & T. Oil Company; that by reason of said conspiracy the plaintiff was embarrassed in the free use and disposition of his lands, and had been damaged thereby in the sum of \$1,000. The complaint also alleged that the defendant Swiss-American Bank, by reason of the deed referred to, claimed some interest in the plaintiff's lands, but that said claim was without any right whatever.

The defendant Rauer defaulted. The remaining defendants, save and except De Long and the M. K. & T. Oil Company, joined issue upon the allegations of the complaint. In addition to denying all of the allegations of the complaint, the defendants Tognazzini and the Swiss-American Bank eventually disclaimed any interest in the plaintiff's lands. The answer of these defendants further averred that at the time of the execution of the deed in question the Fodera defendants were indebted to the bank in the sum of \$12,946; that the Fodera defendants represented to Tognazzini, who was at that time the vice president of the bank, that he (Fodera) was the owner of the real property described in the plaintiff's complaint, and that the defendants De Long and the M. K. & T. Oil Company merely held said property in trust; that the Fodera defendants transferred and conveyed said property to the defendants Tognazzini and W. D. Shawhan as additional security for the payment of the Fodera indebtedness to the bank; that Tognazzini, Shawhan, or the bank did not make any search of the records of Fresno county to ascertain the true status of the title to the property in question, but

relied solely upon the representations made to them by the defendant Antonio Fodera. The answer of the defendants Tognazzini and the bank concluded with the prayer that, if it was found that the Fodera defendants had any interest in the property in question, it be decreed that such interest was subject to a lien by way of first mortgage to the bank.

After the trial commenced the defendants Tognazzini and Swiss-American Bank filed a supplemental answer, unequivocally disclaiming any interest in the plaintiff's lands, and alleging that subsequent to the institution of the action the defendant Tognazzini had executed a quitclaim deed to the Fodera defendants because they had paid their indebtedness to the bank. The defendants M. K. & T. Company and De Long by their answer also absolutely and unequivocally disclaimed any interest in the plaintiff's lands.

Upon a trial of the issues thus framed, the lower court made its findings of fact in favor of the plaintiff, and, among other things, found that the Fodera defendants, Rauer, Tognazzini, Shawhan, and the Swiss-American Bank never had any reason or right to claim that the Fodera defendants, De Long, or the M. K. & T. Oil Company had or ever had any right, title, or claim in or to any part of the lands described in the plaintiff's complaint. It was further found that the defendants De Long and M. K. & T. Oil Company never had or claimed any interest in such lands. Thereupon judgment was rendered and entered against the defendants Fodera, Rauer, Shawhan, Tognazzini, and the Swiss-American Bank, wherein it was decreed that the plaintiff have and recover from each of the defendants named the sum of \$435, as damages for the alleged slander of plaintiff's title. The judgment declared further that the deed from the defendants Fodera to the defendants Tognazzini and Shawhan was null and void, and that each of the several defendants above named be perpetually enjoined from asserting any claim to the land in controversy adversely to the plaintiff.

The defendants Tognazzini and Swiss-American Bank took an appeal from the judgment, and from an order denying them a new trial. Notice of appeal from the judgment was served upon all of the defendants in the action, save and except De Long and the M. K. & T. Oil Company. Notice of intention to move for a new trial and notice of appeal from the order denying a new trial were served upon the plaintiff, but not upon any of the codefendants. The plaintiff now moves that the appeal from the judgment and from the order denying a new trial be dismissed.

[1] The motion to dismiss the appeal from the judgment is grounded primarily upon the contention that the defaulting defendant Rauer and the disclaiming defendants De Long and M. K. & T. Oil Company were adverse parties, whose interests would necessarily be injuriously affected by a reversal or modification of the judgment rendered and entered against the remaining defendants, and that therefore notice of appeal should have been served upon them in order to confer upon this court jurisdiction of the subject-matter of the action.

This contention cannot be sustained. Conceding, as counsel for the plaintiff contends, that before this court can take cognizance of an appeal prosecuted and perfected under the old method of appeal notice thereof must be given to all parties to the action, including the nonappealing defendants whose interest in the subject-matter of the appeal may be injuriously affected by a reversal or modification of the judgment or order appealed from, this rule cannot be successfully invoked in aid of the motion to dismiss in the present case. It is apparent from the record before us that the interests of the particular defendants who were not served

with the notice of appeal cannot in any wise be affected by a reversal or modification of the judgment rendered against the appealing defendants. The defendant Rauer has not appealed from the judgment taken and rendered against him by default; and a reversal or modification of the judgment as against the appealing defendants cannot adversely affect the existing rights or interests of Rauer, because in any event the judgment against him will stand as originally entered. In short, a reversal of the judgment appealed from would not nullify the default of the defendant Rauer nor dissolve the judgment rendered against him. Therefore, with respect to the defendant Rauer, it is manifest that he is not an adverse party on whom service of the notice of appeal was required to be given. *Randall v. Hunter*, 69 Cal. 80, 10 Pac. 180; *McKeany v. Black*, 46 Pac. 381; *Kenney v. Parks*, 120 Cal. 22, 52 Pac. 40.

[2] We are unable to perceive how a reversal or modification of the judgment rendered and entered against the appealing defendants can possibly affect the interests or alter the situation of the disclaiming defendants De Long and M. K. & T. Oil Company. The judgment appealed from is absolutely silent as to these disclaiming defendants, and therefore, in so far as they are concerned, cannot be considered a judgment at all. *Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 151, 86 Pac. 178.

In brief, it does not appear from the record before us that there has been any determination of the plaintiff's claim against the defendants De Long and M. K. & T. Oil Company, and consequently a reversal or modification of the judgment appealed from would not materially alter the situation in which they were left at the conclusion of the trial of the case. *French v. McCarthy*, 110 Cal. 12, 42 Pac. 302.

We do not see that the result would be different even if it be conceded, as counsel for the plaintiff contends, that a reversal of the judgment appealed from would leave the defendants De Long and M. K. & T. Oil Company liable to a future judgment which might be rendered in the case in the event of a new trial being granted. By their answers the defendants last referred to disclaimed unequivocally any interest in the land in controversy; and consequently, as against them, any future judgment which might be rendered in the action could give to the plaintiff only that which, in effect, already had been granted by disclaimer. *Mining Co. v. Mining Co.*, 83 Cal. 613, 23 Pac. 1109.

This being so, it seems clear to us that in any event the defendants De Long and M. K. & T. Oil Company have no interest in the subject-matter of the action or the judgment appealed from which could possibly be affected, adversely or otherwise, by the result of this appeal; and therefore it was not essential that notice of appeal should have been served upon them. *Deiter v. Kiser*, 162 Cal. 315, 122 Pac. 469.

[3] It is the contention of the plaintiff that the appeal from the order denying a new trial should be dismissed, because neither the notice of intention to move for a new trial nor the notice of appeal from the order denying a new trial was served upon any of the codefendants in the action against whom judgment was entered. This contention cannot be sustained. It is based upon the erroneous assumption that a new trial must be granted to all of the defendants against whom judgment was entered if it should be found that the appealing defendants are entitled to a new trial. It will be remembered that the appealing defendants ultimately unequivocally disclaimed any interest in the lands in controversy. Consequently they are interested in, and complain solely of, that phase

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 114 Cal. xvi.

of the judgment which calls for money damages against them as joint tort-feasors. It was the common-law rule that the reversal of a judgment against several joint tort-feasors, and the granting of a new trial for error committed to the prejudice of one defendant, necessitated a reversal of the judgment and the granting of a new trial as to all of the defendants. This rule, however, has been materially modified, if not entirely superseded, by the statutory rule in force in this jurisdiction. It is now the statutory rule in this state that, if a judgment be given against several defendants who have been sued as joint tort-feasors, the judgment, if found to be erroneous as to any one of the defendants, may be vacated as to that one only, and be continued in full force and effect as to the remaining defendants who have not appealed. Code Civ. Proc. §§ 578, 579; *Nichols v. Dunphy*, 58 Cal. 605; *Cole v. Roebing Construction Co.*, 156 Cal. 443, 105 Pac. 255; *Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 151, 86 Pac. 178; *Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 116 Pac. 513.

[4] Incidentally the point is made upon the motion to dismiss that the notice of intention to move for a new trial was ineffectual, because the intention, as stated, was "to move the above-entitled court to vacate the judgment entered in the above-entitled matter, and to grant a new trial in said cause." It is the plaintiff's contention that, inasmuch as the proceedings leading up to a new trial are initiated only by a motion to set aside the decision (Code Civ. Proc. § 657), the notice of intention should have been "to vacate and set aside the decision." This point is without merit. The language of the notice of intention in the present case is identical with the language employed in the notice of intention given in the case of *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957. There the court, in effect, held that, although the notice of intention did not in terms refer to the decision sought to be vacated, nevertheless the language employed effectively notified the prevailing party of the intention to move for a new trial, which, if granted, necessarily would vacate the decision. This was held to be sufficient; and upon the authority of the case cited it must be held that the notice of intention in the present case was in all respects legally sufficient. See, also, *Hoover v. Wolfe*, 167 Cal. 337, 139 Pac. 794.

It follows from what has been said that the motion to dismiss must be denied.

[5] The judgment appealed from is assailed upon the ground that the evidence does not support some of the findings of fact made by the trial court, and also upon the ground that, in so far as the remaining findings are supported by evidence, such findings do not in turn support and warrant the judgment rendered and entered against the defendants Tognazzini and Swiss-American Bank.

We are satisfied that this contention must be sustained. The gist of plaintiff's cause of action, in so far as it controls the judgment for damages, was, in effect, that the defendants Antonio and Rose Fodera, Rauer, Tognazzini, and Shawhan had unlawfully and wrongfully conspired to slander plaintiff's title to the property described in the complaint, and that, in pursuance of such conspiracy, each of said defendants, with the knowledge and consent of one another, falsely represented and pretended, by the means and methods hereinbefore narrated, that they had some claim upon the plaintiff's lands. It will be noted in passing that plaintiff's complaint did not expressly charge the defendant Swiss-American Bank with knowledge of or participation in the conspiracy complained of. The defendants Tognazzini and the bank having disclaimed any right, title, or interest in the lands in controversy, the only issue as against them remaining to be determined was that of the alleged slander of plain-

tiff's title. *Walden v. Peters*, 2 Rob. (La.) 331, 38 Am. Dec. 213; *Hewitt v. Seaton*, 14 La. 159.

Upon the issue of slander of title there was offered in evidence upon behalf of the plaintiff the deposition of the defendant Tognazzini, which, in effect, was as follows: At the time the deed in controversy was executed the defendant Antonio Fodera was indebted to the Swiss-American Bank, of which institution the defendant Tognazzini was manager, in the sum of approximately \$14,000. This indebtedness was variously, but insufficiently, secured. Prior to the execution of the deed Fodera had been pressed for payment and threatened with foreclosure proceedings by the bank. Fodera was unable to meet the demand of the bank, and thereupon, in consideration of the making of the deed in controversy an extension of time was granted him in which to pay his indebtedness. Tognazzini, upon behalf of and as trustee for the bank, accepted the deed as additional security, solely upon the representation of Fodera that he had an interest in the property conveyed. Subsequent to the institution of this action Fodera paid his indebtedness to the defendant bank, whereupon Tognazzini executed to Fodera a quitclaim deed to the land in question, and thereupon filed in the action an absolute and unequivocal disclaimer of any right, title, or interest in the lands of plaintiff.

Aside from the mere fact of the execution and acceptance of the deed referred to, the plaintiff apparently relied on the testimony of Tognazzini to support the claim that the bank and Tognazzini had conspired with the remaining defendants to slander plaintiff's title. At any rate, the record before us is barren of any other evidence which tends even remotely to connect Tognazzini and the bank with the conception and consummation of the conspiracy alleged and established against the other defendants. The testimony of Tognazzini as detailed in his deposition was not disputed, and in keeping therewith the trial court found: "That the defendant Antonio Fodera * * * represented to said defendants W. D. Shawhan and T. C. Tognazzini that he (said Fodera) was interested in the property, * * * and that the same was held in trust by the said M. K. & T. Oil Co. and D. M. De Long for him, the said Antonio Fodera; that thereupon said Antonio Fodera and wife * * * executed the deed as additional security for the payment of the indebtedness then due and owing from said Antonio Fodera and Rose Fodera, his wife, to said Swiss-American Bank; * * * that said T. C. Tognazzini * * * relied solely on the uncertain and vague representations of Antonio Fodera without making any investigation as to the truth of the statements of said Antonio Fodera; that at the time of taking said deed said T. C. Tognazzini and the Swiss-American Bank had no actual knowledge that plaintiff was the owner of said real property."

Standing alone, this finding will not support the judgment for damages for slander of title rendered against defendants Tognazzini and Swiss-American Bank. The finding of the trial court undoubtedly was sufficient to convict the designated defendants of carelessness in consummating a business transaction involving the title to real property; but neither the finding referred to nor the evidence upon which it was based justifies the conclusion that the deed in controversy was knowingly accepted in furtherance of a conspiracy to slander plaintiff's title to the property described in the deed. "Slander of title," as recognized by the law, may be defined to be defamation of title to property, real or personal, by one who falsely and maliciously disparages the title thereto, and thereby causes the owner thereof some special pecuniary loss or damage. *Newhall on Slander of Title*, p. 203; *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151. Admittedly, under this definition, slander of title

may be committed by maliciously clouding the title to real property and causing damage to the owner thereof by the execution, willful acceptance, and malicious recordation of a deed which falsely declares the title of the property involved to be in a person other than the true owner. In short, an action for slander of title may be based upon defamatory words contained and published in an executed deed. It is essential, however, to the maintenance of such an action that the party claiming to be aggrieved by an alleged slanderous disparagement of his title should show, among other things, not only that the statements complained of were false, but that they were maliciously made with the intent to defame, and thereby disparage, the title involved. In other words, malice, express or implied, in the making of slanderous statements, is an essential ingredient of a cause of action for damages for slander of title, without proof of which such action must fail. *Chesebro v. Powers*, 78 Mich. 472, 44 N. W. 290; *Harrison v. Howe*, 109 Mich. 476, 67 N. W. 527; *Walkley v. Bostwick*, 49 Mich. 374, 13 N. W. 780; *May v. Anderson*, 14 Ind. App. 251, 42 N. E. 946; *Cardon v. McConnell*, 120 N. C. 461, 27 S. E. 109; *Hopkins v. Drowne*, 21 R. I. 20, 41 Atl. 567; *Hines v. Lumpkin*, 19 Tex. Civ. App. 556, 47 S. W. 818; *Malachy v. Soper*, 3 Bing. N. C. [Eng.] 371; *Walden v. Peters*, supra; *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; *Newell on Defamation*, 206, 207, 322; *Towns. Lib. & S.* 138; *Odgers, Lib. & S.* (5th Ed.) pp. 80, 84; *Folkard on Slander & Libel* (7th Ed.) p. 55.

In the present case the plaintiff undoubtedly established his claim of clear title to the lands in controversy; but, aside from this, the showing made by him, and the finding of fact above referred to, meet the requirements of the law of the case, in so far as the issue of damages for slander of title was determined against the appealing defendants, in the particulars only that the slanderous statements uttered and published in the deed relied upon as a cause of action for damages were false and proximately provocative of damage to the plaintiff. It was neither shown in evidence nor found in the finding referred to that the designated defendants were actuated by malicious motives when they accepted and published the deed from the *Foderas*. It was, as has been shown, essential to the plaintiff's cause of action for damages that such malice be proved and found; and the burden of proving malice, express or implied, rested upon the plaintiff. True, malice may be fairly implied in any given case from proof of the falsity of an uttered or published defamation when the attendant circumstances convincingly point to the inference that the party charged with the slander of title was not in good faith endeavoring to uphold or assert a supposedly valid claim of title in himself. Such, however, is not the case here. The particular finding of fact referred to is utterly silent as to whether or not the acceptance and recordation of the deed in controversy were prompted by malice, express or implied; and this is so in all likelihood because the undisputed evidence upon the whole case not only fails to show, either expressly or by fair implication, that malice was the motive which induced the defamation complained of, but, to the contrary, compels the conclusion that the appealing defendants were actuated solely by an honest, but mistaken, belief that the lands described in the deed in question had been legitimately conveyed to them. This being so, there is no escape from the conclusion that the facts found by the trial court in the finding referred to fall short of constituting a wrong which, in contemplation of law, will support the judgment rendered against the appealing defendants upon the theory that they had committed an actionable slander of plaintiff's

title. *Odgers, Libel & Slander* (5th Ed.) pp. 80-84; *Butts v. Long*, 106 Mo. App. 313, 80 S. W. 312; *Walkley v. Bostwick*, 49 Mich. 374, 13 N. W. 780.

Other findings of fact were to the effect: (1) That the defendants *Tognazzini* and *Swiss-American Bank* had conspired with *Fodera* to incumber plaintiff's title, and, in pursuance of such conspiracy, accepted the deed in controversy and placed the same on record; (2) that said defendants and each of them never had any reason to claim that *Fodera* had any interest in the plaintiff's lands; (3) that said defendants did not act in good faith in taking the deed from *Fodera*.

These findings are absolutely unsupported by any direct evidence; and, as we have already indicated, it cannot be fairly said that the circumstances of the transaction as revealed by the evidence upon the whole case show, or tend to show, that the deed in controversy was accepted and recorded by the defendant *Tognazzini* for any purpose save the one testified to by him. In short, the only direct evidence upon this phase of the case was contained in the deposition of *Tognazzini*, and that evidence, standing as it does uncontradicted and unimpeached by the admitted facts and circumstances of the transaction, compels, we think, the conclusion that, although not entirely free from fault, the appealing defendants nevertheless, in good faith and without malice, asserted what they honestly believed to be a valid claim of title to plaintiff's property.

"The motion to dismiss the appeal is denied. The judgment, in so far as it purports to assess damages against the defendants, *Tognazzini* and the *Swiss-American Bank*, is reversed. The order denying the motion of said defendants for a new trial is affirmed as to all issues relative to the title to the land described in the complaint, and in all other respects is reversed."

170 Cal. 55

SINNIGE v. OSWALD et al. (L. A. 4049.)

(Supreme Court of California. April 15, 1915.)

1. LANDLORD AND TENANT ⇐211 — ACCEPTANCE OF LOWER RENT—EFFECT ON LEASE.

The acceptance by a landlord of a lower rent than that specified in the lease is not sufficient to establish a change in the lease so as to affect the amount of rent due in the future, although working a settlement of rent accruing during the period for which the lower amount was accepted.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 840-845; Dec. Dig. ⇐211.]

2. GUARANTY ⇐87—ADMISSIONS — EXECUTION OF GUARANTY BY CORPORATION—AUTHORITY OF OFFICER—PROOF.

In an action against a furniture corporation which had guaranteed payment of rent of an apartment house to the amount of \$1,000, where the attorney for the defendant admitted the signature of the guaranty was that of the president of the corporation, while the answer admitted that it guaranteed the payment of rent up to the amount of \$1,000, objection, to the admission of the guaranty in evidence, on the ground that no authority of the president to execute such a contract had been shown, was properly overruled.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 101; Dec. Dig. ⇐87.]

3. GUARANTY ⇐42—GUARANTY OF RENT — CONSTRUCTION.

In an action against defendant furniture corporation on its guaranty of the rent of an apartment house up to \$1,000, where the lease covered a term of 10 years calling for monthly

payments during that period, the total aggregating over \$40,000, the expression of the guaranty "up to the amount of \$1,000" was designed to fix a limit to the guarantor's total liability, meaning that it did not bind itself beyond such sum, but did not mean that its liability under such guaranty was to cease as soon as rent amounting to \$1,000 had been paid under the lease by the lessee.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 58; Dec. Dig. ¶42.]

4. APPEAL AND ERROR ¶195 — SUPPLEMENTAL COMPLAINT—WAIVER OF DEFECT—OBJECTION.

In an action for rent, where a supplemental complaint was filed by leave of court, seeking rent accruing since suit brought, and defendants answered such complaint on the merits, going to trial without objection to the presentation of evidence to sustain its allegations, they waived, and could not raise after judgment the objection that the subject-matter of such supplemental complaint was not properly brought into the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1149; Dec. Dig. ¶195.]

Department 1. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Harry H. Sinnige against Helen Agatha Oswald and another. Judgment for plaintiff, and, from order denying their motion for new trial, defendants appeal. Affirmed.

L. L. Boone and John J. Brennan, both of San Diego, for appellants. Hoff & Chatterson, of San Diego, for respondent.

SLOSS, J. This cause comes here on an order for a rehearing after decision by the District Court of Appeal for the Second Appellate District. That court filed an opinion which states the essential facts, and makes satisfactory disposition of most of the legal questions presented. From that opinion we quote:

"The plaintiff brought this action to recover judgment for several installments of rent claimed to be due from the defendant Helen Agatha Oswald as lessee of an apartment house. Plaintiff owns the property as grantee from the lessors and is also assignee of the lessors' right under the lease. Judgment was obtained against Mrs. Oswald for the full amount of rent claimed, and against defendant Frevert-Bledsoe Furniture Company for \$1,000, claimed under a written guaranty of the payment of the rent to the extent of \$1,000. The defendants appeal from the judgment and from an order denying their motion for a new trial.

"The lease was for 10 years and was made in March, 1912, while the house was in course of construction, and the rent began on May 1, 1912, at the specified rate of \$347 per month. Rent in excess of \$1,000 was paid before the time when the installments became due that are involved in this action. Rent for May, June, and July, 1912, was paid at the \$347 rate. Thereafter rent was paid to the lessors and subsequently to the plaintiff at the rate of \$317 per month, to and including April, 1913. Defendants claim that the lease was changed, by reduction of the rent, for the entire term, bringing it down to \$317 per month. There was not at any time a written modification of the terms, but the smaller amount was accepted from time

to time and receipts in full were given for the installments then paid.

"The complaint herein was filed on June 11, 1913, for the sum of \$347, as rent of May, 1913, and for the further sum of \$347 as rent of June, 1913. On October 10, 1913, a so-called supplemental complaint was filed demanding the same sum of \$347 as July rent. The only demurrers were to the original complaint and were overruled. The action was tried upon the first complaint and the supplemental complaint and the answers of the defendants.

[1] "The finding that there was no change in the terms of the lease in the alleged particular of reducing the rent is sustained by the evidence. Concessions of the kind that were shown by the defendants, when supported by a consideration, are valid to the extent that a lower rent has been tendered and accepted as satisfaction in full of the installments thus paid. They are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent where no such change of terms has been made in writing. Estate of McDougald, 146 Cal. 196, 199, 79 Pac. 875.

[2] "The contract of guaranty attached to the lease reads as follows:

"In consideration of, and as an inducement to, said lessors' leasing the property described in the foregoing lease to said lessee, the Frevert-Bledsoe Furniture Company, a corporation, hereby agrees to and does assign and transfer to said lessors its interest in the furniture purchased or that may be hereafter purchased by said lessee from said corporation, for use in said building hereinbefore described, and which may be placed therein by said lessee, to the extent and amount of the payment or payments which have been or which shall hereafter be made thereon by her to said company; and the said corporation hereby agrees to and does guarantee to said lessors the payment of the rent in said lease specified at the times and in the manner therein stated up to the amount of One Thousand Dollars (\$1,000), which said guarantee is to hold good and to be in full force and effect until said furniture is fully paid for and until said lessee executes and delivers to said lessors the chattel mortgage provided for in the foregoing lease, contemporaneously with and as a part of which lease this agreement is executed.

"Frevert-Bledsoe Furniture Co.,

"By W. L. Frevert, President."

"When this document was offered in evidence, counsel for the defendant furniture company admitted that the signature was that of W. L. Frevert, and that he at the time of signing was president of defendant corporation, but objected to the admission of the instrument in evidence upon the ground that no authority had been shown of the president of the company to execute a contract of guaranty, and particularly this contract of guaranty. The answer of this defendant denied that it guaranteed the payment of said rent at the time or in the manner stated in said lease, or at all, 'except that the lessors should be paid up to the amount of \$1,000,' and further alleged 'that said agreement made by it was subsequent to the making of said lease and was made without consideration.' In view of these admissions, the court did not err in overruling the objection above stated."

We adopt the foregoing portions of the opinion of the District Court of Appeal as our opinion on the points thus discussed. Our views on the remaining questions are as follows:

[3] The defendant furniture company contends that its contract of guaranty did not extend beyond the sum of \$1,000 agreed to be paid by the principal as rent under the

lease; and that, since the evidence shows payment by the lessee of more than \$1,000 of such rental, it follows that the guaranty is fully satisfied.

This contention cannot, we think, be sustained. The lease covered a term of 10 years, and contemplated monthly payments during that period. The purpose of the guaranty was to provide the lessor with security for these successive payments of rent. The total rental aggregated over \$40,000, and the words "up to the amount of \$1,000" were designed to fix a limit to the guarantor's total liability. The guarantor was not binding itself beyond \$1,000, but up to that point it guaranteed "the payment of the rent in said lease specified." The rent guaranteed was the rent for the entire period, not merely for the first three months. This, we think, would be the fair construction of the instrument, if the words just quoted stood alone. The correctness of the interpretation is the more apparent upon a consideration of the further provision that the guaranty is to hold good until the furniture is fully paid for and a chattel mortgage thereof delivered to the lessor. It is perfectly plain from the record that the parties did not contemplate that the furniture would be fully paid for and the mortgage executed before the lapse of many months. Until this was done the lessor was to have the guaranty as security. It certainly was not intended that, if the tenant paid rent for the first three months, the lessor should be without any security, whether by way of mortgage or of guaranty, for the balance of the term. The fair meaning of the instrument, taken as a whole, is that the lessor is to have the security of the \$1,000 guaranty, until it can be replaced by a chattel mortgage on the furniture.

[4] A supplemental complaint was filed by leave of court, asking recovery of rent for the third month (July), accrued after the commencement of the action. Perhaps the subject-matter was not properly brought into the case, but the defendants answered the supplemental complaint on the merits, and went to trial without making any objection to the presentation of evidence offered to sustain the allegations of the pleadings. They cannot be permitted to raise the objection for the first time after judgment. *Groom v. Bangs*, 153 Cal. 456, 96 Pac. 503.

The judgment includes rents for the entire month of July, 1913. It appears that the lessor demanded and the tenant surrendered possession of the premises about the middle of that month. The appellants contend that there should be a proportionate abatement of the July rent. The respondent has stipulated that such abatement may be allowed, and we need not therefore pass upon the correctness of the contention thus made. Pursuant to this stipulation the judgment against both the lessee, Mrs. Oswald, and Frevert-Bledsoe

Furniture Company, the guarantor, should be reduced to \$867.50.

It is ordered that the judgment be modified as above indicated, and that as so modified it stand affirmed.

The order denying a new trial is affirmed. The appellants are not to recover costs.

SHAW, J.; LAWLOR, J., concur.

(170 Cal. 60)

In re MOORE'S ESTATE. (L. A. 3978.)

(Supreme Court of California. April 15, 1915.
Rehearing Denied May 13, 1915.)

EXECUTORS AND ADMINISTRATORS $\S$ 184—ALLOWANCE TO SURVIVING WIFE—STATUTES.

Under Code Civ. Proc. $\S$ 1464, giving a widow a reasonable provision for her support until letters of administration are granted and the inventory of her husband's estate is returned, section 1466, declaring that if the property of the estate set apart, such as household furniture and homestead, is insufficient, the court may make a reasonable allowance out of the estate for the widow's maintenance during its settlement, and section 1467, declaring such allowance may, in the court's discretion, be effective from the death of decedent, a widow was entitled to an allowance during the entire period of widowhood, which might be retroactive and was not lost by her failure to apply for it; and, where there was no property to pay the allowance, she might resort to the statutory provision in order to obtain credit and necessities, and her remarriage before obtaining an order for an allowance did not deprive her of her right to apply for and secure the allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. $\S\S$ 694, 702, 704; Dec. Dig. $\S$ 184.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Phillip K. Moore, deceased. From an order on settlement of the administrator's account allowing an item of credit for money paid to the widow for support during widowhood, certain parties appeal. Affirmed.

Waldo M. York and Harry M. Irwin, both of Los Angeles, for appellants. Charles Lantz, of Los Angeles, for respondent.

SHAW, J. The decedent Moore died, according to the evidence, on February 4, 1910. His widow was appointed administratrix of his estate, and qualified and continued to act as administratrix until February 23, 1912, when she resigned. She remarried a Mr. Fraser on October 9, 1911, and after that marriage, but on the same day, she applied for the order in controversy here for the payment of an allowance out of the estate of Moore for her support during the period of her widowhood, that is, for the period elapsing from Moore's death in 1910 to the date of her remarriage in 1911. The court made an order granting her an allowance of \$60 a month, payable out of the estate of the decedent, amounting to \$1,210. Upon her resig-

nation Mr. Lantz was appointed administrator of the estate. She filed an account of her administration, and that account was settled in March, 1912. It made no mention whatever of the order for a family allowance. It shows, however, that no funds were on hand at the time out of which any allowance could have been paid. Subsequently Mr. Lantz filed his account of his administration, claiming credit for \$1,210 paid to the widow in satisfaction of the allowance. That item was objected to by the other parties interested in the estate. The court overruled the objection and settled the account, allowing the item. From that order this appeal is taken.

Section 1464 of the Code of Civil Procedure provides that on the husband's death the widow is entitled to a reasonable provision for her support until letters of administration are granted and the inventory is returned. Section 1466 proceeds to declare that if the property of the estate set apart, meaning the household furniture and homestead, is insufficient for her support, the court must make a reasonable allowance out of the estate for her maintenance during the settlement of the estate. Section 1467 further declares that:

"Such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent."

It is clear from these provisions that the widow is entitled to an allowance, which may be retroactive, covering the period from the date of the death of the decedent. She does not lose her right to an allowance by failing to apply for it. Under any reasonable construction of these sections she is entitled to it during the entire period of widowhood. If she had made her application the day before her marriage and had obtained it, we do not presume it would be contended that she was not entitled to the money thereby allowed. The fact that she waited until after her marriage before making the application does not prevent her from receiving the allowance. The fact of her marriage did not deprive her of the right to apply for and secure the allowance. This right is not a vested right in the property of the decedent; it is a mere right to prefer a charge, and the allowance may or may not be granted. She may or may not enforce it. But if she gets the order before the estate is closed, she is not deprived of the right by a remarriage before obtaining the order.

The cases relating to homesteads are not applicable to this question. The homestead, as counsel for respondent has said, looks to the future enjoyment, and is made for the purpose of securing to the widow a place in which to live during the time she may require it. She loses that right when she marries some one else. Therefore, when she does not make application until after she marries, the right is gone. The same is not true in case

of a family allowance. This case is an illustration of it. There was no property to pay a family allowance, yet under the policy of the law the estate was bound to support her so long as she remained the widow of the decedent and until the close of the administration. The necessity for her support existed all the time, and she would be entitled to resort to the statutory provision in order to obtain credit and secure necessities. The case of *Bacon v. Perkins*, 100 Mich. 183, 58 N. W. 835, is to the same effect. In that case the statute appears to be the same, in effect, as ours, and the case is authority for the conclusion here reached.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

170 Cal. 33

TROPICO LAND & IMPROVEMENT CO. v. LAMBOURN. (L. A. 3320.)

(Supreme Court of California. April 10, 1915.
Rehearing Denied May 10, 1915.)

1. COVENANTS ⇨46, 104—BREACH OF WARRANTY—"COVENANT OF WARRANTY"—REMEDY.

A covenant of warranty, in a deed purporting to convey title, is an undertaking by the grantor that on the failure of the title which the deed purports to convey, either for the whole estate or for a part only, by the setting up of the superior title, he will compensate in money the grantee for a loss sustained, and the remedy for a breach of warranty is limited to an action for damages, and a suit for specific performance of the warranty is not maintainable.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 46, 170; Dec. Dig. ⇨46, 104.

For other definitions, see *Words and Phrases*, First and Second Series, *Covenant of Warranty*.]

2. SPECIFIC PERFORMANCE ⇨12 — ACTION MAINTAINABLE.

The court will not render a decree of specific performance where it is unable to compel performance of the decree.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 26-28, 37; Dec. Dig. ⇨12.]

3. EXECUTORS AND ADMINISTRATORS ⇨224—ESTABLISHMENT OF CLAIMS—CONTINGENT CLAIMS.

A claim contingent on a breach of warranty by a grantor since deceased must be allowed and established as a contingent claim against the grantor's estate, and, unless properly presented, an action for breach of warranty is not maintainable under Code Civ. Proc. § 1500 prohibiting the holder of any claim against an estate to maintain any action thereon unless the claim is first presented.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 768-788; Dec. Dig. ⇨224.]

4. EXECUTORS AND ADMINISTRATORS ⇨225—PRESENTATION OF CLAIMS—TIME LIMIT—STATUTORY PROVISIONS.

A claimant, to bring himself within the exception in Code Civ. Proc. § 1493, providing that all claims must be presented within the time limited in the notice and any claim not so presented is barred, provided that when it is made to appear by the affidavit of the claimant

that he had no notice by reason of being out of the state, the claim may be presented before decree of distribution is entered, must show, by affidavit, that by reason of being out of the state he had no notice of the publication of notice to creditors, but the proviso as to the showing by affidavit relates only to the method by which a claimant must present a prima facie right to avail himself of the benefit of the proviso.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 789-800, 802, 803, 805; Dec. Dig. ⚡225.]

5. EXECUTORS AND ADMINISTRATORS ⚡221—PRESENTATION OF CLAIMS—TIME LIMIT—STATUTORY PROVISIONS.

Where a claimant against a decedent's estate did not present his claim within the prescribed time, and the court refused to allow the filing of the claim on the ground that claimant was a nonresident and had no notice of the publication of notice to creditors, the claim was, in effect, denied, and the claimant, bringing an action thereon, must not only establish the claim, but also show that he was within the proviso in Code Civ. Proc. § 1493, providing that claims not presented within the time limited in the notice shall be barred, provided that, when it is made to appear by affidavit that claimant had no notice by reason of being out of the state, the claim may be presented at any time before decree of distribution.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. ⚡221.]

6. EXECUTORS AND ADMINISTRATORS ⚡225—PRESENTATION OF CLAIMS—TIME FOR PRESENTATION—EXCEPTIONS—FOREIGN CORPORATIONS.

A foreign corporation, organized to do business in the state and transacting all its business in the state and holding in the state meetings of its board of directors, and having officers residing in the state, is within the state, and not within the proviso in Code Civ. Proc. § 1493, requiring the presentation of claims within the time limited in the notice, provided that, when the claimant had no notice, by reason of being out of the state, the claim may be presented at any time before decree of distribution.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 789-800, 802, 803, 805; Dec. Dig. ⚡225.]

7. TRIAL ⚡397—FINDINGS—SUFFICIENCY.

Where a finding, sustained by evidence, defeats the action, failure to find on any other issue in the case is immaterial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. ⚡397.]

8. ACTION ⚡45—JOINDER OF ACTIONS—STATUTORY PROVISIONS.

An action against an executor of a deceased grantor for breach of the grantor's warranty in a deed and an action against devisees of the land conveyed cannot be joined, within Code Civ. Proc. § 427, defining what actions may be joined.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 378-383, 385-448; Dec. Dig. ⚡45.]

9. ACTION ⚡50—MISJOINDER OF PARTIES.

An action against an executor of a deceased grantor for breach of the grantor's warranty in a deed and an action against devisees of the land conveyed cannot be joined because of misjoinder of parties defendant, because of the absence of unity of interest in the parties.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. ⚡50.]

Angellotti, C. J., and Sloss, J., dissenting in part.

In Bank. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Tropico Land & Improvement Company against Lucie M. Lambourn, executrix of the last will and testament of Susan Glassell Mitchell, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

Tom C. Thornton, Tobias R. Archer, and Denis & Loewenthal, all of Los Angeles, for appellant. Oscar C. Mueller and Horace S. Wilson, both of Los Angeles, for respondent.

LORIGAN, J. This appeal was originally before the District Court of Appeal for the Second appellate district and transferred here on account of the inability of the justices of the district court to concur in a judgment. The opinions of the several justices of that court accompany the transfer. The main opinion was written by Mr. Justice SIIAW, and states the facts and points involved on the appeal. His conclusion on one of these points with which his Associates appear to have agreed, while entertaining a different view on another, is as follows:

"The facts appearing without dispute so far as pertinent to a consideration of the case, as shown by the first count of the complaint, which contains two counts, are as follows: Plaintiff is a corporation created under the laws of Arizona, and defendant is the executrix of the last will and testament of Susan Glassell Mitchell, who died December 31, 1907. On August 30, 1880, Andrew Glassell, who was the owner in fee thereof, executed a deed whereby he conveyed to his daughter, Susan Glassell Mitchell, the real estate in said deed described, 'for and during her natural life remainder to the issue of her body living at the time of her decease, forever, failing such issue of her body remainder to said E. H. Mitchell [her husband] for and during his natural life and remainder equally to the heirs of the party of the first part [the grantor] forever, and to the heirs of said H. M. Mitchell.' The grantee, Susan Glassell Mitchell, entered upon and continued in possession of the land so conveyed until October 28, 1905, when, in consideration of \$52,500 paid her by J. B. Treadwell, she conveyed the same to him, and he and plaintiff corporation, to which he conveyed 106 acres of the land, entered upon and continued in possession thereof down to the bringing of this action. This deed so executed by Mrs. Mitchell to Treadwell contained a covenant of warranty made by the grantor, as follows: 'To have and to hold the same to the said J. B. Treadwell, his heirs and assigns forever; and the said first party [Susan Glassell Mitchell] does hereby covenant with the said J. B. Treadwell and his legal representatives that the said real estate is free from all incumbrances, and that she will and her heirs, executors and administrators shall warrant and defend the same to the said J. B. Treadwell, his heirs and assigns forever, against the just and lawful claims and demands of all persons whomsoever.' At the time Glassell conveyed the land to Mrs. Mitchell she had living two daughters, Lucie M. Lambourn and Eileen G. Bedford, and no other children. These two daughters, by deed duly executed, conveyed to their mother, Susan Glassell Mitchell, such interest and title as they had acquired in the land under and by virtue of the deed from Andrew Glassell to their mother, thus vesting in Treadwell the title and interest in the land, not only of Susan Glassell

Mitchell, but also that of her two children. Prior to the death of decedent, her daughter Eileen died, leaving surviving her a minor daughter, Lucile Richmond Bedford, who was born prior to the execution of the deed by Susan Glassell Mitchell to Treadwell. Lucie M. Lambourn as such executrix, in pursuance of an order of court, caused a notice to creditors of said decedent to be duly published, requiring all persons having claims against said deceased to present them, with vouchers, to the executrix for allowance within 10 months after the first publication of said notice, which was made on January 25, 1909, and thereafter duly published as required by law. On April 9, 1910, Lucile Richmond Bedford, then a minor, by her guardian commenced an action in the superior court of Los Angeles county against plaintiff and others, whereby she sought to have entered a decree adjudging her to be the owner of an undivided one-half of said premises so conveyed by Susan Glassell Mitchell to Treadwell. On April 14, 1910, plaintiff filed in the superior court of Los Angeles county a petition entitled *In the Matter of the Estate of said Susan Glassell Mitchell, Deceased*, wherein it asked for an order requiring the specific performance by Lucie M. Lambourn, as executrix, of the covenant of warranty so made by said decedent as contained in her said deed to J. B. Treadwell, claiming it was entitled to a conveyance from said executrix of all right, title, and interest of said Lucile Richmond Bedford in and to the property so conveyed to it by Treadwell, and wherein it alleged that said Lucile Richmond Bedford was willing to sell and convey her interest to said executrix at a fair valuation thereof, and alleging that said Lucile Richmond Bedford was ready, willing, and anxious to sell said property to said executrix at its reasonable market value, and that said executrix could, by paying the reasonable market value thereof, obtain a conveyance of such interest as Lucile Richmond Bedford had therein, which petition was, in August, 1910, by the court dismissed without prejudice to the rights of petitioner; that Lucile Richmond Bedford is willing and anxious to sell and convey her interest in the land to said executrix, or to any person whom she may nominate, for its reasonable market value, and said executrix can, by paying the reasonable value thereof, have the same conveyed to plaintiff. The value of the property of the estate of said Susan Glassell Mitchell, in excess of an amount sufficient to pay the claims against said estate other than under said covenant of warranty, was \$300,000, all of which, under the terms of the will of said Susan Glassell Mitchell, was to be distributed to Lucie M. Lambourn. The prayer of the complaint, based upon this count, was for a decree requiring the executrix to purchase and procure from Lucile Richmond Bedford all her right, title, and interest in and to the property conveyed by Treadwell to plaintiff at a fair valuation thereof and convey the same to plaintiff. A demurrer interposed to this count of the complaint was sustained upon the ground that it did not appear therefrom that such or any claim had been presented for allowance to the executrix, as required by statute, and also for want of facts alleged sufficient to entitle plaintiff to specific performance of the contract of warranty made by deceased.

[1] "The alleged cause of action for specific performance is based upon a breach of the warranty contained in the deed of Susan Glassell Mitchell. By no rule of interpretation can this covenant of warranty be construed as a contract whereby she agreed to acquire and convey, or cause the owner thereof to convey, an outstanding paramount title to plaintiff. Her deed purported to convey the title, and the covenant was an assurance of title in fee to the land so conveyed to the grantee, was an agreement on her part to defend the same against the lawful

claims of all persons asserting ownership thereof. 'The covenant of warranty in a deed conveying land, or any interest in land, is an undertaking by the warrantor that on the failure of the title which the deed purports to convey, either for the whole estate or for a part only, by setting up a superior title, he will make compensation in money, for the loss sustained by such failure of title.' *King v. Kerr's Adm'rs*, 5 Ohio, 155, 22 Am. Dec. 777. And in *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456, it is said: 'It is well settled that the rule of damages where there has been an actual loss of the premises, is the purchase money and interest.' This rule, 'that the measure of damages is the consideration paid and interest to the date of the judgment of eviction,' says the author of *Pingrey on Real Property* (section 1461), prevails in nearly all the states of the Union. The land, by reason of its enhanced value due to accidental causes, might be worth several times the purchase price paid therefor, and a decree adjudging that defendant should acquire the outstanding title of Lucile Richmond Bedford, assuming she was willing to sell it at its present market value and convey the same to plaintiff, would be wholly unwarranted by the facts stated. The covenant of warranty is not a contract upon which such right can be predicated but merely a promise to make compensation in money for loss due to an eviction. The remedy in such case is to enforce the obligation assumed by the covenantor in an action at law for the damages sustained by reason of the breach of the covenant.

[2] "Moreover the decree asked for, if granted, is one which the court could not enforce. True, it is alleged that Lucile Richmond Bedford is willing to sell her interest at its market value; nevertheless, being under no obligation so to do, she might refuse to sell, in which case the court would be powerless to enforce its decree. The first count of the complaint is wholly wanting in stating facts upon which the court could decree specific performance as prayed for, and hence the court did not err in sustaining the demurrer thereto."

We are satisfied that the conclusion reached in the part of the opinion just quoted is correct, and adopt it as properly disposing of the point on this appeal there determined.

By the second count of the complaint, plaintiff adopted all the allegations of the first count and, in addition thereto, alleged that in April, 1910, after the expiration of 10 months from the first publication of notice to creditors, and after the commencement of said action by Lucile Richmond Bedford, and before the distribution of the estate, it presented to the executrix a verified claim in due form, shown to be a contingent claim, based upon said covenant of warranty, and presented therewith affidavits made by the president and secretary of plaintiff, which affidavits in substance are as follows: That plaintiff prior to October 14, 1905, was a corporation created and existing under and by virtue of the laws of the territory of Arizona, having its office and principal place of business in the city of Phoenix, Ariz., of which territory it was a resident, and at all times prior to April 11, 1910, it had been out of the state of California; that it had no notice or knowledge, actual or otherwise, of the probating of the will of Susan Glassell Mitchell, or of the publication of any notice to creditors in the matter of said

estate, or the appointment of an executrix thereof, until April 8, 1910; that by reason of the fact that said corporation is, and at all of the times mentioned has been, out of the state of California and a resident of the territory of Arizona and a nonresident of California, it had no knowledge or notice of the publication of the notice to file claims against the said estate, and for that reason its claim was not presented to the executrix of said estate for allowance as required by the statute. These affidavits, it was stated therein, were made for the purpose of obtaining permission to present said claim to the executrix of said estate. It was further alleged that on August 2, 1910, the superior court after due proceedings to that end, rejected said claim. Upon this count of the complaint plaintiff prayed for judgment establishing said claim as a good and valid claim against the estate of said Susan Glassell Mitchell, deceased. Section 1493 of the Code of Civil Procedure provides:

"All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court, or a judge thereof, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered."

In presenting its claim for allowance in the probate proceeding it was the purpose of appellant to bring itself within the exception provided by the above quoted section. Upon the trial the court found that plaintiff did, by petition, on April 13, 1910, apply to the superior court for permission to present its said contingent claim to the executrix for allowance, which application was supported by the affidavits set forth in the complaint, and the same was by the court denied; that the averments contained in the affidavits, to the effect that plaintiff at all the times therein mentioned was out of the state of California and had no knowledge or notice of the publication of notice to creditors of said estate, were untrue; that plaintiff's claim was never at any time presented for allowance to the executrix of the estate; and "that the second cause of action set forth in plaintiff's complaint is barred by the provisions of section 1493 of the Code of Civil Procedure of the state of California"—and as a conclusion of law from the foregoing finding, found that the cause of action was barred by said section of the Code, and by reason whereof plaintiff was not entitled to have its claim established against the estate of said decedent. It was with reference to the correctness of this finding and the conclusion of the court thereon that the judges of the District Court of Appeal disagreed.

[3] The claim which the appellant presented originally for allowance by the court in the matter of the estate of the deceased being based upon the covenant of warranty re-

ferred to therein was contingent on a breach of the covenant, an event which might never occur, and the only way in which appellant could perpetuate its right to recover damages from the estate of the covenantor in case the breach should occur was by having it allowed and established as a contingent claim against the estate. *Verdier v. Roache*, 96 Cal. 467, 59 Pac. 480; *Maddock v. Russell*, 109 Cal. 417, 42 Pac. 139; *Barto v. Stewart*, 21 Wash. 605, 31 Pac. 554. Unless so presented no action could be maintained thereon. Section 1500, Code Civ. Proc.; *Burke v. Maguire*, 154 Cal. 462, 93 Pac. 21.

[4, 5] The claim of the appellant, not having been presented within the time limit provided in the notice to creditors for the presentation of claims against the estate, was barred unless the appellant was entitled to the benefit of the exception contained in section 1493. In order to bring itself within that exception, it was necessary for appellant, in the proceeding in the matter of such estate, to make it appear by its affidavit to the satisfaction of the court or judge thereof that by reason of being out of the state it had no notice of the publication of notice to creditors. This appellant undertook to do by presenting its affidavit as heretofore stated, but this right to present its claim was denied by the court. Properly treating this as a rejection of its claim, appellant brought this action to have such claim established against the estate. In its answer the respondent denied that the appellant was, as stated in its affidavit presented in the probate proceeding, out of the state during the time limit provided in the notice to creditors, but that on the contrary, appellant was at all such time in this state. On the theory that an issue of fact as to whether appellant was or was not out of the state was thus presented and to be treated as any other issue of fact, general evidence in support of the position of respondent was received by the court, and its finding that appellant was not out of the state, and its conclusion therefrom that the right of the appellant to present its claim was barred by the provisions of section 1493, was based upon such evidence. The contention of appellant is that the trial of the case on the theory that any such issue was involved, or that general evidence might be received by the court upon it, was erroneous; that the only question involved in the case, as far as the right of appellant to have its claim established against the estate in this action, was whether the affidavit filed in the probate court proceeding, and presented to the court there, sufficiently showed to the satisfaction of the court that appellant was within the benefit of the exception as being out of the state during the time limit for presenting claims, and that the sole and only evidence which should have been received and considered on that question was the affidavit itself of the claimant presented in the probate proceeding; that no other evidence

was proper or admissible. We cannot agree with this position of appellant. We do not think that any different rule applies in the matter of claims, permission to present which against an estate is applied for to the court or judge thereof under the exception, than applies to claims generally presented directly to the executor or administrator for allowance. While the law by virtue of the exception in section 1493 extends an advantage to claimants out of the state, it was not intended thereby to give them any superior advantage over other claimants, or to limit the power of the court as to its action with respect to such claims. All claims presented against an estate, whether inside or outside of the time limit, are required to be supported by affidavit setting forth certain facts. In the case of claims presented within the time limit neither the court nor judge nor the executor nor administrator of the estate is required, under any statement of facts in the affidavit, to allow the claim. It may be rejected, notwithstanding it may appear upon its face with its accompanying affidavit to be a valid claim. Certainly as to claims presented within the time limit and rejected, it would not be pretended in a suit subsequently brought to establish the claim, that the affidavit of facts stated therein would be any evidence in the matter. If the claim is rejected and a suit brought to establish it, the executor or administrator would be entitled to contest any fact set forth or relied on in the affidavit. The whole matter would be at large. There is no reason why any different rule should be applied to an application for leave to present a claim as coming within the exception to the statute which is denied, and a suit subsequently brought thereon. It is true that section 1493 provides that a claimant shall be entitled to the benefit of the exception where it is made to appear by his affidavit, to the satisfaction of the court or judge thereof, that he was out of the state during the time limit of the notice of publication. But we do not understand that the court or the judge in the probate proceeding is bound solely to a consideration of the affidavit.

This requirement as to the showing by affidavit of the claimant relates only to the method by which a claimant must present a prima facie right to avail himself of the benefit of the exception. It does not preclude the court from taking other evidence to satisfy itself whether the claimant, in fact, comes within the benefit of that exception. In our judgment the whole purpose of the section, as far as the exception in favor of absent claimants is concerned, is to give them simply an additional time beyond ordinary claimants to permit the presentation of claims which otherwise would be barred if the court, in the probate proceeding in which application for permission to do so is made, is satisfied it should be granted. Such claimants were not intended to be given any other or

greater rights than ordinary claimants, and should stand upon no different footing as to actions brought to establish claims, the right to present which as coming within the exception, is denied, than should such ordinary claimants. If permission to present the claim is given, and it is thereafter allowed by the executor or administrator and approved by the court in probate, it stands, as other allowed claims, a legal charge against the estate. If permission to present it against the estate is denied, that is equivalent to a rejection of the claim, and it then is in the same position as any other rejected claim, and must be established by an action at law in which the claimant must affirmatively establish all matters which it was essential for him to make proof of in the first instance to the judge or court to whom application was made to be permitted to present it against the estate. It is true that under the exception to section 1493 all that it relates to is the right to present a claim. The claim, if permission is granted to present it, is still to be presented to the executor or administrator and to the judge for allowance and approval. But we do not see that this affects the principle. If the permission is refused, this is the equivalent to a rejection of the claim. There is no provision in the law for any review of the action of the court respecting it, except in an action brought on it as a rejected claim. In such action we think, as we have stated, that in the matter of supporting or defeating its validity, it is subject to the same rules as apply to other rejected claims.

[6] Within this view the fact of whether the appellant was absent from the state when the publication of notice to creditors was made was properly a matter at issue in this action to establish the claim. All evidence which bore on that issue was relevant for consideration, and was not to be confined to a consideration solely of the affidavit of the claimant presented when it applied for permission to present its claim against the estate. The judgment was based, as we have said, upon a finding that the right of the appellant to present its claim was barred by section 1493; that is, that the appellant did not bring itself within the exception contained in that section because the evidence showed that it was not out of the state at the time of the publication of notice to creditors. There can be no question but that the evidence sustains this finding. The appellant sought to bring itself within the exception of the section because it was organized as an Arizona corporation with its principal place of business within that state. While this statement is true, it further appears, however, that long prior to and during the entire time that the notice to creditors was being published all the property of the corporation was within this state, all of its officers and agents were here, all of its business, and really the only business it transacted, was transacted in this state, and all the meetings of

the board of directors were held in this state. It is quite apparent, too, from the evidence, though the articles of incorporation were not introduced in evidence, that while the corporation was organized in Arizona it was so organized for the purpose of carrying on business in the state of California, which it did. While the residence of a corporation is within the state of its creation, it must, of course, be conceded that where comity of the laws of another state will permit of its doing so, it may operate entirely in such other state and there exercise all its franchise and functions. This is what this corporation was permitted to do under the laws of this state, and which it actually did and was doing when the publication of notice to creditors was running. All its officers and managing agents were residents of the state, and its active operations as a corporation were conducted exclusively in this state. In fact, as to this appellant corporation it is the only place where it had any active existence. When such foreign corporation accepts the privilege tendered it under our laws of doing business in this state and prosecutes that business here through its resident managing agent, it submits itself to the laws of this state, the jurisdiction of its courts, and is subject to the control and effect of its process. This is true as to process issued in suits instituted against such corporation in this state (section 411, Code Civ. Proc.), and it is equally true as to process generally. The publication of notice to creditors is statutory process, and when it has been given in compliance with the statute, as the proceeding under which it is given is one in rem, it is binding upon all the world except as to those who may be entitled to the benefit of the exception under section 1493. *MacGowan v. Jones*, 142 Cal. 593, 76 Pac. 503. This benefit is, however, only available to one who is out of the state during the time limit fixed in the notice to creditors. But a foreign corporation, operating here under the circumstances disclosed as to the operation of this appellant, is not out of the state, but within it while such time limit for the presentation of claims is running. Hence the benefit of the exception was not available to it, and its claim was barred by failure to present it within the time limit prescribed. In support of our conclusion that the appellant, though a foreign corporation, was, by reason of the facts recited, within the state and as embracing a more extended consideration of the subject, we cite *Lawrence v. Bailou*, 50 Cal. 258; *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180, 61 Pac. 99; *Thomas v. Wentworth Hotel Co.*, 158 Cal. 281, 110 Pac. 942, 139 Am. St. Rep. 120; *Pinney v. Nelson*, 183 U. S. 144, 22 Sup. Ct. 52, 46 L. Ed. 125; *Turcotte v. Yazoo R. R. Co.*, 101 Tenn. 102, 45 S. W. 1067, 40 L. R. A. 768, 70 Am. St. Rep. 661.

[7] Appellant challenges two other findings

of the court made in disposing of this second cause of action, and further claims that certain other issues were not found upon by the court. While it appears that the only material issue in said second cause of action was with reference to the claim filed by appellant against the estate, still in drafting its pleadings respecting it appellant incorporated by reference thereto certain allegations contained in the first cause of action, upon some of which the court made findings; as to others, it claimed it did not. We do not think the points made respecting the findings or want of findings have any merit. The controlling issue in the second cause of action was, as we have said, respecting the claim of appellant; the right to have it established as a claim against the estate. The finding of the court that the right of appellant to do so was barred by the statute disposed entirely of this second cause of action, and rendered it immaterial to find upon any other issues presented by the pleadings. *Buell v. Brown*, 131 Cal. 158, 63 Pac. 167; *Fogg v. Perris Irr. Dist.*, 154 Cal. 219, 97 Pac. 316. This rule would have applied to the issues upon which the court did make the findings complained of if it had failed to do so, as they were immaterial in view of the finding that the right to present its claim was barred. But as the court did make them and appellant challenges their sufficiency under the evidence, we have examined them, and are satisfied that the objections of appellant are groundless.

[8, 9] When the case was called for trial, plaintiff applied to the court for leave to file an amended and supplemental complaint, making Lucie M. Lambourn individually a party defendant therein, and showing that the entire assets of the estate, except \$5, amounting to upwards of \$225,000, were under the terms of the will of deceased distributed to her. The application was denied, and the ruling is assigned as error. Section 1115, Civil Code, provides:

"Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who has made any covenant or agreement in reference to the title of, in, or to any real property, are answerable upon such covenant or agreement to the extent of the land descended or devised to them, in the cases and in the manner prescribed by law."

Conceding, as claimed by appellant, that under this section Mrs. Lambourn as devisee took the land devised to her subject to the payment of any loss suffered by plaintiff as a result of a breach of the covenant made by her deceased mother, nevertheless, the joinder of a cause of action based thereon with that set forth in the complaint is not authorized by section 427, Code of Civil Procedure. Moreover, there would be a misjoinder of parties defendant by reason of the absence of unity of interest in the parties. The executrix as such could have no interest in the result of the suit.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; SHAW, J.; HENSHAW, J.

ANGELLOTTI, C. J. (concurring). I concur in the judgment, and also in the opinion of Mr. Justice LORIGAN, except those portions thereof relating to the claim of appellant under section 1493, Code of Civil Procedure. As to these portions of the opinion, I concur in the views expressed by Presiding Justice Conrey of the appellate court, when this case was in that court, that the affidavits accompanying the claim of appellant against the estate of the deceased were not such as to require the judge in probate to permit the presentation of the claim after the expiration of the period fixed by law for the presentation of claims, and also in what he says as follows:

"Under section 1493, Code of Civil Procedure, a claim should not be presented after the expiration of the time otherwise fixed by statute, unless the fact that the claimant had no notice by reason of being out of the state 'is made to appear by the affidavit of the claimant to the satisfaction of the court or a judge thereof.' The mere declaration of the officers of a non-resident corporation that the corporation has been organized and exists by virtue of the laws of another state or territory, where it has its office and principal place of business, is not alone sufficient to exempt it from the ordinary rule applying to the published notice to creditors. Notwithstanding the foreign creation and foreign residence of the corporation, it may be that it is transacting business in California and has in this state the offices, officers, and agents sufficient to cause it to be bound by an ordinary notice to creditors. The further declaration by those officers in their affidavits that the corporation had no notice or knowledge of the publication of notice to creditors, and that by reason of the fact of the corporation's absence from the state and residence in Arizona, it had no knowledge or notice of the publication of notice to file claims against the estate, amounts to nothing more as a statement of facts than a statement that the corporation and its officers did not actually know that such notice had been published. All the rest of the statement is mere assertion that, by reason of its nonresidence, etc., the corporation was without notice. This is mere conclusion that the corporation was without notice, a conclusion unwarranted in law, if in fact the corporation was transacting business in this state and had officers here capable of receiving service of process upon the corporation."

It follows that the judge in probate might reasonably hold that the matters stated in section 1493, Code of Civil Procedure, were not shown to "his satisfaction" by the affidavits, and refuse to allow the claim to be presented after the expiration of the period fixed by the statute. This being so, it is unnecessary to express any opinion on the questions whether the refusal of the judge to allow a claim to be presented after the time limited may be reviewed on appeal, or whether such refusal may properly be regarded as a rejection of the claim.

I concur: SLOSS, J.

170 Cal. 66

ANDERSON v. LOS ANGELES TRANSFER CO. (L. A. 3459.)

(Supreme Court of California. April 16, 1915.)

APPEAL AND ERROR 1002—REVIEW—VERDICTS.

A verdict on conflicting evidence or evidence from which different inferences may be drawn cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. 1002.]

Department 1. Appeal from Superior Court, Los Angeles County; Fred V. Wood, Judge.

Action by Leathery Anderson, a minor, by Nels Anderson, her guardian ad litem, against the Los Angeles Transfer Company, a corporation. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Morton, Hollzer & Morton, of Los Angeles, for appellant. Crouch & Crouch, of Los Angeles, for respondent.

SLOSS, J. This is a suit for damages for personal injuries. The plaintiff was standing in the street awaiting the approach of a street car, when she was struck by defendant's automobile. The evidence is conflicting in some respects, but there was testimony tending to show that the plaintiff, a girl of 14, was standing at a place where she had a right to be; that the defendant's automobile, running at a speed of 20 miles an hour, came toward her in the same direction as the street car for which she was waiting; that the plaintiff saw the automobile approaching, but did not succeed in getting out of the way in time to avoid being struck by it. The verdict was in favor of the plaintiff, and the defendant appeals from the judgment and an order denying a new trial. The only point raised on the appeals is that the evidence shows that plaintiff was guilty of contributory negligence, and the defendant was not guilty of negligence.

The rules of law governing this class of cases are thoroughly well settled, and it is unnecessary to cite authorities. The question of negligence is one of fact for the jury, and the finding of the jury cannot be overturned by the court where the evidence is conflicting, or where, although the evidence is without conflict, different inferences may reasonably be drawn from it. We are satisfied that the facts shown in the record were sufficient to justify the inference that the driver of defendant's car was guilty of negligence in running at the rate of speed at which he was going, without turning either to the right or the left to avoid the plaintiff, whom he saw standing on the street. On the other hand, the evidence equally justifies the inference that the plaintiff acted reasonably in assuming that the defendant's car would not continue in its course until a point of

time when it would be too late for her to get out of the way, and that, when that time came, she attempted, with due care, but unsuccessfully, to escape. In short, it is a case where conflicting inferences may be drawn, and this court must sustain the findings of the jury.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; LAWLOR, J.

(170 Cal. 68)

Ex parte RICHARDSON. (Cr. 1910.)

(Supreme Court of California. April 16, 1915.)

1. LICENSES ⇨9 — ORDINANCES — LICENSE TAXES FOR REVENUE.

A city ordinance, which imposes a license tax on every person owning or controlling any slot machine at places specified in the application for license, but which contains no regulatory provisions, imposes taxes for revenue purposes only.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. ⇨9.]

2. LICENSES ⇨7 — ORDINANCES — LICENSE TAXES FOR REVENUE.

A city ordinance, imposing a license tax on persons owning or controlling slot machines, as a license tax for revenue only, and solely on the method of doing business and not on the business, is not authorized by the charter, declaring that no license tax can be imposed on any person who at any fixed place of business in the city sells merchandise, except such as require permits from the board of police commissioners for the doing of the business.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. ⇨7.]

3. LICENSES ⇨7 — ORDINANCES — LICENSE TAXES FOR REVENUE.

License taxes for revenue purposes must operate equally, and with uniformity, and any classification providing different charges for those engaged in the same business must be founded on some natural and reasonable distinction, pertinent to the matter; and an ordinance, imposing a license fee on persons owning or controlling slot machines at \$2 per annum for each machine, except machines used to deliver raisins, which shall pay a license of \$1 per annum, and except that single action slot machines, attached to chairs of theaters, delivering but one package without refilling, shall pay \$8 per annum per 100 machines, or eight cents per annum for each machine, is invalid.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. ⇨7.]

In Bank. Application for habeas corpus by Ralph M. Richardson, for his discharge from custody for conviction for violation of an ordinance of the city and county of San Francisco. Petitioner discharged.

B. B. Blake and Willard J. Smith, both of San Francisco, and Fred J. Goble, of Oakland, for petitioner. A. L. O'Grady and Jno. Floyd, both of San Francisco, for respondent.

ANGELLOTTI, C. J. The petitioner was convicted in the police court of the city and county of San Francisco of a violation of the provisions of section 2 of Ordinance No.

765, as amended by Ordinance Nos. 1471 and 1537 (N. S.) of said city and county, and adjudged to pay a fine of \$5, and in default of payment of such fine to be imprisoned for one day. Having refused to pay such fine he was taken into custody, and on his petition a writ of habeas corpus was issued to determine the question of the legality of his imprisonment.

The charge against petitioner was that he operated, owned, and controlled a certain machine, to wit, a match machine, with a nickel-in-the-slot attachment, at No. 230 Market street, without first having procured a license therefor from the tax collector of the city and county, as required by said ordinance. The complaint sufficiently states an offense under the provisions of section 2 of the ordinance, and the only question presented by this proceeding is as to the validity of said section.

The ordinance is one entitled "Imposing a license on nickel-in-the-slot machines." By section 1 a license fee or tax of \$2 per annum is required of every person, etc., owning or having control of any machine, in or on which, on deposit of a piece of money, within said machine, any service is rendered by means of such machine, such, for example, as the playing of music, the registering of one's weight, etc., for each machine so used. Sections 2 and 3 of said ordinance are as follows:

"Sec. 2. Every person, firm or corporation owning or having control of any candy machine, chocolate machine, postage stamp machine, or any other machine or apparatus of any kind, character or description from which, on deposit of a five cent piece, or any other piece of money, or any article representing money, within said machine, candy, chocolate, postage stamps or other articles of merchandise (except raisins) are ejected or delivered, shall pay a license of \$2.00 per annum for each machine so used; provided that machines delivering raisins shall pay a license of \$1.00 per annum, except that for single action slot machines when attached to chairs or railings of theaters or other places of amusement, delivering but one package without refilling, every such person, firm or corporation shall pay at the rate of \$8.00 per annum per one hundred machines so used, or eight cents per annum for each machine so used. Amended by Ordinance No. 227 (N. S.) approved June 11, 1907.

"Sec. 3. Every license hereunder shall be issued only to the licensee for said machine or apparatus at a particular place of business or location, and shall not be valid at any other place of business or location except by transfer there-to upon the written authorization of the tax collector. Every machine or apparatus so licensed must have conspicuously attached to it a metallic tag, to be furnished by the tax collector, numbered consecutively from the date of issue and showing the time for which issued."

Section 4 exempts such machines used in connection with any telephonic instrument operated by a telephone company, and section 5 provides that a violation of any provision of the ordinance shall be a misdemeanor, punishable in a prescribed way.

[1] The ordinance is utterly devoid of any-

thing indicating that it was enacted in the attempted exercise of the police power of regulation, except in so far as the mere imposition of a license tax may indicate such a purpose. It simply provides that a specified license tax for each machine shall be paid, that the license shall be valid only for the use of the machine at a particular place of business or location, except when transferred upon written authorization of the tax collector, and that every machine so licensed must have conspicuously attached to it a metallic tag, showing the number and time for which issued. The provision as to the metallic tag is obviously simply for the purpose of requiring proof, apparent to any one who may care to observe, or whose duty it is to observe, that the required tax on any machine in use has in fact been paid. No duty is imposed on any person operating such a machine except to pay the tax. No power or duty is imposed on any officer other than to collect the tax and to furnish the metallic tag, except that a license issued for a particular place may be transferred for use at another place on authorization of the tax collector. No officer has a right to refuse to issue a license for any place designated by the applicant. The applicant designates the place or places, as he sees fit, and pays the tax, and the tax collector must then issue the tag or tags. There is no limitation as to the place of operation or on the number of machines. It has been held that the mere imposition of a license tax may indicate an exercise of the police power of regulation, but no such intent may fairly be implied from that fact here, when we consider the nature of the business involved. The business covered by section 2 is simply the sale and delivery in small quantities of *any* article of merchandise, upon payment of the stipulated purchase price therefor, by means of a mechanical contrivance operated automatically, which itself delivers the article purchased upon the deposit of the money required, without the necessity of the interposition of a salesman. It is this *mode* of making the sale and delivery that is the only attempted basis of the imposition of the tax, and there is no such difference between this mode, and the ordinary mode of sale and delivery of small articles of merchandise by means of a salesman as to furnish conceivable ground for supposing, in the absence of other regulatory provisions, that the charge was imposed either for the purpose of limiting the number of the machines in use, or for the purpose of reimbursing the city for the expense likely to be imposed on it *in consequence of their use*. See *County of Plumas v. Wheeler*, 149 Cal. 764, 87 Pac. 909. That this was not intended as a regulatory tax is further indicated by the attempted discrimination made in favor of such machines when used in delivering raisins. Of course it is apparent that there is no such distinction between raisins and all other kinds of merchandise

as would warrant the lesser regulatory charge of \$1 per annum for machines used in the delivery of raisins, as against \$2 per annum for machines used in the delivery of any other article. It is to be observed that by its terms the ordinance applies alike to the tradesman, personally conducting his business at a fixed place of business, who installs in such place one or more of such machines, for the sale of certain articles of merchandise, and the owner and operator of such a machine who, by arrangement with such a tradesman, installs and operates it in his place of business. As to the tradesman so operating such a machine in his own place of business, it is obvious that there would be nothing but a mere change in his manner of selling—simply the adoption of a labor-saving device, dispensing with the necessity of a clerk or salesman in consummating a very small transaction. It may be that some regulatory provisions as to the use of such machines could be sustained as a valid exercise of the police power. However, we have no such question here, for none such is contained in this ordinance. Taking into consideration the language of the ordinance, the absence of regulatory provision, and the nature of the subject of taxation, we would be shutting our eyes to the obvious facts, were we to hold that the license tax here attempted to be imposed was imposed other than solely for the purpose of raising revenue. It is an attempted license tax for revenue purposes only on the prescribed method or manner of making sales of merchandise, a prescribed amount for each machine.

We are thus brought to the question whether the section of the ordinance involved can be sustained as a valid exercise of the power to impose a license tax for revenue purposes.

[2, 3] As the foregoing discussion has made apparent, the tax imposed by section 2 of the ordinance is imposed solely on such vendors of small articles of merchandise as use such a machine in making their sales and deliveries as is described therein. The vendor who sells and delivers the same articles through the medium of a clerk, salesman, or other human agency is not required to pay any license tax. Indeed, in view of the provisions of the San Francisco charter, no license tax can be imposed upon any person who "at any fixed place of business in the city and county, sells * * * goods, wares, or merchandise," except such as require, by express charter provision, permits from the board of police commissioners for the doing of their business (article 2, c. 2, § 1, subd. 15; *Rapp v. Kiel*, 159 Cal. 702, 115 Pac. 651), and such permits are required only as to a few classes of merchants, such as retail liquor dealers, pawnbrokers, peddlers, junk shop dealers, and dealers in secondhand goods. It is urged that *all* these machines are operated at *fixed places of business* in the city and county, within the meaning of the language of this provision, section 3 of the ordinance

specially providing that the license must designate the particular place of business or location where the machine is to be used, and that those using them are therefore exempted from license tax by the charter. There is some force in this contention. But whether it be well based or not, we are unable to perceive any warrant for the discrimination against the vendor who uses such a machine in making sales and deliveries. The license tax attempted is one solely on his *mode* of making his sales and deliveries, without any reference whatever to the amount of business done. If he uses such a machine, or machines, for that purpose, he must pay a license tax of \$2 per annum for each machine so used. If he sells and delivers the very same merchandise in any other manner, he is not required to pay any license tax at all. It is elementary that there must be equality and uniformity in the imposition of license taxes for revenue purposes, and that any classification, providing different charges for those engaged in the same business, a charge for some and exemption for the others, must be one founded upon some natural and reasonable distinction pertinent to the matter. So, different charges may be imposed on those engaged in the same business, proportioned to the amount of business done, estimated in many different ways (see *Ex parte Lemon*, 143 Cal. 558, 77 Pac. 455, 65 L. R. A. 946; *Bramman v. City of Alameda*, 162 Cal. 648, 124 Pac. 243), and this is the usual basis of any difference in the amount of charge on those engaged in the same business. But, and we are now speaking solely of revenue taxes, we know of no principle that warrants the imposition of a tax on some of those engaged in a certain business, solely because of the method they use in making their sales and deliveries, and the exemption of all engaged in the very same business who do not use that method. We are speaking, of course, of methods not involving any occupancy or use of public property, such, for instance, as the use by wagons of a public highway. A tax thus imposed is really one solely on the method used by the merchant, and not on the business, a tax of the same nature as would be one imposed on a tradesman solely because of his use in making sales of such articles as a computing scale, a cash register, a cash carrier, or some other such modern device. A difference in such mere methods of making sales and deliveries does not furnish a proper basis for classification of vendors of merchandise. The case of *Seattle v. Denchor*, 58 Wash. 501, 108 Pac. 1086, 137 Am. St. Rep. 1076, 28 L. R. A. (N. S.) 446, is directly in point, and sustains our conclusion that there is no legal ground for any such distinction as that attempted to be made by the city and county of San Francisco in this matter. The same principle was applied by

this court in *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916, where an ordinance discriminating against merchants using trading stamps in the conduct of their business was declared invalid.

We are of the opinion that section 2 of the ordinance in question cannot be upheld as a valid enactment.

The petitioner is discharged from custody.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

170 Cal. 74

McRAE v. ROSS et al. (Sac. 2134.)

(Supreme Court of California. April 17, 1915.)

1. APPEAL AND ERROR ⇐1071—HARMLESS ERROR—FINDINGS—FAILURE TO MAKE.

Where the findings were sufficient to sustain a judgment for defendants, failure of the court to find on other matters in issue was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. ⇐1071.]

2. SPECIFIC PERFORMANCE ⇐114—REQUISITES.

In a suit for specific performance of a contract to sell land, the adequacy of the consideration and the fairness of the bargain must appear from facts alleged and proved.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-370, 372; Dec. Dig. ⇐114.]

3. FRAUDS, STATUTE OF ⇐71, 116—SALE OF REAL ESTATE—EMPLOYMENT OF BROKER.

By the statute of frauds, Civ. Code, § 1624, Code Civ. Proc. § 1973, a contract for the sale of real estate, or for the employment of a broker to consummate such sale, must be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 113-139, 251-260; Dec. Dig. ⇐71, 116.]

4. FRAUDS, STATUTE OF ⇐116—AUTHORITY OF BROKER TO CONTRACT—STATUTE.

Under Civ. Code, § 2309, providing that an oral authorization of agency is sufficient for any purpose, except that an authority to enter into a contract required by law to be written can be conferred only in writing, written authority from defendants was necessary to confer upon their brother in charge of their ranch authority to sell such ranch or to employ a broker to sell it.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 251-260; Dec. Dig. ⇐116.]

5. FRAUDS, STATUTE OF ⇐119—SALE OF INTEREST IN LAND—ORAL DECLARATION—ESTOPPEL.

Where there is no written contract to sell land, defendant owners cannot be held bound thereto by estoppel arising from their oral declarations, since such ruling would nullify the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 113, 266, 267, 270; Dec. Dig. ⇐119.]

6. APPEAL AND ERROR ⇐1011—REVIEW—FINDINGS.

A finding based on substantially conflicting evidence cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ⇐1011.]

7. CONTRACTS — 24 — COUNTER OFFER.

A counter offer by an offeree operates as a rejection of the original offer.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 100-103; Dec. Dig. 24.]

8. BROKERS — 49 — REAL ESTATE AGENT — RIGHT TO COMMISSION — PERFORMANCE.

A real estate broker, seeking a commission for a sale, must show that he produced a purchaser ready, able, and willing to purchase on the terms authorized.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. 49.]

9. VENDOR AND PURCHASER — 351 — BREACH OF CONTRACT — DAMAGES — STATUTE.

Under Civ. Code, § 3306, providing that the detriment caused by breach of an agreement to convey real property is deemed to be the price paid and expenses incurred in examining title and preparing papers, adding in case of bad faith the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, plus expenses incurred in preparing to enter on the land, where no price had been paid by plaintiff suing defendants for refusal to convey, and where there was no bad faith, the alleged breach of his contract caused no damage.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1017, 1047-1058; Dec. Dig. 351.]

Department 1. Appeal from Superior Court, Solano County; A. J. Buckles, Judge. Action by J. A. McRae against Albert T. Ross and others. Judgment for defendants, and plaintiff appeals. Affirmed.

McCoy & Gans and H. P. Andrews, all of Red Bluff, for appellant. Arthur C. Huston, of Woodland, and F. F. Marshall, of Dixon, for respondents.

SLOSS, J. Plaintiff appeals from a judgment in favor of defendants, and from an order denying his motion for a new trial.

The complaint is in four counts. The first alleges the ownership by defendants of a ranch in Solano county, containing 521.65 acres; alleges that in 1910, said defendants offered to sell said ranch to plaintiff, or to any one designated by him, for \$41,000, and agreed that, in case of a sale to another, plaintiff was to have all of the price above \$41,000, that in December, 1910, plaintiff secured a purchaser, who agreed with defendants to purchase the ranch for \$62,468.87, and that nothing has been paid plaintiff. The second cause of action alleges that defendants placed the ranch in plaintiff's hands for sale, and authorized him to sell it for \$41,000, agreeing that he was to receive as commission the purchase price above \$41,000; that a sale had been arranged through plaintiff for \$62,468.87, and that no part of the excess over \$41,000 had been paid. The third count is based on the theory that plaintiff himself purchased the ranch for \$41,000, but that defendants, acting in bad faith, refused to sell to him. The value of the ranch is alleged to be \$62,468.87, and the difference between that sum and \$41,000 is claimed as

damages. The fourth count attempts to set up a cause of action for specific performance of the contract to sell to plaintiff for \$41,000. The answer denies most of the allegations of the complaint. The court found against the existence of the contract and authorization set up in the complaint, found that plaintiff did not produce a purchaser, or accept any offer of defendants to sell the property to him, and that defendants are not indebted to plaintiff in any sum. Judgment went in favor of defendants for their costs.

[1, 2] The findings above outlined are sufficient to sustain the judgment so far as the prayer for a money judgment is concerned. Whether or not the court failed, as appellant claims, to find on other issues, is therefore entirely immaterial. The fourth count demands no particular attention. It failed to state a cause of action, there being no averment of facts showing the fairness of the contract or the adequacy of the consideration. This pleading would not have supported a decree of specific performance. *White v. Sage*, 149 Cal. 613, 87 Pac. 193, and cases cited.

No errors in rulings on evidence are assigned. The appellant claims merely that the evidence does not support the findings of the court.

[3-5] It is clear that the findings in favor of the defendants Raymond H. Ross, Mabel I. Ross, and Mrs. Henry are in accord with the undisputed evidence. A contract for the sale of real estate, or for the employment of a broker to sell real estate, must be in writing. Civ. Code, § 1624; Code Civ. Proc. § 1973. None of these three defendants ever made any written contract with plaintiff, or even had any written communication with him. Plaintiff attempted to show that each of them had referred him to a brother, their codefendant, Albert T. Ross, as the person in charge of the ranch. But the testimony was that Albert did not have any written authority to bind them, and this was necessary to empower him to make a contract, on their behalf, to sell real estate or employ an agent to sell it. Civ. Code, § 2309. Even if the making of the oral statements had been shown without contradiction—which is not the case—such statements would not have bound these defendants. There is no ground for the contention that the alleged declarations raised an estoppel against the three defendants. To so hold would destroy the statutory requirement that authority to sell real property must be in writing.

[6-8] The remaining question is whether the findings in favor of defendant Albert T. Ross are supported. The evidence in this behalf is quite voluminous, and we shall not undertake to recite it in detail. Read as a whole, it presents the very usual aspect of a substantial conflict, which puts the finding of the trial court beyond the power of appel-

late review. The testimony on behalf of defendants tended to show and justified the trial court in believing this to be the state of facts. In August, 1910, Albert T. Ross had written to plaintiff, telling him that the ranch was for sale for \$41,000 and that, if he got a chance to sell it, he should charge a good price "so you can get a commission out of it, as my figures are net." Nothing came of this, and some months later McRae wrote to A. T. Ross, offering \$36,000 for the land. This was, of course, a rejection of any offer contained in the August letter, and ended that offer. *Niles v. Hancock*, 140 Cal. 157, 73 Pac. 840. On November 1, 1910, Ross answered McRae's letter, saying:

"We all feel that the ranch is worth what we are asking. * * * I don't feel as if we can take \$40,000, but will take \$41,000, that is if it is sold before the alfalfa is up. * * * We thank you for your offer. Am willing to answer any question about the place any time you should wish to write."

This is the only writing which plaintiff can look to as supporting his cause of action. Following its receipt, McRae brought one or two people to see the property, but there was no result from these efforts except in the case of one Reed, who finally made a contract with the defendants to buy the ranch for \$61,117.50. But this was a contract under which nothing was to be paid until October 1, 1911, about nine months after the making of the agreement. Assuming that the letter of November 1, 1910, authorized McRae to make a sale, it did not authorize a sale on the terms that were subsequently agreed upon between Reed and Ross. Reed testified that when he made his offer for the property, he was not in a position to pay for it. A broker who seeks a commission for a sale must show that he has produced a purchaser, ready, able, and willing to purchase on the terms authorized. *Gunn v. Bank of Cal.*, 99 Cal. 349, 33 Pac. 1105. This the plaintiff did not do. Furthermore, there was testimony to the effect that McRae, instead of facilitating a sale to Reed, endeavored to prevent an agreement between Reed and Ross.

[9] Of the contention that McRae himself purchased the property, it is enough to say that the court found, with respect to the third count, that defendants did not act in bad faith in violating the alleged contract, and that plaintiff suffered no damage. These findings are sufficient to support the judgment in favor of defendants on this count. Assuming that there was a contract, and that it was broken, the measure of damages, in the absence of bad faith, is "the price paid, and expenses properly incurred in examining the title and preparing the necessary papers." Civ. Code, § 3306. No price had been paid by plaintiff, nor did he show the incurring of any expenses. The finding of a want of bad faith was fully justified, and it follows that the alleged breach caused no damage. Aside

from all other considerations, the plaintiff was properly denied relief on this count.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.

(170 Cal. 24)

SPRING STREET CO. v. CITY OF LOS ANGELES et al.

HAMBURGER REALTY & TRUST CO. v. SAME et al.

(L. A. Nos. 3322, 3325.)

(Supreme Court of California. April 10, 1915.)

1. MUNICIPAL CORPORATIONS ⇨473—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS.

Special assessments for public improvements are based on the theory that the improvement benefits the owner; hence, where land is condemned for an improvement, a special assessment of benefits against the remaining property to the value of the property taken, to which was added the cost of making the improvement, is void, because plainly confiscatory.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1121; Dec. Dig. ⇨473.]

2. MUNICIPAL CORPORATIONS ⇨493—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS.

Where a special assessment for public improvements was plainly confiscatory and unlawful, it cannot be justified on the theory that the property owners had their day in court before the city council and that its action in confirming the assessment was conclusive.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1091-1093, 1160-1165; Dec. Dig. ⇨493.]

In Bank. Appeals from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Separate actions by the Spring Street Company, the Pacific States Corporation substituted, and the Hamburger Realty & Trust Company and others, against the City of Los Angeles and others. From judgments for defendants and orders denying new trial, plaintiffs appeal. Reversed, and causes remanded.

Lloyd, Hunt, Cheney & Geibel and Lloyd, Cheney & Geibel, all of Los Angeles, for appellant Spring Street Company. Denis & Loewenthal and E. E. Mellette, all of Los Angeles, for appellant Hamburger Realty & Trust Co. Albert Lee Stephens and C. D. Pillsbury, both of Los Angeles, for respondents.

HENSHAW, J. These actions, separately brought, were both for the purpose of having declared void the same special assessment based on benefits received by the land under the widening of Eighth street in the city of Los Angeles, and so to enjoin the collection of the sums charged by the assessment against the properties of plaintiffs. The two cases, involving, as they do, the same considerations of law, may be determined together. The appeals in both cases are from the judgment and from the order denying the motion for new trial.

The authorities of the city of Los Angeles decreed the widening of Eighth street in that city for a distance of six blocks between Figueroa street upon the west and Broadway upon the east to the easterly line of the former and the westerly line of the latter. The street was to be widened five feet upon each side, necessitating the taking of a five-foot strip from all of the property owners upon the northerly and upon the southerly side of this street between Figueroa and Broadway. An assessment district was declared, which assessment district embraced (approximately) all of the lands between Figueroa street and Broadway to a distance of about 110 feet north and 110 feet south of Eighth street. On Eighth street in this district were lots of differing values, interior lots having a frontage on Eighth street alone, other lots having a frontage upon Eighth street and upon one or another of the intersecting streets, thus being corner lots of greater value.

A suit to condemn these five-foot strips was instituted, and the decree fixed the amount to be paid to the owners for their lands to be taken. These judgments aggregated \$226,682.50. The Hamburger Realty & Trust Company (which alone may be considered as representing all of the other plaintiffs) was awarded damages in the sum of \$20,000. The Hamburger Realty & Trust Company's property is situated at the southeast corner of Eighth and Broadway, having a frontage of 120 feet on Broadway within the assessment district, and extending on Eighth street 166.75 feet. It is unquestioned, and appears from the judgments given, that properties fronting on Eighth street alone are of very much less value than properties fronting on Broadway and its adjoining street—Hill street—which are important commercial and business streets of the city. The taking of the five-foot strip from the plaintiff was therefore a taking from all of its real estate within the district of 166.75 feet x 5. But what was perhaps of equal consequence, it was a cutting down of the Broadway frontage by five feet. To cover the cost of the proposed improvement, the board of public works of the city of Los Angeles, under the charter acting in lieu of a street superintendent, prepared and filed an assessment, charging against the lands in the district certain sums based on the benefits which it was estimated they would receive by reason of the street widening, and in the case of the Hamburger Realty & Trust Company charged their lands in the assessment with \$12,794.10.

Upon notice given of the filing of this assessment, protests were entered against it by certain disaffected property owners. A hearing of these protests was had before the "Streets and Boulevards Committee of the Council," which reported a recommendation that the protests be sustained, "and that the assessment be referred back to the board of public works with the recommendation that the same be modified as follows, to wit: That

the assessments on lots fronting on the cross streets be as they are at present; that the lots fronting on Eighth street be assessed the same amount as allowed for land taken and that the balance of the amount to be raised be assessed equally per front foot on the land fronting on Eighth street." Upon this report coming before the council, it ordered:

"That the board of public works be instructed to make and file a new assessment, and that the report of the streets and boulevards committee be referred to the board of public works for consideration in making the said new assessment."

Under these recommendations or directions the board of public works reported to the city council as follows:

"Gentlemen: Pursuant to a motion made and adopted by the city council at its meeting on April 6, 1910, the assessment for the widening of 8th street from Broadway to Figueroa street was returned to this board with instruction to make a new assessment, and referring with said instruction the following recommendation of the committee of streets and boulevards for the consideration of this board: 'That the assessments on the lots fronting on the cross streets be as they are at present; that the lots fronting on Eighth street be assessed the same amount as allowed for land taken, and that the balance of the amount to be raised be assessed equally per foot on the land fronting on Eighth street.' This board has followed that recommendation, and has shown the amounts assessed in red ink alongside of the amounts assessed in the original assessment. We are, however, still of the opinion, that the original assessment as made by this board is proper and correct, and beg leave to invite the attention of the honorable council to the several assessments on lots situated in the middle of blocks, and which have been assessed a comparatively small amount in this new assessment, because the amount allowed for land taken was small, whereas these inside lots are benefited more in proportion to the lots on the corners, as they only have the Eighth street frontage."

Protests were filed to this so-called new assessment, urging that it was arbitrary, unjust, excessive, and illegal; but, after hearing, the council confirmed it in toto.

The effect of the assessment so made is not and may not be questioned. It canceled every dollar of the \$226,000 awarded by the court in the condemnation proceedings for the taking of this private property for a public use, under an implied omnibus finding that the property of every person whose lands fronted on Eighth street was benefited at least to the amount of his award in the condemnation proceedings for the taking of his property, and was also benefited just a little more, that little being the property owner's proportionate share of the expense of the city in the matter of its condemnation proceeding, which additional amount is contemplated by the suggestion contained in the report of the streets and boulevards committee "that the balance of the amount to be raised be assessed equally per front foot on the land fronting on Eighth street." Specifically, upon the property of the Hamburger Realty & Trust Company is imposed an assessment of \$20,000, in cancellation of the judgment of the court of the value of its property taken for

this public use, and \$115.20 being its proportionate share of the expense to which the city was put in the doing of this thing. Thus, in practical effect, while real property of the plaintiff to the value of \$20,000, as found by the court, is taken away from it for public use, and while the Constitution of the United States and of this state declares that this cannot be done without compensation to the owner, this plaintiff not only receives no compensation, but in addition to the loss of its property is compelled to pay \$115.20 because the city has seen fit to take it. Thus plaintiff would have saved \$115.20 if, upon the first intimation that the city designed to condemn its property under the laws of the land, it had hastened to make the city a free gift of it. And the same is true in the case of every other property owner having the misfortune to own lands fronting upon Eighth street. When finally we are told that this result has been accomplished under the Constitution and laws of the land, it becomes a matter of most serious importance to determine whether or not this can be true.

[1] It will not be amiss here to consider briefly the nature of the power exercised by the Legislature, and, under its direct authority, by its mandatories, in the matter of these so-called special assessments based on benefits. We need not be at pains to trace the development of the use of the power, nor yet is it important to refer it to any particular branch of the power of sovereignty—whether it be called the taxing power, the police power, or the power of eminent domain. Bearing in mind that with us all the power that any sovereign state ever possessed resides in the people acting through their Legislature, saving as that power is controlled or restrained by the Constitution, and as this power of sovereignty, excepting under the constitutional restraint, would permit, as was done in autocracies, the despoiling of the private citizen and the confiscation of his property, it is quite sufficient to refer to this fact for the origin of the power. Like numberless other powers which have in the past been exercised selfishly, cruelly, and unjustly, it is still a part of sovereignty, saving as it is denied, or repressed, or controlled, by the Constitution. That in certain aspects it bears a likeness to taxation is unquestioned, in that it is a charge in terms of money based upon the real property of the owner, which the owner himself is compelled to pay, or in default risk the seizure and sale of his holdings. That in certain aspects it partakes of the nature of eminent domain is manifest from the fact that if a man may be compelled to expend \$1,000 for the improvement of the street upon which his property happens to front, there is a certain taking of that \$1,000 for the public use. And, finally, that in other aspects it partakes of the nature of the exercise of the police power is obvious when consideration is paid to the construction of public sewers, drainage districts, and

like works making for the benefit of the public health. Yet in no one, nor yet in all of these sovereign prerogatives can this particular power be said to rest under our form of government, since, if it be said that a special assessment is in strictness a tax, it does violence to our constitutional provision touching the uniformity of taxation. If it be said that this power is referable to the sovereign prerogative of the right of eminent domain, the answer is that with us the state cannot exercise that power without compensation made to the owner of the property taken. And whatever might be said of the ability to refer an assessment for a drainage system to the police power, the argument would fail utterly when applied to the opening and widening of streets, to irrigation districts, desert land reclamation, and similar forms of public control over lands privately owned. Indeed, to avoid doing violence to these constitutional limitations upon the power of the Legislature, it must be held, as it has so often been held, that a special assessment is not, in the constitutional sense, a tax at all. It is "a compulsory charge placed by the state upon real property within a predetermined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein, enhancing the present value of such real estate, and laid by some reasonable rule of uniformity based upon, in the ratio of, and limited by, such enhanced value." Hamilton, *Law of Special Assessments*, § 56. The improvement must have a certain public character, and this we find conspicuously in street improvements, and less conspicuously in reclamation district assessments. Were it not for this recognized characteristic, it would be justifiable to order any owner of any vacant lot to build thereon and to build a prescribed structure, since under the theory of benefits it could successfully be urged that the enhanced value of the land covers the cost of the structure compulsorily imposed upon it. It may be said that the interest of the public would demand that a building lot in the heart of a business district of a city should not be left vacant, its improvement tending to increase business and to enhance the values of surrounding property in which the public is interested. But so far such a public interest has not been considered adequate in support of such an exaction. That the return to the property owner by way of benefit is, under our system of government, the basic foundation upon which this right rests, becomes apparent from the consideration that, if we are not able to say that the owner for the specific charge imposed is compensated by the increased value of the property, then most manifestly we have a special tax upon a minority of the property owners, which tax is for the benefit of the public and which tax is special, unequal and ununiform. Therefore the compensating benefit to the property owner is the warrant, and the sole

warrant, for the Legislature itself to impose the burdens of these special assessments. It has been a matter of profound regret to this court, and indeed to every court which has been called upon to consider the question, that in the application of this principle, theoretically equitable, practical operations have shown grave wrong and injustice to be done. With ceaseless reiteration the courts have deplored these unjust exactions and extortions. With tiresome repetition have they advised the lawmakers of methods for the exercise of the power more in consonance with equity and fair dealing. *Reclamation District v. Birks*, 159 Cal. 233, 241, 113 Pac. 170. But the result here and elsewhere has been that these suggestions, instead of being received as guides, directing a more equitable exercise of the power, have been treated as though they were invitations to an excessive use of the power, in an effort to see just how far the legislative agents and mandatories might go in their taking of private property without compensation, until told by the court that they had passed the outermost bound of law and reason.

That bound has been reached and passed by the assessment in this case. It bears upon the face of the record, as here presented, convincing and conclusive evidence that no effort at all was made by the council to assess in proportion to benefits. It is impossible that under the exercise of any discretion in the matter it could be found that in every case the damage awarded by the court for the taking of the property was exactly or more than covered by the benefit which would accrue to the remaining property by the widening of the street. And it is also impossible that those separate pieces of property were, in addition, each one of them, benefited to the exact added amount which it cost the city to take the condemned land. It is to strain credulity beyond the breaking point to ask that any such belief be for a moment entertained. Applicable to this assessment is the language of the Supreme Court of Vermont, speaking through the learned Mr. Justice Redfield, when it says:

"We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name." *Allen v. Drew*, 44 Vt. 174.

We believe the assessment here in question to be so manifestly and so grossly unjust upon the face of this record as to call for no extended argument for its condemnation. It was not even the quasi judicial act of the board intrusted with the duty of making the assessment, the board of public works. That board apparently entered upon the performance of its duty with a due sense of responsibility justly pertaining to its judicial

character. If the communication of the city council to them was a command, they felt compelled to obey it in the matter of the new assessment and did so under formal protest. If it was not a command, but merely a suggestion, then it was a suggestion of which their judgment did not approve, and their disapproval of which they formally expressed. But we need not be at pains to linger over this obvious proposition, for it is not sought by respondents to defend this assessment upon its merits.

[2] The defense is merely that the property owners had their day in court before the city council, their petitions and protests were denied, and the action of the council, in the absence of fraud, will be held conclusive. But to this we answer that the action of the council in the particulars to which this assessment is here subjected to attack is not conclusive, under the principle declared in *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81, and reaffirmed in *Schaffer v. Smith*, 147 Pac. 976 (L. A. No. 3833) decided April 1, 1915, and that the assessment here in question does not come within the principle of *Lambert v. Bates*, 137 Cal. 676, 70 Pac. 777. But still further we hold that the record here presented furnishes such convincing evidence that the assessment was ordered prepared without the slightest exercise of judicial discretion, and so unwarrantedly, arbitrarily, and unjustly, as to work a confiscation of the property and to be, therefore, in no legal sense an assessment at all. If this court should say:

"Whenever it is proposed to take private property for purposes of street-widening, public parks, or any other recognized public use, the authorities will submit without protest to any judgment given by the courts in condemnation proceedings instituted to determine the value of the property proposed to be taken. They may so submit with security, because they will then assess on account of benefits against the remaining properties of the private owners an amount equal to the award of the court plus an additional proportionate charge for the same expense to which the property owners unwarrantedly have put the authorities in the latter's laudable efforts to benefit the public. Thus it will soon be realized by the property owners that in any such case it will be cheaper for them to donate their property outright, and thus save this additional charge. N. B.—In every case, however, care must be observed not to take all of any individual's land, or nothing will be left against which to assess on the theory of benefits. In every case, therefore, enough should be left for this most necessary purpose"

—such a declaration would shock the legal profession of the land. Yet for this court to uphold this assessment upon the record before it would be the equivalent of doing this very thing.

The judgments and orders appealed from are reversed, and the causes remanded.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.

170 Cal. 65

In re SCOTT'S ESTATE. (L. A. 4125.)
(Supreme Court of California. April 16, 1915.)
WILLS ⚡647 — RESTRICTIONS — RESTRAINTS
UPON MARRIAGE—STATUTE.

Under Civ. Code, § 710, providing that "Conditions imposing restraints upon marriage * * * are void, but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage," where testator's will gave his entire property to his widow, providing, "Should she wish to marrie agane then then 75 per cent of the hole amount at my death will go to my children," the condition was in restraint of marriage and void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1533-1538; Dec. Dig. ⚡647.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Appeal by Eliza V. Scott from an order of the court giving her a qualified estate in the whole property under the will of her husband, Charles Headwood Scott, deceased. Order reversed.

Chase, Overton & Lyman, of Los Angeles, for appellant.

SHAW, J. In this case the testator made a will in the following words:

"I give all my Earthly Positons both real and persnel to my wife Eliza V. Scott. Should she wish to marrie agane then then 75 per cent of the hole amount at my death will go to my children known as C. W. Scott of Detroit, Mrs. Thomas Ogg of Glendale of California, Cancel B. Scott of California, \$5.00 five dollars to Mrs. C. B. Sayles of Detroit Michigan."

The court below held that this will did not contain a condition in restraint of marriage and distributed the estate upon that construction, given the widow a qualified estate conditional upon her remaining unmarried.

The court is of the opinion that this was not a correct construction of the will and that the effect of the expression beginning with the words "should she wish to marrie agane" is that if she should marry she would by that act forfeit 75 per cent. of the estate given to her in the previous clause. This makes it a condition in restraint of marriage and therefore absolutely void under section 710 of the Civil Code. The first part of the will, the clause giving her all his estate, is the effective part of the will.

The order is reversed.

We concur: SLOSS, J.; LAWLOR, J.

26 Cal. App. 65

BRAINERD v. KYDD. (Civ. 1335.)

(District Court of Appeal, First District, California. Feb. 26, 1915. Rehearing Denied by Supreme Court April 27, 1915.)

1. BILLS AND NOTES ⚡523—ACTIONS—EVIDENCE—FINDINGS.

Where, in an action on a note given by a subscriber for stock of a corporation, the evidence showed that the agent of the corporation, authorized to solicit stock subscriptions, took the note as agent in payment of the stock, and

that the corporation was ready to turn over to the subscriber the stock on payment of the note accepted by the corporation and turned over to the agent, who sued thereon, findings that, at the beginning of the action, the agent was the owner and holder of the note were justified by the evidence.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822-1825; Dec. Dig. ⚡523.]

2. CORPORATIONS ⚡76—SUBSCRIPTIONS FOR STOCK—NOTES FOR PRICE—ACCEPTANCE.

Where a corporation accepted a note executed by a stock subscriber for the price and was ready to deliver the stock according to the terms of subscription, and the corporation and the agent procuring the subscription took every precaution to compel the subscriber to take the stock and pay the note, the note became a binding obligation as against the objection that there was no acceptance by the corporation of the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 197-209, 213-218; Dec. Dig. ⚡76.]

3. CORPORATIONS ⚡76—STOCK SUBSCRIPTIONS—NOTE FOR PRICE—CONSIDERATION.

Where a subscriber for stock of a corporation gave an agent of the corporation, authorized to solicit subscriptions, a subscription and a note for the price thereof, and the corporation accepted the subscription, the note was supported by a sufficient consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 197-209, 213-218; Dec. Dig. ⚡76.]

4. CORPORATIONS ⚡76—CONTRACTS FOR SUBSCRIPTION OF STOCK—NOTES—CONSIDERATION.

Where a subscriber for corporate stock executed a note for the price, payable one day after date, and the corporation was ready to turn over the stock on payment of the note, but the subscriber repudiated the transaction, the consideration for the note did not fail.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 197-209, 213-218; Dec. Dig. ⚡76.]

Appeal from Superior Court, City and County of San Francisco; L. T. Price, Judge.

Action by Benjamin H. Brainerd against Rose M. Kydd. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

J. W. McCaughey and Edward J. Lynch, both of San Francisco, for appellant. Ira S. Lillick, of San Francisco, for respondent.

PER CURIAM. This is an appeal by defendant from a judgment in favor of the plaintiff and from an order denying defendant's motion for a new trial.

The complaint is founded upon a promissory note made by defendant, dated August 12, 1910, payable to her order at the office of the Western States Life Insurance Company one day after date, and indorsed by her in blank. On the day this note was delivered, the plaintiff and the defendant met at the home of the defendant. He represented himself as, and in fact was, the agent of the company, authorized to take subscriptions for its stock. After some negotiation the defendant agreed to subscribe for 40 shares at \$25 per share, whereupon the note in

suit, an application, and a receipt were signed and countersigned, respectively, by plaintiff and defendant. Plaintiff received the note and application, and defendant the receipt. The application and receipt, consisting of printed forms, with blank spaces, which the parties filled in, contained the terms of plaintiff's agency, and constituted the written contract for the sale and purchase of the stock. Defendant expressed herself as willing to pay at once the amount called for by the contract, if the plaintiff would wait until she could go to the savings bank to procure the money; but, as the plaintiff was leaving for Honolulu on that day, he could not wait, and took the one-day note in issue here instead of cash. It was understood between the parties when the plaintiff took the note that the next day the defendant would call at the office of the Western States Insurance Company in San Francisco, pay her note, and take delivery of the stock. Plaintiff at once took the note and application to W. E. Grigsby, of the firm of Pratt & Grigsby, general agents of the insurance company, explaining the transaction and telling him that the defendant would call the next day. Mrs. Kydd called as she had promised, but, having in the meantime learned that she could invest her money to better advantage, declined to proceed with the transaction. The company, on the other hand, refused to release her from the obligation she had incurred, and tendered to her the stock called for by the contract. She declined both the tender and to pay the note. The note and application for the stock remained in the possession of Pratt & Grigsby until the plaintiff returned from Honolulu, which was some time after the apparent maturity of the note. Learning what had occurred, plaintiff, with a view doubtless of saving his commissions, bought the note from the company. The stock had been issued in the name of Richard O'Connor and indorsed by him, and was held by the company ready to turn over to the defendant at any time upon payment of the note.

The defendant in effect contends that, whether the answer pleads fraud or not, the transaction is of such a nature that it was the duty of the court to refuse to entertain the action. There is absolutely no foundation in this case for such contention. The case involves a plain business proposition, and it is but fair to say that, according to the testimony, it is free from any taint of fraud.

[1] Defendant's next contention is equally without merit. She asserts that the findings of the court are not supported by the evidence, for the reason that they are to the effect that the note upon its execution was indorsed and delivered by the defendant to the plaintiff as his own property, and that then and there he became the owner of the note. Of course, according to the evidence, he took the note as the agent of the company in payment of whose stock it was given, and

there is nothing in the findings holding to the contrary. All that the findings in effect hold is that, at the time of the commencement of the action, the plaintiff was the owner and holder of the note.

[2] The third contention of the defendant is that the note never became a binding obligation for want of acceptance by the insurance company. The simple and ready answer to this contention is that plaintiff, if not others, testified in so many words that the company did receive and accept the note; and, as we read the record, it is an undisputed fact in the case that the company did accept the note, and was ready at once to deliver the stock according to the terms of the contract, and later every precaution was taken by the company and the plaintiff here to compel the defendant to perform her part of the contract.

[3] Passing to the point as to whether or not there was any consideration for the note, but little comment is necessary. It appears that, if the defendant had taken up the note the day after its date, the company having accepted her application as it did, she would have been entitled to receive 40 shares of the capital stock of the company at the agreed price of \$25 per share, all as was stipulated in the application and receipt, which constituted the contract between the parties. The note, therefore, it must be held, was supported by a consideration. *Vickrey v. Maier*, 164 Cal. 384, 129 Pac. 273; 7 Cyc. 691.

[4] In this connection defendant further contends that, if any consideration ever existed, it has since failed. This claim is based on the circumstance that, about two months after the note was executed, all the original issue of stock of the company had been sold, and that it was then impossible, even if the defendant had been willing to accept the same, to deliver to her 40 shares of the original issue, which she claims the contract calls for. Under her contract she was to accept the 40 shares the day after the execution of the note; and as the evidence shows that that number of shares of the original issue was tendered to her on that day, which tender was open to her acceptance for two months thereafter, we are at a loss to see how it can be said that the consideration failed. This point, like every other point made in the case, is highly technical. The 40 shares to which she was entitled under the contract were issued and have stood at different times in the names of one other person and the plaintiff, to be delivered to her at any time upon payment of the note. Thus it is seen that her claim in this regard is without substantial merit.

Coming now to the last point which we shall consider, it is sufficient to say, in answer to the same, that it was and is assumed by both sides that, when plaintiff called at the insurance company's office the day after the making of the note and contract, she intended to effect a release, if possible, from

those obligations, but there was no attempt to show a rescission of the contract; and we have no doubt that any error the court may have committed with reference to the admission of evidence was harmless and inconsequential.

The judgment and order are affirmed.

26 Cal. App. 691

MISSION FIXTURE CO. v. POTTER.
(Civ. 1587.)

(District Court of Appeal, Second District, California, March 3, 1915. Rehearing Denied April 2, 1915; Denied by Supreme Court April 29, 1915.)

1. TROVER AND CONVERSION — FINDINGS.

In an action for the conversion of two lots of gas and electric fixtures which had been consigned to defendant's firm as samples from which orders could be made, findings that all of the consigned fixtures were left in the possession of defendant's partner when defendant withdrew from the firm, that notice of dissolution was given to plaintiff, which thereafter continued its dealings with defendant's former partner, who thereafter abandoned the business and left only a small part of the goods, which were taken possession of by defendant, and sold on execution against his former partner, sustained a judgment against defendant for that part of the lot.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 304-307; Dec. Dig. ¶68.]

2. PARTNERSHIP — DISSOLUTION — EFFECT — DEFENSES — ESTOPPEL.

In such case the plaintiff was estopped from thereafter claiming that defendant's responsibility continued as to the other goods formerly consigned to the partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 661; Dec. Dig. ¶292.]

3. PARTNERSHIP — RETIRING PARTNER — LIABILITY.

A retiring partner may be held for the obligations of the firm theretofore created.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 484-486; Dec. Dig. ¶236.]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by the Mission Fixture Company against George E. Potter. Judgment for plaintiff, and from the judgment and the refusal of a new trial, defendant appeals. Judgment and order reversed.

B. F. Thomas and Richards & Carrier, all of Santa Barbara, for appellant. H. P. Starbuck and Canfield & Starbuck, all of Santa Barbara, for respondent.

JAMES, J. This action was brought to recover damages for the alleged conversion of a certain lot of personal property. The alleged value of all the property claimed to have been converted was the sum of \$337.32. The court, in entering judgment in favor of the plaintiff, first determined that that recovery should only be for the sum of \$50, which was the value of only a portion of the property described in the complaint. Thereafter

a motion was made, under the provisions of section 663, C. C. P., by the plaintiff that the court enter upon the findings of fact as made a different judgment, and this motion was granted and a judgment for the sum of \$320.26, together with costs, was then entered in favor of the plaintiff. Defendant made a motion for a new trial, and, the same being denied, took this appeal, which is from the judgment, as well as from the order referred to.

The property alleged to have been converted consisted of two lots of gas and electric fixtures which were consigned to defendant and one Fred R. Carrel, who were doing business as a copartnership at Santa Barbara under the name of Santa Barbara Electric Company. These consignments were made in July and August of the year 1909. About one year later the partnership existing between the defendant and Carrel was dissolved; Carrel purchasing the interest of defendant, Potter, and continuing the business theretofore conducted by the copartnership, under the same name. Notice of the dissolution and change was given directly to the plaintiff herein. The consigned goods were goods to be used as samples from which orders might be made to the plaintiff, which was a manufacturer of such articles. The consignments were made in such a way as to create a contract of bailment from which the parties derived mutual benefit. On the one hand, the bailees were enabled to exhibit in their store samples of various kinds of fixtures without being put to the expense of paying for such samples, and, on the other hand, the consignor was benefited by the orders which would be received for merchandise of the kind shown by the samples furnished. It was agreed that these fixtures would remain in the possession of the bailees, subject to being returned at any time to the bailor upon its demand. After the dissolution of the partnership between Carrel and Potter, Carrel continued in the business and the sample fixtures held on consignment remained with him. They were allowed to remain there for the purposes of the business which was thereafter conducted by Carrel. They were allowed to remain there by the plaintiff because of the benefit which it was presumed would accrue to it through sales to be made by Carrel of fixtures of the kind shown by sample.

[1] The trial court by its findings determined that all of the consigned fixtures were left in the possession of Carrel in August, 1910, when Potter withdrew from the firm, and that notice of the dissolution was given to the plaintiff; that the plaintiff continued thereafter its business relations and dealings with the said Carrel; that thereafter Carrel abandoned the business and all of the stock and materials thereof and left the city of Santa Barbara, leaving only of the two lots of consigned fixtures a small part, the value

of which was \$50; that the remainder of the consigned fixtures could not then "or since, and cannot now, be found." A finding follows to the effect that the defendant here took possession of the small lot of fixtures left by Carrel which belonged to the consignments and converted the same to his own use. If it may be said that these findings are sufficient to show a conversion of all of the fixtures and facts which would make the defendant responsible therefor in damages, then it must be said that the evidence does not sustain such findings. As to the small lot of fixtures for the value of which the court first entered judgment, we think that such a judgment was warranted not only by the evidence, but by the findings.

After Carrel abandoned the business, the defendant, by an action brought to recover a debt due him from Carrel, took possession of all of the stock found in the place of business of Carrel, and caused a sale thereof to be made under execution. It may be urged that the instructions of the defendant, who was the plaintiff in that action, to the officer making the sale, provided only for a sale to be made of the property of Carrel; but whether that is true or not seems immaterial, as it sufficiently appears that all of the merchandise found in Carrel's place of business was appropriated by the defendant, and whether he could under such a sale give good title or not, he did, in fact, cause the possession of the remainder of the consigned goods to be transferred to another person. But as to the larger part of the consignments, as segregated by the trial judge in his findings, the same conditions of fact or as to the law do not apply.

[2, 3] We think that when the firm of Potter & Carrel was dissolved, and the plaintiff was given notice of that fact, and, understanding clearly the situation, proceeded to deal with Carrel as the new owner of the business, it thereby estopped itself from thereafter claiming that the responsibility of Potter continued as to the goods formerly consigned to the copartnership. It should be kept in mind that the consigned goods were allowed to remain with Carrel for a year and a half after the dissolution of the partnership occurred. They were left there, not for the purpose of benefiting the firm or the firm's business as it had previously existed under the copartnership, but directly for the benefit of the business which was continued thereafter; the consideration moving to the plaintiff being that it would secure orders for goods as per samples which made up the consigned lots. The mutual considerations were continuing; the property could have been retaken upon demand at any time by the plaintiff, and all obligation required from it would have been thereby discharged. There need be no question made as to the law which declares that a retiring copartner may be held

for the obligations of the copartnership theretofore created. The text-book rule is uniform, and the decisions are without conflict to that point. See *Parsons on Copartnership*, § 296, and cases cited. In this case, when Potter notified the plaintiff that he had withdrawn from the firm, plaintiff had the option to demand the return of the goods, or to continue business with Carrel under the same or different arrangement with respect to the consigned merchandise. It chose to follow the latter course, and allowed the sample stock to be left in Carrel's place of business solely because of benefits to be received in the future from the business as conducted by Carrel. Under all of these facts, surely it must be said that impliedly a new contract was made with the new proprietor of the business formerly conducted by the copartnership, and that the responsibility of the defendant as a copartner had ceased before the alleged conversion was made.

We think that the judgment should be reversed.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 637

CLOYNE v. LEVY. (Civ. 1608.)

(District Court of Appeal, Second District, California. Feb. 24, 1915.)

1. ACCORD AND SATISFACTION — COMPROMISE AND SETTLEMENT — PART PAYMENT — CONSIDERATION — "ACCORD."

Where a debtor is insolvent, or where a genuine controversy as to the amount due exists, acceptance by the creditor of less than claimed by him in extinguishment of the debt is a sufficient consideration for a parol agreement to extinguish the debt within Civ. Code, §§ 1521, 1524, defining an "accord" as an agreement to accept, in extinction of an obligation, something less than that to which the person agreeing to accept is entitled, and providing that part performance of an obligation, when expressly accepted by the creditor in writing in satisfaction, extinguishes the obligation.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 60-65, 84, 87; Dec. Dig. —8; *Compromise and Settlement*, Cent. Dig. §§ 35-50; Dec. Dig. —6.

For other definitions, see *Words and Phrases*, First and Second Series, *Accord*.]

2. ACCORD AND SATISFACTION — COMPROMISE AND SETTLEMENT — ACCEPTANCE OF LESS SUM THAN AMOUNT DUE — EVIDENCE.

Evidence held not to justify a finding of an accord and satisfaction, so that the creditor could recover an additional sum.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 162-165; Dec. Dig. —26; *Compromise and Settlement*, Cent. Dig. §§ 91-94; Dec. Dig. —23.]

3. CONTRACTS — MUTUAL MISTAKE — EVIDENCE.

Evidence held to sustain a finding that there was no mistake in reducing an agreement to writing.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 448-453, 1197-1199, 1799, 1800; Dec. Dig. —99.]

4. CONTRACTS 129—GAMING 5—VALIDITY—GAMBLING CONTRACT.

A contract between the principal stockholder of a bank and a depositor of the bank, which recites the rendition of judgment in favor of a third person against the depositor and his intention to appeal, and which provides that depositor shall leave the deposit in the bank pending the appeal and until final termination of the litigation, in consideration of which the principal stockholder, on final defeat of depositor, will pay to him legal interest on the judgment from a specified date, which depositor shall then be under obligation to pay, is not invalid as tending to encourage litigation or as in the nature of a gambling contract, and the mere fact that in the contingency that the judgment shall be reversed no interest shall be paid will not affect the validity of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 616-632; Dec. Dig. 129; Gaming, Cent. Dig. §§ 5-15; Dec. Dig. 5.]

Appeal from Superior Court, Ventura County; Robert M. Clarke, Judge.

Action by Thomas Cloyne against A. Levy. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, *Wolff v. Cloyne*, 156 Cal. 746, 106 Pac. 104.

Charles F. Blackstock, of Oxnard, for appellant. Robert M. Sheridan, of Ventura, and Edward M. Selby, of Los Angeles, for respondent.

SHAW, J. This action grew out of the following facts: Thomas Cloyne agreed in writing to buy from M. L. Wolff a certain tract of land, at which time he paid \$1,000 on account of the purchase price thereof. Upon Cloyne refusing to consummate the deal by paying the balance of \$16,026.80, in accordance with the agreement, Wolff, on June 28, 1907, tendered him a deed, which Cloyne refused to accept. Whereupon Wolff brought suit upon said contract for the specific performance thereof.

The result of the trial was a judgment rendered on February 14, 1908, in favor of Wolff for \$16,912.05, bearing interest at the rate of 7 per cent. until paid. From this judgment Cloyne appealed to the Supreme Court. Defendant Levy had no interest in the litigation, but it appears that Cloyne had a large sum of money on deposit in his bank, and before taking said appeal Cloyne and Levy, who was the chief owner of the bank, made an agreement on February 29, 1908, which, after reciting that judgment had been rendered in said action in favor of Wolff bearing "interest at the rate of 7 per cent. per annum from and after the 28th day of June, 1907," and that Cloyne intended to appeal said case and had on deposit in the Bank of A. Levy, Inc., a sum of money exceeding the sum of \$18,000, of which bank Levy was the principal stockholder and therefore to his interest to have said deposit remain in said bank pending the conclusion of such litigation, provided:

That Thomas Cloyne should leave a sum of money amounting to at least \$18,000 on deposit in said bank pending said appeal and until the final termination of the litigation, in consideration of which "the said A. Levy hereby agrees in consideration thereof that if the said Thomas Cloyne shall eventually be defeated in said litigation, that is to say, if judgment shall finally be rendered against said Cloyne in said matter, then and in such event the said A. Levy agrees to pay to said Thomas Cloyne an amount equal to the legal interest figured at 7 per cent. per annum on said judgment from June 28, 1907, and which said Thomas Cloyne shall then be under legal obligation to pay."

It was further provided, that if the case should be reversed or eventually decided in favor of Cloyne, Levy should not pay any interest on said deposit.

The judgment in the case of *Wolff v. Cloyne*, 156 Cal. 746, 106 Pac. 104, was, on January 15, 1910, by the Supreme Court affirmed, and on February 17, 1910, Levy paid to Cloyne the sum of \$2,313, which represented interest on said judgment rendered in *Wolff v. Cloyne* at the rate of 7 per cent. per annum for a period extending from February 14, 1908, the date of the judgment, to the date of its affirmance on appeal.

The action is upon the agreement to recover the balance of \$754.38, alleged to be due thereon. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

Defendant in his answer admits the execution of the agreement as set out in the complaint, but, by both answer and cross-complaint, alleges that said written agreement does not express the true intent and meaning of the parties in making said agreement, which, as alleged, was that he, defendant Levy, should pay plaintiff such rate of interest from the date when said judgment was rendered, to wit, February 14, 1908, and not from June 28, 1907, which was the date when Wolff tendered the deed to Cloyne, but that in reducing their agreement to writing a mutual mistake was made in inserting the date June 28, 1907, as the time from which interest should run.

Upon these allegations defendant asked for a reformation of the agreement. It is also alleged in the answer that this mistake was discovered by both parties on or about February 17, 1910, at which time defendant paid to plaintiff the sum of \$2,313, and that plaintiff accepted said sum in full satisfaction and discharge of any and all claims under and by virtue of said agreement.

It thus appears that defendant, while conceding that under the agreement as written plaintiff is entitled to recover the sum sued for, nevertheless insists not only that the amount paid under the circumstances shown constituted an accord and satisfaction, but also that under the evidence he was entitled to have the instrument reformed so as to express what he insists was the true intent and meaning of the parties. As to both these

contentions, the court found against defendant.

The obligation of defendant under the terms of the written agreement was to pay plaintiff interest on the judgment from June 28, 1907, to the date of its affirmance. This amounted to \$3,067.38. On February 17, 1910, defendant paid Cloyne \$2,313 towards the liquidation of said indebtedness. Appellant insists that such payment constituted an accord and satisfaction, the effect of which was to discharge the obligation.

[1] If this payment of the lesser sum extinguished the obligation of defendant upon the agreement, it was (in the absence of an acceptance in writing, or made pursuant to the terms of a written instrument [Civ. Code, § 1524]) by virtue of a new agreement, which in law is termed an accord and satisfaction. Civ. Code, § 1521. To support, and render such an agreement, when executed, valid, since there was no writing as specified in section 1524, *supra*, it must, like other contracts, be founded upon a sufficient consideration. *Deland v. Hiatt*, 27 Cal. 611, 87 Am. Dec. 102; *Dobinson v. McDonald*, 92 Cal. 33, 27 Pac. 1098. The fact that the debtor is insolvent, or that a genuine controversy exists as to the amount of the obligation, may, in the absence of a writing, constitute sufficient consideration for the agreement when the creditor accepts, in extinction of the obligation, a less sum than that due from the obligor.

[2] Appellant's contention is that when plaintiff, on February 17, 1910, went to the former's bank, presented his bank book and requested that Levy enter therein, to plaintiff's credit, the amount of interest due to him under the terms of the agreement, a dispute arose between them as to the correct amount, and after some discussion on the subject, wherein plaintiff expressed the opinion that he was entitled to a greater sum than that which appellant proposed to pay him, finally agreed to accept interest for the period extending from February 14, 1908, thereby waiving any right to interest for the period from June 28, 1907, to February 14, 1908. Conceding this contention supported by the testimony of defendant (as to which we entertain grave doubt), it is nevertheless contradicted not only by plaintiff himself, but by his daughter, who was present. From this testimony, accepted by the court as true, it appears that Cloyne handed his bank book to Levy, asking him to make entry of credit therein of the amount of interest due; that Levy took the book and made a computation, and, after the same was verified at Levy's request by an employé of the bank, he then made the entry of \$2,313 and handed the book to Cloyne, saying, "There is your interest." According to plaintiff's testimony, there was not only no dispute, but no discussion. He relied upon Levy, who appears to have been his banker, to enter the correct

sum. Afterwards, feeling that the sum paid was less than that due, he had a computation made which disclosed the balance herein claimed to be due under the terms of the agreement. The finding of the court to the effect that there was no accord and satisfaction is amply supported by the evidence.

[3] Little is urged in support of the proposition that the evidence is insufficient to support the finding to the effect that there was no mutual mistake in reducing the agreement to writing, other than that the recital of the rendition of a judgment bearing interest at the rate of 7 per cent. per annum is, since the judgment was rendered February 14, 1908, inconsistent with such fact. This apparent inconsistency is fully explained, however, by the testimony of plaintiff that, owing to the fact that the judgment as rendered included interest from June 28, 1907 (the date of the tender of the deed by Wolff), plaintiff and his friends insisted that Levy should obligate himself to pay interest from such date. To this defendant objected, but finally agreed thereto; whereupon, to remove any uncertainty as to this being the meaning of the parties, the words, "from June 28, 1907," were inserted by interlineation after the words, "per annum on said judgment," and with this interlineation made the parties executed the agreement. The finding upon the evidence disclosed could not have been other than that made.

[4] There is no merit in the contention that the agreement tended to encourage litigation, or was in the nature of a gambling contract, and therefore void as against public policy. It was made upon a sufficient consideration, namely, that defendant was to have the use of the money for which he was to pay interest. The fact that in the contingency that the judgment should be reversed he was to pay no interest could not affect the validity of the agreement.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 684

THOMAS v. BORUFF. (Civ. 1617.)

(District Court of Appeal, Second District, California. March 1, 1915.)

PHYSICIANS AND SURGEONS ⇄ 24—COMPENSATION—AGREEMENT TO PAY—SUFFICIENCY OF EVIDENCE.

In an action by a physician against the brother-in-law of a patient for services performed in an operation, evidence held sufficient to support a finding that defendant promised to pay the expenses in connection with the operation.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 53-62; Dec. Dig. ⇄ 24.]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by C. P. Thomas against F. L.

Boruff. Judgment for plaintiff, and defendant appeals. Affirmed.

Trippet, Chapman & Biby, of Los Angeles, for appellant. Hindman & Yakey, of Los Angeles, for respondent.

SHAW, J. Plaintiff, a physician and surgeon, sues in his own behalf and as assignee of H. E. Southworth, also a physician and surgeon, to recover for services rendered in performing, at the special instance and request of defendant, a surgical operation upon Henry Caystile, brother-in-law of defendant. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

The appeal may be disposed of by a consideration of the evidence in support of the finding:

"That on or about the 7th day of April, 1913, the plaintiff herein, C. P. Thomas, and the said H. E. Southworth, at the special instance and request of the defendant herein, F. L. Boruff, performed professional services for one Henry Caystile, which said services were and are of the reasonable value of \$500, which the defendant herein undertook, promised, and agreed to pay for."

The evidence tends to prove that, while Dr. Southworth had theretofore treated Mr. Caystile, he was not under employment by him at the time the operation was performed; that defendant asked him to perform it, and the defendant, upon being told by Southworth that the latter had spoken to Dr. Thomas regarding the matter, personally requested him to perform the operation, and said: "I want you to give him all the service that is possible, every attention, and I will foot the bills." On the morning when the operation was performed, in conversation with both plaintiff and Southworth, defendant said to the former, "I suppose you have called me in here for the purpose of having me say that I will pay for these services;" and plaintiff said, "Well, if those are the facts, Mr. Boruff, that is all right." "Well," said defendant, "you boys go ahead and fix him up the best you can, and I will pay the bill." Upon plaintiff telling defendant that the operation was necessarily attended with great danger and uncertainty, he replied, "Go ahead and do the best you can for him." Another witness testified that Mr. Boruff said to plaintiff to do the best he could for the man, and he (defendant) would pay the bill. Not only does this testimony strongly tend to establish an original promise on the part of defendant to pay for the services, both of plaintiff and that of his assignor, but the testimony of defendant himself is corroborative of this view. His testimony is that, upon Dr. Southworth requesting him to "stand for the expense," he said, "Yes, I will stand for the bill if you will allow me to select the man to operate;" to which Dr. Southworth replied, "Well, I have selected a man and Henry wants me." "I know he does," said

defendant, "he prefers to have you, but I will not pay the bills on your account;" to which Dr. Southworth said, "I have secured Thomas; he is a good man;" in answer to which defendant replied, "Go ahead, if he wants you; go ahead." This evidence might very properly be construed as a waiver of defendant's wish to name the operator as a condition of paying the bill.

Since the finding complained of is supported by the evidence adduced on behalf of plaintiff, it follows that there was no error in the ruling of the court in denying defendant's motion for a nonsuit. Conceding that, even if defendant had not promised to pay the bill, plaintiff and his assignor might nevertheless have rendered the service, it is sufficiently clear, we think, that before performing the operation defendant made an original promise to pay the expense, and that plaintiff and Southworth relied upon such promise.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

28 Cal. App. 714

FINNAN et al. v. RECLAMATION DIST.
NO. 273 et al. (Civ. 1330.)

(District Court of Appeal, Third District, California. March 9, 1915. Rehearing Denied April 8, 1915.)

1. DRAINS $\hookrightarrow$ 76—RECLAMATION DISTRICTS—ASSESSMENTS—NOTICE.

An owner of property within a reclamation district is entitled to a hearing at some time on the question of benefits.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76-81; Dec. Dig. $\hookrightarrow$ 76.]

2. DRAINS $\hookrightarrow$ 14—RECLAMATION DISTRICTS—IRREGULARITIES—CURING BY STATUTORY PROVISIONS.

Defects in the original petition for a reclamation district resulting from an omission of a material fact or the absence of any petition and other irregularities may be cured by statute.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 5, 6; Dec. Dig. $\hookrightarrow$ 14.]

3. DRAINS $\hookrightarrow$ 82—RECLAMATION DISTRICTS—ASSESSMENTS—IRREGULARITIES—POWER OF BOARD OF SUPERVISORS—JUDICIAL REVIEW.

Pol. Code, § 3462, as amended in 1911 (St. 1911, p. 614), providing that reclamation assessment lists shall be filed with the clerk of the county board of supervisors, who shall appoint a time to hear objections, notice of which shall be given by publication, and providing that at any time before the hearing any person interested may file objections, and at the hearing the board shall hear evidence, and may modify the assessment or make a reapportionment, and authorizing any person aggrieved by the decision of the board to sue within a specified time after the filing of the assessment list, must be confined to the acts of the board of supervisors on matters over which they have jurisdiction, and an order of the board in excess of authority may be attacked in any independent proceeding, and the provision does not make an assessment lawful when the purpose of it is contrary to the law, and land in a reclamation district must be assessed for reclamation purposes or the assessment cannot be lawfully enforced, and, when an assessment has been lev-

ied for purposes other than those specified, the assessment is not validated, and the owner may sue in equity for relief.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 81, 83-87; Dec. Dig. ¶¶ 82.]

4. DRAINS ¶68—RECLAMATION DISTRICTS—ASSESSMENTS—IRREGULARITIES—POWER OF BOARD OF SUPERVISORS.

A reclamation district assessment which includes prior assessments declared illegal, and interest accruing thereon, and which provides that credit shall be made for payments on the illegal assessment, with interest on the sums paid, is unauthorized within section 3466½, and not validated by section 3462, as amended in 1911 (St. 1911, pp. 644, 647).

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 72; Dec. Dig. ¶¶ 63.]

5. DRAINS ¶67—RECLAMATION DISTRICTS—ASSESSMENTS—"PROCEEDING ALREADY COMMENCED."

A proceeding to levy a reclamation district assessment was commenced within Pol. Code, § 3478, as amended in 1911 (St. 1911, p. 648), providing that all reclamation districts shall be subject to the Code, except as to proceedings already commenced for the levy or collection of assessments where prior to the amendment a petition for assessment was filed, and commissioners appointed for the filing of the petition and appointment of commissioners were necessary for a valid assessment.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 73, 76, 91; Dec. Dig. ¶¶ 67.]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by John Finnan and another against Reclamation District No. 273 and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

McCutchen, Olney & Willard, of San Francisco, Clary & Louttit, of Stockton, and F. E. Boland, of San Francisco, for appellants. A. H. Ashley, R. C. Minor, and Geo. F. McNoble, all of Stockton, and F. O. Housken, of New Hope, for respondents.

BURNETT, J. On February 8, 1910, there was filed with the board of supervisors of San Joaquin county a petition for the levy of an assessment, No. 3, of \$167,006.90, upon the 7,047.80 acres of land in reclamation district No. 773 (situated entirely in San Joaquin county), and on the same day respondents, as the owners of 317 acres of land in said district, filed with said board their protest against said levy, and on February 25th following they filed an additional protest. The board of supervisors, however, appointed commissioners to levy the assessment prayed for.

On June 12, 1911, the assessment list made by said commissioners was filed in the office of the county treasurer of said county. It remained there until July 13, 1911, and was then returned to the board of trustees of said district. That board, on July 25, 1911, made its order directing that the total amount of said assessment be paid. On January 29, 1912, said reclamation district brought an action in the superior court of said county against respondents to recover \$7,080.70, the

amount assessed against a portion of their land. Respondents' demurrer thereto was sustained on the ground of the want of facts. On March 13, 1912, an amended complaint, verified by the secretary of said district, was filed in said court. In this amended complaint the whole record of the proceedings relating to this assessment No. 3 was set forth either directly or by way of exhibits. On May 27, 1912, the superior court sustained respondents' demurrer to said amended complaint without leave to amend, and on May 31, 1912, judgment was entered accordingly. No appeal was ever taken from that judgment. However, the assessment list, which had been filed with the county treasurer, was withdrawn, and on July 15, 1912, it was presented to the board of supervisors, which board made an order fixing August 6, 1912, for the consideration of said list, and on said date the board approved said assessment. On December 16, 1912, respondents commenced this action in the superior court to have said orders of the board of supervisors annulled, and to have it adjudged that said assessment was null and void, that the district had no lien on the lands of plaintiffs, and that the defendant district, its trustees, officers, etc., be enjoined from offering for sale or selling any portion of said lands and for general relief. The complaint proceeds upon the theory that the board of supervisors had no jurisdiction to appoint commissioners to levy the assessment, that the invalidity of said assessment was conclusively determined by said judgment of May 31, 1912, and that, by reason of the fraud of defendants, the plaintiffs were deprived of the opportunity to contest the said assessment before the said board. The findings and judgment were in favor of plaintiffs, and were entered November 5, 1913. On February 3, 1913, another suit was also brought by plaintiffs for a writ of certiorari to annul said order of the board appointing commissioners, and also the order approving the assessment list filed by said commissioners. The judgment in that action was entered April 19, 1913, and was in favor of plaintiffs as prayed for. Appeals have been taken on separate records from these last two judgments, and it is manifest that the vital questions involved therein are identical; the difference being as to the form of procedure that should have been adopted in the court below. The action now being considered contemplated and resulted in complete relief to plaintiffs, and the other was commenced because of doubt on the part of plaintiffs as to the proper remedy to invoke.

In the first action commenced, as stated, on January 29, 1912, defendants therein (plaintiffs here) took the position not only that the complaint, and also the amended complaint, failed to state sufficient facts to constitute a cause of action, but that by reason of certain amendments to the reclamation statute, approved April 5, 1911, the su-

perior court had no jurisdiction of the action. As to the latter objection, however, the trial court ruled against the defendants, but held that no cause of action was or could be stated. As to the jurisdictional question, Hon. J. A. Plummer, the trial judge, in his opinion filed upon the demurrer to the original complaint, declared:

"In so far as the objection that the court has no jurisdiction of this action by reason of the act of the Legislature approved April 5, 1911, is concerned, the court is of the opinion that section 18 of said act, which becomes section 3478 of the Political Code, completely answers the contention of counsel for defendants, and that under the provisions of said section the action may be maintained."

The basis for the contention of said defendants (respondents herein) that the court had no jurisdiction of said action, and which contention, it may be said, is now the claim of appellant herein (plaintiff therein), is found in section 3462 of the Political Code, as amended by said statute of 1911. Therein it is provided that the assessment list prepared by the commissioners "shall be filed with the clerk of the board of supervisors of the county." Prior to said amendment the section provided: "The list so made must be filed with the treasurer of the county." Said amended section also provides that the board of supervisors shall appoint a time for hearing objections to said assessments, and shall give notice thereof by publication for two weeks; that any person interested in any of the land subject to the assessment may file written objections thereto; that the same must be considered by said board; that after hearing the evidence offered the board "may modify or amend the assessment in any particular, or make a reapportionment of the entire assessment." Furthermore, if the amount of any assessment be changed, another day must be appointed for hearing any objection to said assessment as thus changed, and this procedure shall be followed "until the amount of each assessment shall be finally fixed and approved." When the board of supervisors shall finally approve the assessment, such order shall be indorsed upon said assessment list, signed by the chairman and attested by the clerk of said board, "and such decision of said board of supervisors shall be final, and thereafter said assessment list shall be conclusive evidence that the said assessment has been made and levied according to law, except in an action commenced as hereinafter provided. The lists shall then be filed with the county treasurer. * * * No objection to such assessment shall be considered by the board of supervisors or allowed in any other action or proceeding, unless such objection shall have been made in writing to the board of supervisors as above specified." It is further provided that any person aggrieved by the decision of the supervisors may bring an action in the superior court to have said assessment corrected, modified, or annulled, but such action must be brought within 30 days after said assessment list has been filed

in the office of the county treasurer, and, "if said action shall not be commenced within 30 days, no action or defense shall thereafter be maintained attacking the legality of said assessment in any respect." The subsequent section provides that from and after the filing of said list or a certified copy thereof with the county treasurer the charges assessed upon any tract of land shall constitute a lien thereon, and shall impart notice thereof to all persons.

It is thus to be seen how ample are the powers conferred by this statute upon the trustees of the district and the board of supervisors, and how limited is the time apparently in which proceedings must be instituted if any application is to be made to the superior court for a review of the action of these local boards in determining and fixing the assessment and its apportionment; such application to be made only if the property owner has filed his objections with the said board of supervisors. It is the contention of appellant that therein the Legislature has clearly expressed its intention to provide an exclusive method of redress on the part of an aggrieved party, and the conclusion follows that a landowner who fails to file his objections with the board of supervisors or to bring his action in the superior court within said 30 days is precluded from questioning in any subsequent proceeding the validity of said assessment, unless upon the ground that by reason of fraud he was prevented from pursuing the course therein prescribed.

[1] The radical change made in the law was, no doubt, intended to avoid the long delays incident to the old procedure, and to afford a prompt and effective agency for validating and collecting assessments. As pointed out in Reclamation District No. 351 v. Sels, 117 Cal. 165, 49 Pac. 131, "the property owner is entitled to a hearing at one time or another upon the question of benefits," and before the passage of section 3493½ of the Political Code he made his showing when an action was brought to recover the assessment. But by the adoption of said section provision was afforded for an action by the district, to be brought within one year, to test and determine all questions relating to the validity of the assessment, and therein the property owner could urge any available defense. In either case, however, protracted litigation often ensued, and the payments were sometimes deferred for years, even if the court did not finally determine the assessment was invalid by reason of some technical defect in the proceedings, and thus require the work to be done again from the beginning.

[2] The principle of the amendment is, of course, commendable, and, as far as we are advised, there is no valid legal objection to the provision in reference to the finality of said proceedings, at least as far as their regularity and the question of the apportion-

ment of the assessment are concerned. This can be said of defects in the original petition as well as of other irregularities. No doubt, an omission of a material fact from said petition or the absence of any petition at all could thus be cured. This consideration is adverted to in *Wilcox v. Engebretsen*, 160 Cal. 288, 116 Pac. 750, wherein, in reference to the necessity for filing a petition to authorize the city board of trustees to make an order to change the grade of a street, it was said:

"Where a statute requires such a petition to be filed as a condition precedent to the making of such order, the board or council has no power to make the order until a sufficient petition has been filed. This is settled by the cases of *Turill v. Grattan*, 52 Cal. 97, *Mulligan v. Smith*, 59 Cal. 206, and *Kahn v. Board*, 79 Cal. 396 [21 Pac. 849], and as to that point there is no dispute. But the necessity for such petition is the creature of the statute. It is not required by any constitutional guaranty. From this it follows that the statute may dispense with such requirement, or it may provide that the decision of the board or council as to its sufficiency, or any subsequent act depending upon it, such as the issuance of bonds, shall be conclusive evidence of the fact that a sufficient petition has been filed. Such provisions will be upheld as valid. *Chase v. Trout*, 146 Cal. 356, 80 Pac. 81. In the case just cited, and in *German, etc., Society v. Ramish*, 138 Cal. 130, 69 Pac. 89, it was held that the conclusive evidence clause of the street improvement bond act of 1893 cured all such defects."

[3] But we do not understand that such provision has the effect of validating an act that is void; in other words, of making an assessment lawful when the purpose of it is contrary to the law, and of placing beyond the reach of the general equity powers of the court the question of the jurisdiction or legal authority of the board to take any step at all toward the levy of an assessment.

It is certainly fundamental that no person's property can be taken for a purpose not authorized by law. Land in a reclamation district must be assessed for reclamation purposes or the assessment cannot be lawfully enforced. The order of the board of supervisors, if in excess of authority, assuredly cannot be less amenable to attack in any independent proceeding than the judgment of a court of record, and yet, in *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317, it was held that it is not within the power of the Legislature to divest the jurisdiction in equity cases conferred by the Constitution upon the superior court, and that "jurisdiction could not be divested or affected by section 1666 of the Code of Civil Procedure, making the decree of distribution conclusive as to the rights of heirs, legatees, or devisees," and that "the power of a court of equity to relieve against judgments is not confined to cases where they have been procured by fraud, but extends also to judgments wrongfully given by reason of mistake either of the court or of the injured party unmixed with fraud."

We think Judge Plummer was right in the following comments:

"This provision of the Code, however, must be limited and confined to acts of the board of supervisors upon matters over which they have jurisdiction. In other words, the law provides that boards of supervisors upon statements presented to them by boards of trustees of reclamation districts may levy assessments for certain purposes, particularized and specified in the Codes. When it is shown that trustees have asked for the levy of an assessment in accordance with those provisions, and for the purpose for which assessments are allowable, and that the board of supervisors has acted therein within the limits prescribed by the Code, then and in that event the action of the board of supervisors will be deemed final and conclusive. But whenever it appears that an assessment has been levied for purposes other than those specified in the Code, section 3462 certainly cannot be held to validate such an assessment and preclude an inquiry as to the same by an owner whose lands are about to be sold under proceedings (or for purposes) having no warrant in law. * * * If this is not a correct statement of the law, then the property rights of an owner of land within a reclamation district are subject to the whims and caprices of those who may happen to be the trustees of a reclamation district."

[4] In said opinion it is also said:

"It appears by the statement filed with the board of supervisors on February 8, 1910 (upon which this proceeding rests), that \$115,397.90 of the assessment for \$167,006.90 asked are inserted in said statement for the purpose of covering two prior assessments declared illegal, and legal interest accrued thereon, and that this assessment list presented to the board of supervisors and approved by it is, in fact, an assessment, to the extent of (at least) \$115,397.90, to overlap and cover said former illegal assessments. It is further stated in said report that certain landowners had not paid such illegal assessments, that certain other landowners had paid the same, and that the treasurer of San Joaquin county must credit the several paying landowners, upon this (or any following) assessment, with the amounts paid by them upon the said assessments declared illegal, together with interest upon said several sums from the dates of their respective payments (the amounts of said payments and interest to be applied to the payment of any assessment thereafter levied). For this purpose, the report asks that there be included in this assessment the amounts so paid by the several landowners upon the said two illegal assessments, together with interest thereon from the several dates of payment to February 7, 1910. Then follow interest items aggregating \$12,661.90. It will be noted that there is no provision either in the old Code or in the amended Code which authorizes an assessment for any such purpose; and there is no provision in the amended Code which authorizes the board of trustees of any reclamation district, or any officer thereof, to allow any such credit. Section 3466½ is the sole measure of both the mode and the power of adjusting assessment burdens under such conditions, to wit, a separate assessment according to benefits derived (not to expense incurred) or a reassessment."

It may be said that respondents claim there were other fatal defects in said assessment, but they need not be noticed.

Briefly stated, it was therefore the opinion of the lower court not only that under the amended statute a court of equity could inquire into the legal authority for the assessment, and that in the instant case the assessment was invalid, but also that the whole proceeding as to the levy and collec-

tion of said assessment was to be measured by the statute as it existed when the petition was filed with the board of supervisors, and hence that the court had jurisdiction of said action of January 29, 1912, and that its judgment therein was a conclusive determination of the invalidity of said assessment. It is conceded by appellants that such was the effect of that judgment if the old law was operative. That question undoubtedly depends upon the proper construction of said section 3478 of the Political Code as amended by said act of 1911.

[5] The language of that section is as follows:

"All reclamation districts now legally existing in this state, which were created by or formed under the provisions of any statute of the state, shall henceforth be subject to the provisions of the Political Code of the state of California relating to reclamation districts the same as though such districts had been formed by or created under the provisions of said act relating to 'swamp and overflowed salt marsh and tide lands': Provided, that this provision shall not affect any proceeding that shall have been already commenced for the levy or collection of assessments in such districts when this act takes effect; nor shall it affect any act done or performed in relation to the affairs of such districts prior to such last-mentioned date."

It is true that the assessment had not been actually levied, but the proceeding had "been already commenced" for the levy and collection of said assessment. The filing of the petition for the assessment and the appointment of the commissioners, as already seen, took place long "prior to such last-mentioned date." These prior acts were, indeed, important only as a part of the process for the levy and collection of the assessment. In fact, their only purpose was to lay the legal foundation for said assessment, and it seems to have been the intention of the Legislature that, where the initiatory steps had been taken, the course was to be pursued to the end under the old statute. If this is the right view, then the said action brought by the trustees in January, 1912, was expressly authorized by the law, and was concededly final, as before stated.

As the matter is presented here, we think the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

26 Cal. App. 724

FINNAN et al. v. BOARD OF SUP'RS OF SAN JOAQUIN COUNTY. (Civ. 1323.)

(District Court of Appeal, Third District, California. March 9, 1915. Rehearing Denied April 8, 1915.)

Appeal from Superior Court, San Joaquin County; G. W. Nicol, Judge.

Action by John Finnan and another against the Board of Supervisors of the County of San Joaquin. From a judgment for plaintiffs, defendant appeals. Affirmed.

Clary & Louttit, of Stockton, and McCutchen, Olney & Willard, of San Francisco, for appellant. A. H. Ashley, of Stockton, for respondents.

BURNETT, J. This is a companion case to No. 1330, 148 Pac. 227, the opinion in which is filed herewith. While this bears an earlier number on appeal than the other cause, it was brought later in the superior court, as we have already seen. For a statement of the facts it is sufficient to refer to said opinion in No. 1330. If we are right in the conclusions reached therein, this action was unnecessary, and resulted in costs that might have been avoided. However, the fact that the other action was pending does not seem to have been called to the attention of the learned trial judge who presided in this action. If it had been, he might have held that it afforded "a plain, speedy, and adequate remedy." In view of our conclusion in the other case, we deem it unnecessary, though, to decide whether the old law afforded such remedy, as the question now seems moot so far as this court is concerned. It may be added that, under said amended statute, such remedy seems to be clearly afforded.

The judgment is affirmed.

We concur: HART, J.; CHIPMAN, P. J.

26 Cal. App. 696

KEPNER v. JOHN M. C. MARBLE CO. (Civ. 1532.)

(District Court of Appeal, Second District, California. March 4, 1915. Rehearing Denied by Supreme Court May 3, 1915.)

1. REFORMATION OF INSTRUMENTS $\hookrightarrow$ 16 — GROUNDS—FRAUD—MISTAKE.

A contract may be reformed for fraud or mutual mistake of the parties, or mistake of one party which the other at the time knew or suspected.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. $\hookrightarrow$ 16.]

2. REFORMATION OF INSTRUMENTS $\hookrightarrow$ 20 — GROUNDS—FRAUDS—ACTS CONSTITUTING.

Where a party to a contract did not occupy confidential relations to the other party, the latter was not justified in relying on representations of the parties that the contract, as reduced to writing, contained a stipulation orally agreed on, and the other party could not, on the ground of fraud, obtain a reformation of the contract by the insertion of the provisions.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 79, 80; Dec. Dig. $\hookrightarrow$ 20.]

3. REFORMATION OF INSTRUMENTS $\hookrightarrow$ 17 — GROUNDS—MISTAKE.

Where a lessee intended that the lease should embody a provision orally agreed on, and believed that it was inserted therein, and his failure to discover the omission was due to his own carelessness, and there was nothing to show that the lessor suspected that the lessee so believed, the lease could not be reformed on the ground of the lessee's mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 69-71; Dec. Dig. $\hookrightarrow$ 17.]

4. LANDLORD AND TENANT $\hookrightarrow$ 39 — LEASE — INDEPENDENT AGREEMENT—ENFORCEMENT.

An oral agreement by a lessor of premises described in the lease as a two-story frame apartment house, to construct, if required, a third story and lease it to the lessee at an annual rental equal to 10 per cent. of its cost, is disconnected with the lease and a chattel mortgage given by the lessee for the price of furni-

ture contained in the premises and bought by the lessee, and the lessor's breach of the oral agreement does not defeat his right to enforce the lease and chattel mortgage.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 101-103; Dec. Dig. ☞ 39.]

5. FRAUDS, STATUTE OF ☞58—PAROL LEASE FOR TERM OF YEARS.

An oral agreement by a lessor in a written lease of premises described as a two-story frame apartment house for a term of years, to construct, at the request of the lessee, a third story and lease it to him on specified terms for the term of the original lease, is in effect a contract for a lease of premises for more than a year and is void under the statute of frauds (Civ. Code, § 1624, subd. 5).

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 90, 91; Dec. Dig. ☞ 58.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by A. E. Kepner against the John M. C. Marble Company, in which defendant filed a cross-complaint. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Robert G. Loucks, of Los Angeles, for appellant. Oscar A. Trippet and John E. Biby, both of Los Angeles, for respondent.

SHAW, J. This was an action for the reformation of a lease made by defendant to plaintiff and, as reformed, to have the same, together with a chattel mortgage made by plaintiff to defendant and a bill of sale made by defendant to plaintiff, all executed in connection with the said lease, rescinded for failure of consideration. Defendant answered, denying the material allegations of the complaint, and also filed a cross-complaint for the foreclosure of the chattel mortgage given it by plaintiff. The court gave judgment for defendant and rendered a decree for the foreclosure of the chattel mortgage, from which, and an order denying his motion for a new trial, plaintiff prosecutes this appeal.

In August, 1909, defendant was the owner of a two-story apartment house in the city of Los Angeles, known as the Boylston Apartments, together with certain furniture contained therein. As a result of negotiations between the parties, it was, on August 31, 1909, orally agreed that defendant would sell to plaintiff the said furniture for the sum of \$1,800 in cash and lease said apartment house to him for a term of five years from September 1, 1909; it being understood that plaintiff should execute to defendant a chattel mortgage upon said furniture to secure the payment of the rent of said premises to the extent of not exceeding \$2,000. It was further orally agreed, if plaintiff should so elect and request, defendant would in the spring of 1910 construct a third story upon said apartment house, in which case, and upon the construc-

tion of which, plaintiff would lease it, paying therefor as rental, during the balance of the term specified in said lease, 10 per cent. per annum upon the cost of such construction. Defendant prepared the lease, together with the bill of sale of the personal property and the chattel mortgage, and on September 3, 1909, plaintiff went to the former's office, where the documents were presented to him for his approval and execution. After a half hour's examination and consideration thereof, he executed the lease and chattel mortgage (retaining duplicate copy of the lease), and received from defendant the bill of sale to the furniture sold to him, and which was covered by the chattel mortgage. The lease contained mutual covenants usual in such instruments, but made no reference to the fact orally stated by defendant that it would in the spring of 1910, if desired by plaintiff, add to said apartment house a third story for which plaintiff should pay the rental as hereinbefore mentioned.

Plaintiff entered into possession of the demised premises, and on November 1, 1909, the parties executed a supplement to the lease, which, after reciting that the lessor, at the request of the lessee, was about to complete improvements (which consisted of a steam-heating plant) at a cost of \$1,150 upon the premises, made upon the understanding with the lessee that he should pay an increased yearly rental of 10 per cent. thereon, and further that "whereas, it may become desirable during the term of the lease to make further improvements upon the premises which will inure to the advantage of the lessee," provided that plaintiff should pay said additional rental, commencing on December 1st, and which supplement contained the further provision:

"And it is further agreed that in the event that, at the instance and request of the lessee, the lessor shall construct upon, or add other improvements to, the premises, the lessee shall pay an additional rental of 10 per cent. of the actual cost thereof to the lessor."

On January 20, 1910, plaintiff demanded that defendant erect the third story upon said apartment house, but defendant refused to comply therewith for the reason that such structure would be in violation of a city ordinance.

The reformation asked is the insertion in the original lease of the alleged oral agreement, whereby, it is claimed, defendant obligated itself, at the request of plaintiff, to construct an additional story upon said apartment house.

[1] The grounds which will justify the reformation of a written contract are: First, fraud; second, a mutual mistake of the parties; and, third, a mistake of one party which the other at the time knew or suspected. Not the slightest ground exists for claiming that, with intent to deceive the plaintiff, defendant represented that the

lease, as reduced to writing, did contain the alleged oral covenant.

[2] Moreover, defendant did not occupy a fiduciary relation towards plaintiff; hence he was dealing with it at "arm's length" and was not justified in relying upon such representations, even though they were made. Neither does it appear that the provision omitted therefrom was due to mutual mistake of the parties.

[3] As we understand appellant's contention, it is that the omission was due to his mistake, since it was his intention to have it inserted, and believed it was so incorporated, which facts the defendant at the time knew or suspected. That plaintiff intended to have the provision incorporated in the lease is wholly inconsistent with the fact that he spent a half hour or so examining that and other papers and retained in his possession a duplicate of the lease which presumably, by reason of its importance and in view of the fact that he, as stated, did not examine it carefully before its execution, must thereafter have acquainted himself with its contents, and likewise inconsistent with the fact that two months later he executed the supplement thereto, wherein he made no reference to the alleged obligation of defendant to construct a third story, or make other improvements other than such as defendant at its option might make. There is no evidence that it was ever agreed orally that the written lease should embody such provision. As said by the trial court:

"Unless it was understood or intended by the parties that the terms of their agreement respecting the third story should be incorporated into their written lease of the two-story building, there is no ground for a reformation."

Appellant cites the case of *Los Angeles Co. v. New Liverpool Co.*, 150 Cal. 21, 87 Pac. 1029, wherein, supported by numerous authorities, it is said (quoting from the syllabus):

"The mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly."

The principle there enunciated cannot aid appellant in the case at bar, since the court upon sufficient evidence finds that it was not the intention of the parties to incorporate the provision in the lease. Conceding, however, that plaintiff did intend to have it embodied in the lease and, believing it was so inserted, signed the lease, and that his failure to note such omission therefrom was due to his own carelessness, notwithstanding which fact he would, provided the mistake was at the time known to or suspected by defendant, be entitled to have it reformed, the evidence in the case wholly fails to establish such knowledge on the part of defendant, or even disclose reasonable grounds upon which to base the suspicion that plaintiff executed the instrument

under a mistaken belief that it contained the provision. The evidence and circumstances proven, together with the inferences fairly deducible from such circumstances, fully justified the court in making findings of fact from which it properly concluded that plaintiff was not entitled to have the lease reformed in the manner prayed for.

[4, 5] The oral contract was one wholly disconnected with the lease and chattel mortgage given to secure payment of the rent reserved therein. By it defendant agreed to construct in the spring, if so requested by plaintiff, a third story upon said two-story apartment house and lease it to plaintiff for an annual rental equal to 10 per cent. of its cost. While defendant might be liable for a breach thereof, such non-compliance constitutes no defense to the enforcement of the lease and chattel mortgage, the terms of which, as we have seen, must be construed according to the plain import of the language used therein. To quote from the opinion of the trial judge:

"If the oral agreement respecting the third story be regarded as an agreement requiring the lessor to make improvements in or upon the leased premises, then it is in direct conflict with the provision of the written lease that the lessor shall not be required to make any improvements, and therefore such oral agreement is inadmissible under the provisions of sections 1625 and 1639 of the Civil Code. *Tracy v. Union Iron Works*, 104 Mo. 193, 16 S. W. 203. It would also conflict with the description of the premises described in the written lease. The leased premises are described in the written lease as a 'two-story frame apartment house.' The performance of the agreements respecting the third story would convert the leased premises into a 'three-story frame apartment house.' If the oral agreement respecting the third story requires the lessor to build new or additional premises and to lease the same to the lessee for a term beginning in the spring of 1910 and ending with the term described in the written lease of the original two-story building—a term of more than four years—and to lease the same at a rental equal to 10 per cent. of the cost of building such new or additional premises, then the contract is in effect a contract for a lease of a premises for more than a year, and it is void under subdivision 5, § 1624, of the Civil Code."

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 701; 27 Cal. App. 163

RUFFIN v. BECKER et al. (Civ. 1304.)

(District Court of Appeal, Third District, California. March 9, 1915. On Rehearing, April 10, 1915. Rehearing Denied by Supreme Court June 7, 1915.)

1. GUARANTY ⇐49—DISCHARGE OF GUARANTOR—CONTRACTS—CONSTRUCTION.

A contract between a lessor and a guarantor of the lessee provided that the lessor had agreed to sell, and that the guarantor had agreed to buy, the leased premises for a certain sum, and that the guarantor should have 30 days after receipt of abstract to pay the price on obtaining a deed free from incumbrance, and that if during the 30 days the guarantor pointed out objections to the title, the lessor should have 60 days to remedy such defects, and if they were not removed, the agreement should terminate and the deposit be repaid. *Held* to disclose an in-

tention that if title was not made satisfactory within the specified time, the contract should cease, and, so construed, it did not release the guarantor from his liability as guarantor of the lessee on the agreement terminating with the failure of the lessor to perfect title.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 60; Dec. Dig. ¶49.]

2. CONTRACTS ¶155—CONSTRUCTION.

An ambiguous contract, prepared solely by one party thereto, must, under Civ. Code, § 1654, be construed most strongly against him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 736; Dec. Dig. ¶155.]

3. CONTRACTS ¶155—CONSTRUCTION—INTENTION OF PARTIES.

An ambiguous contract, prepared solely by one party thereto, must, as required by Code Civ. Proc. § 1864, be construed in the sense he supposed the adverse party understood it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 736; Dec. Dig. ¶155.]

4. VENDOR AND PURCHASER ¶80 — CONTRACTS — CONSTRUCTION—PAROL EVIDENCE.

Where a contract by a guarantor of a lessee for the purchase of premises was ambiguous as to its effect on the liability of the guarantor if the contract was not carried out by the failure of the lessor to convey good title, parol evidence that when the contract was executed, the guarantor interpreted it to mean that, in such case the rights of the parties as existing prior thereto would be unaffected, showed that the guarantor was not released from his liability as such on the lessor's failure to convey good title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 132-135; Dec. Dig. ¶80.]

5. APPEAL AND ERROR ¶1050 — HARMLESS ERROR—EVIDENCE.

Error in admitting parol evidence to aid in the construction of a written contract, in harmony with a proper construction of the contract, is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. ¶1050.]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by David T. Ruffin against David Becker and another. From a judgment for plaintiff, defendant E. R. Lilienthal appeals. Affirmed.

Lilienthal, McKinstry & Raymond, of San Francisco, for appellant. Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

BURNETT, J. The appeal is from the judgment and order denying a new trial. There is no controversy as to the facts, the construction of a certain written instrument being determinative of the merits of the case. The action was brought against Becker as lessee and Lilienthal as guarantor or surety for the recovery of the sum of \$2,100 for rent of certain premises on Geary street in San Francisco. As stated above, there is no dispute as to the terms of the lease, the amount due thereunder, or that appellant Lilienthal guaranteed the payment of the rent. There are only two grounds upon which appellant relies for a reversal: (1) That a certain executory contract of sale

dated April 29, 1908, operated as a release of the guarantor from all obligations created by said lease; and (2) that the court erred in overruling appellant's objections to certain questions asked of the plaintiff, the only witness examined at the trial.

[1] The said instrument of April 29, 1908, by which appellant claims to have effaced his liability under the lease, was as follows:

"This agreement, made this 29th day of April, 1908, between David T. Ruffin of San Francisco, California, first party, and E. R. Lilienthal of the same place, second party, Witnesseth:

"That first party has agreed to sell, and second party has agreed to buy, that certain property in San Francisco, California, together with the improvements thereon [describing said leased property] for the sum of nineteen thousand dollars, whereof one thousand dollars have been paid by second party to first party contemporaneously herewith, and the balance shall be payable upon the completion of the purchase as hereinafter provided.

"Second party shall have thirty days after receipt from first party of an abstract of title to said property for the payment of the balance of the purchase price against delivery of a good and sufficient deed free from incumbrance.

"If during said thirty days, second party shall point out in writing any objections to the title, first party shall have sixty days within which to remedy said defects. If during said sixty days said defects should not be remedied, then, unless the time be extended, *this agreement shall terminate*, and said deposit shall be repaid to said second party. * * *

"It is part of the consideration hereof that second party shall be released from all liability under that certain written guaranty executed by him of performance by David Becker under the lease made to the latter by first party under date of October 31, 1906."

It seems to us that the reasonable construction of said instrument leads to the conclusion that the parties intended that if the title was not made satisfactory to the prospective purchaser, said executory contract of sale should cease to be operative, and that all rights of both parties created by said contract should be at an end. In other words, they agreed that if Ruffin failed for 60 days to make good any defects in the title pointed out by Lilienthal, the parties should thereafter sustain to each other the same relation as though no such contract had been executed. This, it is believed, is the fair import of the expression, "*This agreement shall terminate and said deposit shall be repaid to said second party.*" If said contract was extinguished the provision thereof in relation to said release of the guaranty would, of course, fall with the other terms. Lilienthal did point out certain objections to the title, and no steps were taken by Ruffin, within 60 days or, indeed, at any time, to obviate the objections, and nothing further was done toward the consummation of the sale or the transfer of the property. As we view it, the agreement of sale, therefore, terminated and it constituted no defense to the action on said guaranty.

We cannot accept appellant's contention that he was released from any obligation on the guaranty by virtue of the execution of

said executory contract of sale. At the time of the execution of said contract there was due for rent the sum of \$1,200, and Lilienthal was bound to make good to Ruffin the sum of \$300 per month till the end of the term, amounting to something over \$12,000. Unless the language of the contract compels the construction we should be slow to impute such unreasonable intention on the part of Ruffin to surrender this valuable right resting upon a concededly valid obligation for a contract of sale that was quite likely to and really did lapse at the expiration of 90 days after April 29, 1908. It seems more reasonable to hold that the parties had in view the consummation of the sale, and that the consideration for the transfer of the property was, on the part of Lilienthal, the payment of \$19,000 and of Ruffin the conveyance of the land and the release of said guaranty.

[2] But if there is any ambiguity in the respect indicated, then it must be construed against appellant in accordance with the familiar principles pointed out in the briefs.

First, the said contract of sale was prepared by Lilienthal, and neither Ruffin, nor any legal advisor of his, had anything to do with its preparation. "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." Section 1654, Civil Code; *Lassing v. James*, 107 Cal. 348, 40 Pac. 534.

[3, 4] Second, it must be taken in the sense that Lilienthal supposed Ruffin understood it. Section 1864, Code of Civil Procedure. There can be no doubt from the evidence as to the facts in relation to this point. Mr. Ruffin testified:

"At the time this thing was executed I had it read over twice and Mr. Lilienthal interpreted it for me partially. He said: 'That's a fair agreement; it is fair to you; it is fair to me.' And he said, 'You give me 30 days after you give me the abstract to pay for it in, and at the end of that time if I find any flaws in the title I will give you 60 days to remedy it in; and at the end of that time if you have not remedied them, our agreement is null and void, and we have not accomplished anything; we are back where we started.'"

Third, the ambiguity is entirely clarified by the parol evidence of the intention of the parties. We have already quoted above sufficient of the testimony of Mr. Ruffin to relieve the question of any doubt that the relinquishment of the liability on the guaranty was to be conditional upon the completed sale of the property.

[5] If we are right in the constructions we have placed upon said executory contract of sale, parol evidence of the conversations and prior negotiations of the parties was unnecessary and, indeed, inadmissible, but it was entirely without prejudice, since it was in line and harmony with the written instrument itself.

But as we conceive it, the view most fa-

vorable to appellant that can be taken is that said instrument was ambiguous and fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof. Hence, upon this assumption, the case would be one for the application of the familiar rule embodied in sections 1856 and 1860 of the Code of Civil Procedure.

We deem further consideration of the cause unnecessary. Being entirely satisfied that the decision of the lower court is just, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

BURNETT, J. The judgment heretofore rendered was set aside to permit appellant to file his reply brief. His time had been extended several times in accordance with stipulations of the attorneys and apparently the last period agreed upon had expired. The cause was therefore deemed submitted and the judgment of affirmance followed. Thereafter it was made to appear that another stipulation had been signed by the attorneys for respondent giving appellant additional time to file his reply brief. Through inadvertence this stipulation had not been presented to the court, and the court was not apprised of its existence until after said judgment was rendered. No objection was made by respondent to the motion of appellant to reopen the case. We have considered said reply brief, but we adhere to the views expressed in the opinion heretofore rendered. Affirmed.

26 Cal. App. 686

KINCAID v. DUNN et al. (Civ. 1663.)

(District Court of Appeal, Second District, California. March 1, 1915.)

1. DAMAGES $\approx$ 113 — INJURY TO PERSONAL PROPERTY—MEASURE—STATUTES.

Under Civ. Code, § 3333, relating to breach of an obligation not arising from contract, the measure of damages for injuries to personal property, in the absence of its total destruction, is the difference in its value immediately before and after the injury, provided that, if it be capable of repair at an expense less than its diminution in value, the recoverable damage is limited to the cost of repairs.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 90, 91, 279, 280; Dec. Dig. $\approx$ 113.]

2. APPEAL AND ERROR $\approx$ 173—REVIEW—THEORY OF CASE BELOW.

In an action for damages to plaintiff's automobile, where the case was tried below on the theory that the proper measure of damages was the cost of repairs, the defendants making no offer to show that the diminution in value, the proper measure of damages claimed by them on appeal, would be less than the cost of such repairs, they could not complain.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. $\approx$ 173.]

3. DAMAGES $\approx$ 188—INJURIES TO PERSONAL PROPERTY.

In an action for damages to plaintiff's automobile, evidence held sufficient to justify a

finding that plaintiff had been damaged in the sum of \$310.85.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 511; Dec. Dig. ¶188.]

4. DAMAGES ¶46—INJURIES TO PERSONAL PROPERTY—RECOVERY.

In an action for damages to plaintiff's automobile, it was not a condition precedent to recovery for certain items of damage that plaintiff should actually have expended the sum in replacing or repairing the damaged parts.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 99, 251; Dec. Dig. ¶46.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by W. J. Kincaid against Francis Dunn and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Frank D. McClure, of Los Angeles, for appellants. T. W. Duckworth, of San Bernardino, for respondent.

SHAW, J. Action for damages. The complaint charged defendants with so negligently driving an automobile that it ran into and collided with plaintiff's automobile, injuring it to his damage in the sum of \$350. The court gave judgment for plaintiff, from which, and an order denying their motion for a new trial, defendants appeal.

[1, 2] Appellants' chief contention is that the evidence is insufficient to support the finding of the court that plaintiff's automobile was damaged in the sum of \$310.85. For the purpose of ascertaining the damage, plaintiff was permitted, without objection on the part of defendants, to testify as to the cost of repairing the car. Appellants now insist that such evidence was erroneously admitted for the reason that the measure of damage was the difference in the value of the car before and after the injury. Section 3333, Civil Code, provides:

"For the breach of an obligation not arising from contract, the measure of damages * * * is the amount which will compensate for all of the detriment proximately caused."

This detriment, in the absence of total destruction of the property, is the difference in the value of the property immediately before and after the injury, provided, however, if the injury be capable of repair at an expense less than the diminution in value of the property as injured, the damage is limited to the cost of making such repair. Section 435 (9th Ed.) Sedgwick on Damages. As stated, the cause was, without objection on the part of defendants, tried upon the theory that the injury could be repaired, as found by the court, at a cost of \$310.85. Neither did defendants offer to show that the diminution in value on account of the injury would be less than the cost of such repairs. They should not now be heard for the first time on appeal to complain that the case was tried on an erroneous theory.

[3, 4] Conceding the correctness of the theory upon the trial so had, appellants nevertheless insist that the evidence is insufficient

to support the finding of damage in the sum of \$310.85. The evidence clearly tends to prove that after the accident plaintiff had the car taken to a garage and fixed up to an extent that would enable him to get it home, for which work he paid \$123; that later he paid \$36 for replacing parts that were broken in the collision, making a total of \$159. It further appeared that the fenders were broken, the cost of repairing which was \$22; that the lamps were likewise broken, the cost of obtaining which was \$33; that the windshield was broken, the cost of replacing which would be \$15; and that the tonneau or body was smashed and broken, the cost of repairing which would be \$200. These items, added to the sum actually paid out, aggregate an amount in excess of that which was allowed by the court and clearly support the finding as to the amount of damage. Appellants, however, contend that the last four items, aggregating \$270, should not be considered in ascertaining the amount of damage sustained by plaintiff for the reason that he had neither incurred nor expended any sum in the replacing of such damaged parts or making repair thereof. In other words, the position of counsel is that, if plaintiff's automobile had been totally destroyed, he could not have maintained an action to recover damages therefor unless he had first bought a new machine. While it is true, as contended by appellants, that no recovery can be had in personal injury suits for services rendered by physicians in attending the injured, unless such bills have been paid, or at least liability incurred therefor, such rule does not apply in an action to recover for damages to personal property. In the one case the damages are special and can only arise out of the fact that the expense has been incurred and constitutes a liability against the plaintiff, whereas in the other the action is for general damages.

While there was some conflict of evidence touching upon the negligence of defendants, that offered on behalf of plaintiff clearly tended to establish the issue in his favor and was ample to support the finding complained of.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 664

IIART v. ALL PERSONS, etc., et al. (Civ. 1245.)

(District Court of Appeal, Third District, California. Feb. 26, 1915.)

1. QUIETING TITLE ¶44—TITLE OF PLAINTIFF—SUFFICIENCY.

A plaintiff, in a suit to quiet title, cannot rely altogether on defendant's failure to prove title, and cannot prevail, unless he shows title in himself, and, if he has no title, he may not complain that some one else, also without title, asserts an interest in the land.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. ¶44.]

2. QUIETING TITLE $\S$ 10—TITLE OF PLAINTIFF—SUFFICIENCY.

Actual possession and occupancy of land under claim of ownership for any period enables the possessor to maintain action to quiet title against a trespasser or one establishing no title in himself.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. $\S$ 36-42; Dec. Dig. $\S$ 10.]

3. ADVERSE POSSESSION $\S$ 16—ACQUISITION OF TITLE BY ADVERSE POSSESSION—STATUTORY PROVISIONS—"OCCUPANCY."

One who never exercised any acts of possession of land, except to survey it and set boundary stakes, does not show occupancy, within Civ. Code, $\S$ 1006, providing that occupancy for any period confers title against all, except the state and those who have title by prescription, transfer, will, or succession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. $\S$ 82-89; Dec. Dig. $\S$ 16.]

4. ADVERSE POSSESSION $\S$ 17—"OCCUPANCY"—"OCCUPATION"—"ACTUAL POSSESSION."

Occupancy within Civ. Code, $\S$ 1006, providing that occupancy for any period confers title, good against all, except the state and those having title by prescription, transfer, will, or succession, is synonymous with actual possession, as distinguished from constructive possession, and the possession must be such as, if continued uninterruptedly for the statutory period, may, so far as possession is required, ripen into title, and "occupation" meaning subjection to control and signifying actual possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. $\S$ 90-95; Dec. Dig. $\S$ 17.]

For other definitions, see Words and Phrases, First and Second Series, Actual Possession; Occupancy.]

5. ADVERSE POSSESSION $\S$ 27—POSSESSION—EVIDENCE—SUFFICIENCY.

Evidence held not to justify a finding that plaintiff was in occupancy of the land in controversy, within Civ. Code, $\S$ 1006, declaring that occupancy confers title against all, except the state and those having title by prescription, transfer, will, or succession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. $\S$ 121, 122, 652, 664, 684; Dec. Dig. $\S$ 27.]

6. QUIETING TITLE $\S$ 44—TITLE OF PLAINTIFF—ADVERSE POSSESSION.

A plaintiff, suing to quiet title under the McEnerney act, who relies on adverse possession, must show every element necessary to constitute adverse possession by clear and positive testimony, and proof that, for purposes of pleasure, members of plaintiff's family once or twice a week went to the land in controversy to see ships come in and enjoy the beautiful view of the ocean it afforded, and to have an occasional picnic there, does not show adverse possession, for the land possessed considerable value as a residence site.

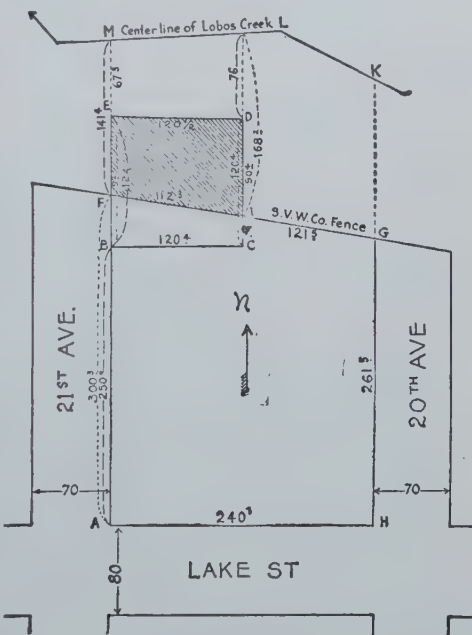
[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. $\S$ 89-92; Dec. Dig. $\S$ 44.]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Suit to quiet title under the McEnerney Act by Catherine Hart against the Spring Valley Water Company and others, in which the defendant named set up title to a part of the land in controversy. From a judgment for plaintiff, and from an order denying a new trial, defendant named appeals. Reversed in part, and affirmed in part.

Page, McCutchen, Knight & Olney, of San Francisco, for appellant. Daniel O'Connell, of San Francisco, for respondent.

CHIPMAN, P. J. On August 25, 1911, plaintiff brought suit under the McEnerney act to establish her title to two parcels of land situated in the city and county of San Francisco. In its amended answer appellant set up title to a portion of one of these parcels, but the court found in favor of plaintiff as to all land claimed by her. The appeal is from the whole of the judgment and the order denying the motion for a new trial, although no error is claimed, except as to a portion of one lot of the land. The situation is explained by the following diagram; the land in dispute being the shaded portion:



B C D E—Land described in complaint.
F I—Line of Spring Valley Water Company's fence.
B C I F—Land admittedly owned by Catherine Hart.
F I D E—Land in dispute.

It is stated by appellant that:

"Neither party claimed title to the disputed territory by direct chain of title from a paramount source. Plaintiff's claim reduces itself to an assertion of title by prescription under a conveyance in 1878 from a party who did not deraign title from any paramount source of title. Appellant claims by prescription under three separate conveyances, none of which are from grantors shown to be connected with the title of plaintiff's grantor."

During the trial it was also stated by appellant that its only claim "is that of adverse possession." The conveyances upon which plaintiff relies, it may be stated, are a deed from A. W. Von Schmidt to Henry Hart (plaintiff's husband), dated January 21, 1878, deed from Henry Hart to Henry E. Hart (plaintiff's son), dated some time between January 21, 1878, and December 15, 1890,

deed from Henry E. Hart to Catherine Hart, plaintiff herein, dated December 15, 1890.

At the outset it may be well to state that it would have been legally impossible for the court to have found in favor of defendant's contention that it had a title by prescription to said disputed tract. Evidence of certain essential elements of adverse possession on the part of defendant was utterly lacking. Indeed, it is at least doubtful whether there was sufficient evidence of any of these elements. The only showing made in favor of defendant's claim was in reference to a certain fence that was built years ago upon or near the southern line of said shaded portion of the diagram. There was no evidence that defendant had exclusive possession of the disputed strip or that it paid any of the taxes that were levied upon it. There was no showing that said tract was entirely inclosed or that any portion of it was used or actually occupied by defendant.

As to the Spring Valley Water Company's fence, no witness was called who had personal knowledge of when or how or under what authority it was located and constructed, and the two who testified declared nothing of their own knowledge, except simply facts from which only the inference could be drawn that the fence actually existed along said line from a very early period. The most important witness for appellant was Mr. Herman Schussler, who was assistant engineer of the company from 1864 to 1866, and who has been chief engineer and consulting engineer ever since. He testified:

That he visited Lobos creek with Mr. Elliott, the city engineer, in the summer of 1866, and that he then saw a fence. "For the purpose of keeping cattle and impurities out of the creek, there was a fence on both sides of the creek. If I remember right, there was one on both sides—one on the south side, on the upper edge of the bank, and one on the north side of the flat close to within 50 or 75 feet of the creek—so that the cattle and horses of the government officers would not get at the water. * * * Anywhere between 1866 and 1870 I saw that the fence was up on the upper edge of the slope—quite a straight line. There was an old board fence there."

He further testified:

That he did not put up the fence nor order it put up; that "it was there before I came there"; and the only thing he knew about the fence was that he "had seen it there a number of times."

The only other witness as to this matter for appellant was George P. Dillman, a surveyor and civil engineer, but he knew nothing about the fence and did not see it until 1908, and his testimony is significant only as to the location of the old fence. He declared:

That "I was just told to make a survey of the fence as it existed from Fifteenth avenue to the ocean. I didn't have any other instructions. I just picked up the fence as it went along." That he did not "know anything about the title."

[1] The foregoing is not decisive of the case, however, as, notwithstanding no finding nor judgment as prayed for by defendant could be sustained, appellant has the legal

right to insist that the evidence was insufficient to support the findings and judgment in favor of plaintiff.

It is, of course, true that, in an action to quiet title, plaintiff cannot rely altogether upon defendant's failure to prove his title. The rule is as stated in *Williams v. City of San Pedro, etc., Co.*, 153 Cal. 49, 94 Pac. 236:

"It is elementary that a plaintiff, in an action to quiet title, cannot prevail unless he shows title in himself. If he has no title, he cannot complain that some one else, also without title, asserts an interest in the land"—citing cases.

Therefore we must consider the attack made by appellant upon the judgment in favor of respondent, and especially the contention that the evidence is insufficient to support two certain findings of the court "upon the sufficiency of the evidence to support which," appellant claims, "depends the correctness of the judgment which the lower court entered." These findings are:

"A. W. Von Schmidt was on January 21, 1878, and long prior thereto, in open, actual, notorious, exclusive, and peaceable possession of the real estate described in paragraph 2 of said complaint," and "ever since said January 21, 1878, the said Henry Hart, Henry E. Hart, and Catherine Hart, the plaintiff, have been in the actual, open, notorious, exclusive, and peaceable possession of said above-described estate openly, claiming to own said described real estate against all other persons and against all the world, and during the period between said January 21, 1878, and December 15, 1890, the said Henry Hart and Henry E. Hart so claimed the said real estate in fee, and since said December 15, 1890, said Catherine Hart, the plaintiff, has so claimed title to said described real estate in fee against all persons and against all the world."

[2] Before considering, however, the sufficiency of the evidence to support these findings, we may refer to a principle that is not disputed, to the effect that:

"The actual possession and occupation of land under claim of ownership for any period is sufficient to enable the party in possession to maintain an action to quiet title as against a trespasser or one who establishes no title in himself." *McGovern v. Mowry*, 91 Cal. 383, 27 Pac. 746; *Morris v. Clarkin*, 156 Cal. 16, 103 Pac. 180.

The foregoing statement, which we adopt, is taken from portions of the opinion heretofore filed in the case. Upon further and more careful examination of the evidence and the principles of law applicable thereto, we find ourselves compelled to reach a different conclusion from that first arrived at.

Neither party deraigned title from the paramount source. Both parties, however, claim to have "entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question" (Code Civ. Proc. § 322); and both urge that their claim has ripened into title by adverse possession, as defined in section 323 of the Code of Civil Procedure, which reads:

"For the purpose of constituting an adverse possession by any person claiming a title found-

ed upon a written instrument, * * * land is deemed to have been possessed and occupied in the following cases: 1. Where it has been usually cultivated or improved; 2. Where it has been protected by a substantial inclosure; 3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant; 4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

Section 325, Code Civ. Proc. provides:

"That in no case shall adverse possession be considered established under the provision of any section or sections of this Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously," etc.

Defendant's claim of title by prescription has already been disposed of. It remains to determine whether plaintiff has shown sufficient facts to support the findings in her favor.

[3] It was admitted that plaintiff has whatever title was in Von Schmidt, and if the latter, when he conveyed to Henry Hart, had such possession as would have sustained an action against a trespasser, the concession of defendant in effect clothes plaintiff with such title and would be sufficient to support her action as against defendant. Von Schmidt was not a witness, and all we know of his possession is derived from the testimony of members of the Hart family. There is no evidence of any inclosure of the land by Von Schmidt and no evidence that he made any use of the land. He claimed to own it and, in 1878, caused public notice to be given that he would sell at public auction certain blocks of land which, it is claimed, included the land in question. Such sale was held, and Henry Hart bought certain land at the sale and took a deed from Von Schmidt. The fence shown on the diagram as the Spring Valley Water Company's fence was there at that time, and Henry Hart testified that Von Schmidt told him it was put there "to keep the cattle out," but when it was erected or by whom does not appear, although the evidence was that it was in existence in 1866. The probability is that the water company caused it to be erected, as in 1866 it was maintaining a fence of which the fence referred to by Henry Hart was a part, extending from Fifteenth avenue, along Point Lobos creek, to the ocean; and Engineer Schussler testified that it was to keep cattle from the creek and prevent the water from pollution "and holding the land." Speaking of this fence, he testified:

"The company's fence, as I have known it for many years, was along the line indicated on Johnson's survey, which is marked on this map here."

He did not state, however, who caused the fence to be built, as it was there when he took office with the company.

Appellant attaches significance to the calls in Von Schmidt's deed to Henry Hart. The description reads that, from the point of beginning 250 feet from the northeast corner of Lake street, the line runs:

"Thence easterly at the right angle and parallel with Lake street, one hundred and twenty feet, thence at a right angle northerly and parallel with Twenty-First avenue one hundred and twenty feet, more or less, to the southerly line of the lands of the Spring Valley Water Company, thence northwesterly along said line of said lands one hundred and twenty feet, more or less, to the easterly line of Twenty-First avenue, thence southerly along said line of Twenty-First avenue one hundred and twenty-four feet, more or less, to the point of beginning."

The call for 120 feet northerly to the southerly line of defendant's lands, and thence northwesterly along said line, opens a question whether the distance or the monument would control, and it would seem also to suggest a recognition on the part of Von Schmidt and his grantee that the southerly boundary of defendant's land was the northerly boundary of plaintiff's land. From the view of the case we have taken, we do not find it necessary to consider this feature of the evidence.

Henry Hart testified that Von Schmidt told him that he "went down to within 50 feet of the creek," which would include the land in dispute north of this fence, as shown by the diagram. Hart testified:

"There were stakes there—surveyed stakes—a number of stakes—the tops of the stakes with Von Schmidt's name on them on the northerly line within 50 feet of the water. Q. And was on your boundary line? A. It was on our boundary line. Q. How many of these monuments were there? A. There was about 12 on each side, north, east, west, and south."

Did the fact that Von Schmidt surveyed the land, staked the boundaries as shown, and afterwards pointed out the land as land he was selling, constitute actual possession or occupancy? Section 1006 of the Civil Code provides as follows:

"Occupancy for any period confers title sufficient against all except the state and those who have title by prescription, transfer, will, or succession."

The term "occupancy," as here used, means possession, actual possession, as contradistinguished from constructive possession. "Occupation" is synonymous with the expression "subjection to the will and control" and with "possessio pedis," and signifies "actual possession." *Lawrence v. Fulton*, 19 Cal. 683, 690; *McKenzie v. Brandon*, 71 Cal. 209, 12 Pac. 428; *U. S. v. Rogers* (D. C.) 23 Fed. 658, 666. In *Plume v. Seward*, 4 Cal. 95, 97, 60 Am. Dec. 599, where the claim rested on possession, Mr. Chief Justice Murray said:

"From a careful examination of the authorities, I am satisfied there must be an actual bona fide occupation, a *possessio pedis*, a subjection to the will and control, as contradistinguished from the mere assertion of title, and the exercise of casual acts of ownership, such as recording deeds, paying taxes," etc.

In *Murphy v. Wallingford*, 6 Cal. 648, 649, citing *Plume v. Seward*, the court said:

"A mere entry without color of title, accompanied by a survey and marking boundaries, is not sufficient."

There is no evidence that Von Schmidt ever exercised any acts of possession, except to survey the land and set boundary stakes. This we are satisfied was not sufficient to constitute occupancy as contemplated by the statute.

[4, 5] Having no title by possession or otherwise, Von Schmidt conveyed none. Plaintiff must therefore rest her right to recover either upon her own occupancy, as we have held that term to mean under section 1006 of the Civil Code, or she must recover by reason of having established adverse possession. But occupancy, as we have seen, is synonymous with possession, and the possession must be actual and such as, if continued uninterruptedly for the statutory period, might, so far as possession is required, ripen into title. What was the character of the possession shown by plaintiff? We quote from the testimony.

Plaintiff, Catherine Hart (wife of Henry) testified that she went on the premises first 33 or 34 years ago.

"Q. Did you go upon the premises? A. I did not live on it at all. Q. Did you go upon it and see it—walk over it? A. Yes, sir; walked over it all the time. Q. How often? A. Most always go there—maybe once a week, or maybe twice a week, anyway—and the beautiful scenery you could see there and the ships coming in on the water and we would take lunch there sometimes."

She testified:

"That no one claimed title, to her knowledge. 'They never bothered me up to now. Q. Did you cultivate the land in any way? A. No, sir; never planted anything and never leased it to any one.'"

She testified:

"That there were no sidewalks there. 'The street was there and I could walk to the place. I was there often. I used to take the children there for the view. It was a beautiful place to visit.'"

Henry Hart testified:

"That after he bought the property he went on the property 'sometimes a dozen times a month, sometimes two or three times a week. I would go out there to have a good walk, ever since I bought it from Von Schmidt. Q. Prior to the time the Spring Valley Water Company served papers on you under the McEnerney act, did they ever make any claim to you of any interest in that property? A. Never. Q. Did they ever dispute your right to go upon the property? A. No, sir. Q. Did you claim ownership of the property when you went on the property? A. Yes, sir.' He and his wife paid all the taxes. 'Q. Did Von Schmidt point out to you the property which you were then purchasing from him? A. He pointed to me the spaces. He said, 'That is my ground.' Q. Did you see a fence on the property at that time? A. There was a little rickety fence put up there for keeping the cattle from getting to the water. Q. Do you know how far that fence was north of Lake street? A. I didn't go down that far to look at it at that time. Q. Did it go across the property which Von Schmidt pointed out to you as being his property? A. There was

a creek of water that the Spring Valley used to use, and there was a little fence to keep the cattle out. * * * Q. You never cultivated the property? A. No; I bought it same as I would buy any other piece of ground to hold it—to let it stop there. Q. Did you build a fence on the property? A. Me and my boy, when we were putting the McEnerney act on, we had it fenced. Q. When did you put that fence on it? A. Here about two or three years ago. I forgot how long since we had the McEnerney act."

It appeared that he put the fence there in August, 1911. The evidence was that this so-called McEnerney fence was built after the defendant in this action had commenced an action to quiet its title under the McEnerney act against all persons, in which this plaintiff was one of the defendants. That action was commenced December 30, 1910, and is pending.

Henry Hart testified:

"That, assisted by his son, he built a 'fence five or six or eight years ago, three or four boards high. It was built five or six years ago when the teams used to be running over it, and I didn't want the teams running over it. * * * It was to the south of Spring Valley.'"

Plaintiff's son fixes the time this fence was built as a year or two before the McEnerney fence was built. This fence, however, did not inclose any of the land in dispute, to wit, the land north of the Spring Valley fence, and it does not definitely appear upon what part of the land the fence was, except that it was south of the Spring Valley Company's fence and was to keep the teams from running over the land.

The most that can be said of this testimony is that, for purposes of pleasure, members of the Hart family once or twice a week went to the land to see the ships come in, to enjoy the beautiful view of the ocean it afforded, and to have an occasional picnic there. They did this under claim of ownership, and no one disputed their right, but there was nothing in these acts importing that kind of actual possession of the land which the law demands of one claiming ownership of it; there was nothing in them to indicate exclusive ownership or possession. It was no more than other persons residing in the city might have done and probably did. For more than 30 years plaintiff and her grantors had exercised this and no other kind of dominion over this land. The fencing done south of the Spring Valley Company's fence, as to which the time of its construction and where it was erected are indefinite, would not add anything to the claim of actual possession of the land in dispute; and the fence built in 1911 to comply with the requirements of the McEnerney act was constructed to meet the claim of the water company that had, prior thereto, erected a fence around the land.

[6] Did plaintiff establish her claim of adverse possession? The burden was on plaintiff to show that every element necessary to constitute adverse possession was made clear (1 Cyc. 1143); and the doctrine of adverse possession is to be "strictly construed, and

such possession cannot be made out by inference, but only by clear and positive proof." 1 Am. & Eng. Ency. of Law, p. 887. The requirements in an action under the McEnerney act are very fully and clearly set forth in *Lofstad v. Murasky*, 152 Cal. 64, 68, 91 Pac. 1008, in which the rule as stated in *Plume v. Seward*, supra, was approved.

We held, in *Mattes v. Hall*, 21 Cal. App. 552, 563, 132 Pac. 300, that, whether the entry is with or without claim of title under a written instrument or without color of title, "the possession must be evidenced by means having reference 'to the particular locality or quality of the property,' must be 'manifested in some appropriate manner.'" In *Cohen v. Anderson*, 22 Cal. App. 634, 135 Pac. 1096, we had occasion to consider the claim of adverse possession where the claimant sought to build up a right by proof of using the land as a summer resort; the only season of the year when it could be so used being a few months in the summer. We there held that adverse possession was not made out.

Respondent claims that:

"No particular use of the land was required of the plaintiff and her predecessors, and the uses to which it was put by them were such as were appropriate and reasonably adapted to the particular land, its condition and location, and were sufficient proof of actual possession."

There are cases in our California reports and elsewhere which would sustain the claim of possession where the evidence showed that the land was peculiarly adapted to the particular use to which it was being put, by reason of its condition and location. *Coryell v. Cain*, 16 Cal. 567, is cited by respondent, among other cases. But in that case the court said:

"By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation—by a substantial inclosure—by cultivation, or by appropriate use, according to the particular locality and quality of the property."

Mining claims and water privileges are mentioned as having a peculiar character. There was no evidence tending to show that the property here involved possessed any exceptional quality, or that its locality gives it any peculiar character, or that its use was "according to the particular locality and quality of the property." While, no doubt, the land in question furnishes a beautiful view of the ocean and may be a delightful spot for picnics and to enjoy a morning's walk, there is no evidence that this is the highest or best or only use to which it may be put or to which it is adapted. The description of it by plaintiff's witnesses would indicate considerable value as a residence site. We cannot bring ourselves to believe that the use made of this land was such as would meet the requirements of the statute or that it shows such possession as the cases uniformly hold to be essential in establishing adverse possession.

In *Lofstad v. Murasky* the court quoted approvingly from *Wolf v. Baldwin*, 19 Cal. 313, in stating what kind of actual occupation was required under the Van Ness ordinance and as applicable under the McEnerney act, as follows:

"A possession which is accompanied with the real and effectual enjoyment of the property. It is the possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others; and this possession must be evidenced by occupation or cultivation, or other appropriate use, according to the locality and character of the particular premises. * * * It must, in other words, be an open, unequivocal, actual possession—notorious, apparent, uninterrupted, and exclusive—carrying with it marks and evidences of ownership, which apply in ordinary cases to the possession of real property."

It was said, in *Brumagim v. Bradshaw*, 39 Cal. 24, 46:

"A mere intention to occupy land, however openly proclaimed, is not possession. The intention must be carried into actual execution by such open, unequivocal, and notorious acts of dominion as plainly indicate to the public that the person who performs them has appropriated the land and claims exclusive dominion over it. Anything short of this is not what the law denominates * * * possession."

The statute requires, as one of the prerequisites to the establishment of adverse possession, "that the land has been occupied and claimed for the period of five years continuously," etc. Civ. Code, § 325.

Inasmuch as the occupation contemplated by the statute has not been sufficiently shown, the finding of ownership in plaintiff is not established, and the judgment is not supported. This alone, without considering other objections made by appellant, compels a reversal.

So far as concerns the land in dispute, to wit, the land north of the Spring Valley Water Company's fence, as shown on the diagram, the judgment and order are reversed, and, as to the land south of said fence, the judgment and order are affirmed; each party to pay his own costs.

We concur: HART, J.; BURNETT, J.

26 Cal. App. 703

ALTPETER et al. v. POSTAL TELEGRAPH CABLE CO. (Civ. 1258.)

(District Court of Appeal, Third District, California. March 9, 1915.)

1. PLEADING ⚡248 — AMENDMENT — NEW CAUSE OF ACTION.

An amendment which changes the cause of action set out in the original pleading is not allowable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 703½, 709; Dec. Dig. ⚡248.]

2. PARTIES ⚡59 — SUBSTITUTION — NEW PARTY.

Where there is no joint interest or privity of interest, a different defendant cannot be substituted for the defendant originally sued, and

in this respect there is no distinction between individuals and corporations.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 90-94, 165; Dec. Dig. ☞59.]

3. APPEARANCE ☞8—WHAT CONSTITUTES—STATUTE.

Under Code Civ. Proc. § 1014, providing that a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him, an appearance may be made by acts other than those enumerated, if of an unequivocal character showing a submission to the general jurisdiction of the court; and the action of an attorney for a corporation named in the summons by mistake and against which there was no cause of action before amendment of the complaint so as to make another corporation a party defendant, in trying to obtain a dismissal, was not an "appearance" for the substituted defendant.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 23-41; Dec. Dig. ☞8.]

For other definitions, see Words and Phrases, First and Second Series, Appearance.]

4. JUDGMENT ☞138—VACATION.

Under Code Civ. Proc. § 473, providing, when the summons has not been personally served on the defendant, the court, on terms, may allow such defendant within one year after judgment to answer to the merits of the original action, a corporation substituted as a party defendant in place of another corporation, and for whom the attorney for such other corporation had no authority to appear, was entitled to a vacation of the judgment against it and to answer to the merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251, 254; Dec. Dig. ☞138.]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Catherine Altpeter and another against the Postal Telegraph Cable Company. Judgment for plaintiffs, and from the denial of its motion to set aside and vacate the judgment, defendant appeals. Reversed, with direction to grant motion and allow defendant to file an answer.

See, also, 143 Pac. 92.

Willard P. Smith and B. B. Blake, both of San Francisco, for appellant. E. E. Gaddis, of Woodland, for respondents.

CHIPMAN, P. J. Defendant moved to set aside and vacate the judgment rendered in favor of plaintiffs on the ground that defendant was not served with summons and did not appear in the action. The motion was denied, and defendant appeals from the order.

It appeared that when the action was commenced there existed two corporations bearing the same name, one organized under the laws of the state of New York, and one organized under the laws of the state of California. They will be referred to hereafter as the New York corporation and the California corporation, respectively. In the title of the action the name of the corporation was given without stating where incorporated, but in the body of the complaint the defendant was described as "a corporation organized and acting under and by virtue of

the laws of the state of New York." This corporation had then on file, in the office of the secretary of state, a copy of its articles of incorporation, and had also filed a statement designating the name and residence of the person or agent upon whom process could be served, namely, J. K. Beede, of Sacramento, who was served with summons as such designated agent. The articles of incorporation of the California corporation were, of course, on file in the same office whence issued the certificate of the secretary of state showing that it had been duly incorporated, and a copy of these articles was in the hands of plaintiffs' attorney, and was introduced in evidence by him, and showed that the principal place of business of the corporation was in San Francisco, and that there were three directors or trustees, two of whom resided in Berkeley, Alameda county, and one in Fruitvale, said county, and that they were the subscribers to all of the shares of the corporation. Beede was an employé of the California corporation.

The New York corporation having been duly served with summons, its attorney, Mr. L. T. Hatfield, filed an answer to the complaint, and appeared when the case was called for trial. The action was for damages caused by the alleged cutting down of trees in front of plaintiff's premises by defendant's employés. When the first witness was called it appeared from his testimony that the persons engaged in the alleged trespass were in the service of the California corporation, and were not acting for or by authority of the New York corporation, and were not in any way connected with that corporation. Thereupon followed the proceedings which have given rise to this appeal. The upshot was that the court allowed the complaint to be amended by striking out the words "New York," and inserting in lieu thereof the word "California," and, as thus amended, and after Mr. Hatfield had withdrawn from the case, disclaiming any authority to appear for the California corporation, the court directed the trial to proceed, no one representing the defendant, and the jury brought in a verdict against the substituted defendant, the California corporation. It is from the judgment on this verdict that the defendant seeks to be relieved and to be given an opportunity to be heard upon the merits.

[1, 2] If the two corporations were distinct and separate entities, the court was unauthorized to allow the complaint to be amended, as was done, and to order the trial to proceed in the absence of any service upon the California corporation, and without its being represented or having made an appearance.

It is well settled that an amendment of the original pleading is not allowable which changes the cause of action therein set forth (Hackett v. Bank of California, 57 Cal. 335; Bowman v. Wohlke, 166 Cal. 121, 128, 135

Pac. 37); nor can a different defendant be substituted for the defendant originally sued where there is no joint or privity of interest (Dubbers v. Goux, 51 Cal. 153; Sterrett v. Barker, 119 Cal. 492, 51 Pac. 695); and the rule is the same where the defendant is a corporation; there is no distinction made between natural and artificial persons in respect of such an amendment (Western Ry. of Alabama v. McCall, 89 Ala. 375, 7 South. 650; Denver & R. G. R. Co. v. Loveland, 16 Colo. App. 146, 64 Pac. 381; Concrete Publishing Co. v. Reed, 70 Misc. Rep. 22, 126 N. Y. Supp. 653).

All the proceedings at the trial are made part of the record now here on the appeal. It is quite evident that plaintiffs' attorney was of the opinion that, because both corporations had the same name, the fact that one was organized and existed under the laws of the state of New York and the other under the laws of California, so simple an amendment as striking out the words "New York" from the complaint and inserting the word "California" was allowable and, to strengthen his view, he introduced witnesses who were officers and employes of the California corporation to show the identity of the two corporations in point of fact. It appeared from the testimony very clearly that the two corporations were as distinct and separate as any two persons could be who were born of different parents and happened to have the same name. It did not appear that the two corporations had any officers or employes in common. There was an entire failure to establish any identity between the two others than in their name. After some interchange of opinion between counsel and the court the court took the matter under advisement until the afternoon session. At the opening of court Mr. Hatfield stated:

"Of course, if there is an amendment allowed which results in dismissing this defendant, naturally we have no objection, but any orders involving any other parties to the action we insist should include an order dismissing the defendant who is in court. There is no representation of any other defendant here, and we do not propose to appear for them or anything of the kind, so the making of any orders should be upon the theory that there be a dismissal or nonsuit to the New York corporation."

Mr. Hatfield was then called by plaintiffs as a witness, apparently for the purpose of showing that he was at that time the attorney for the California corporation, and Mr. Beede was called by plaintiffs and interrogated as to his employment. So far as concerns Mr. Hatfield, it appears elsewhere, as will presently be shown, as well as from his testimony, that he had no authority to appear for the corporation, and he frequently stated in the course of the proceedings that he appeared only for the defendant served with summons. Mr. Beede's employment was with the California corporation, and he had no other except that, as has already been stated, he had been designated by the New

York corporation as the person on whom service of process might be made. Some discussion ensued between counsel in which Mr. Hatfield again insisted:

That he was not appearing for the California corporation, and that he had no authority to appear for it; "that counsel for plaintiffs was notified almost immediately that he had sued the wrong party. There is no surprise in this case. The Court: The only question on which I am in doubt is whether or not the plaintiff has been put upon inquiry here as to whether or not he had not sued the wrong party by this answer. * * * Mr. Gaddis: He simply told me that we had sued the wrong party, without giving us any other information at all. Mr. Hatfield: You admit that you were notified that you had sued the wrong party? Mr. Gaddis: Yes; but that wouldn't mean anything."

The court then stated:

"I shall have to strike out the name of 'New York' and substitute the name of 'California' in the pleadings. Mr. Hatfield: Then we ask to have a formal order made showing that the New York corporation is dismissed. The Court: The motion to amend will be granted. * * * Mr. Gaddis: I want both corporations before the court, and then I will know where I stand. It seems to me I am entitled to have that. * * * Mr. Hatfield: We want the record so we will know what it is, if the New York corporation is stricken out. Mr. Gaddis: I want both corporations in. Mr. Hatfield: There is no such application before the court. Mr. Gaddis: There is no reason why this corporation should be stricken out. Why does Mr. Hatfield exercise such diligence? Mr. Hatfield: Because it is my business."

After some remarks by the court and counsel:

"Mr. Gaddis: All I ask is to amend that and do that by interlineation. Mr. Hatfield: We object to any interlineation. * * * The Court: I understood your motion to be a motion to amend by striking out 'New York' and substituting 'California.' Mr. Gaddis: Yes, sir. Mr. Hatfield: We would like the court's instruction on the effect of that. The Court: The ruling is that the motion is permitted that it be done on the face of the record; striking out the words 'New York' and substituting the word 'California' on the face of the record. The clerk will make the order striking out the words 'New York' on the face of the record, and insert the word 'California.' Mr. Hatfield: We take an exception. Are there any terms? The Court: I see no occasion for any. You are not before the court. Mr. Hatfield: I would ask for an order dismissing the case as to the Postal Telegraph Cable Company of New York. The Court: There is no such defendant in the case, and never has been. I am taking your words exactly as they were given. The Postal Telegraph Cable Company of New York—there is no such company as I have seen. Mr. Hatfield: I never said anything of the kind. (The reporter reads the remark of Mr. Hatfield as follows: 'I would ask an order dismissing the case as to the Postal Telegraph Cable Company of New York.') The Court: That is not a party before the court. Mr. Hatfield: I understand, and I respectfully suggest that we withdraw from the case. If we are not before the court, we are not here. The Court: That is a different proposition, and that is not before the court. Mr. Hatfield: Then we will retire, and we do not intend any disrespect to the court. If the California corporation is the defendant in this case, we have no appearance for it, and no authority to appear. The Court: You will not be bound by the proceedings whether you remain or not. Mr. Hatfield: If we made a defense I think we would. The Court: Your presence or absence doesn't alter the sit-

uation. Mr. Gaddis: I am sorry to see you go. The Court: I will state now you have a jury here, and the jury will have to be disposed of. Mr. Gaddis: I expect to go ahead and put in the case with your honor's permission. (At this point Mr. Hatfield leaves the courtroom.)"

The trial then proceeded, and several witnesses were sworn and testified, and counsel offered in evidence the articles of incorporation of the California corporation. The record then reads:

"(At this point Mr. Hatfield returns into court.) Mr. Hatfield: I would like to have ten days in which to prepare a bill of exceptions—ten days' additional time. The Court: I will grant you the order of ten additional days. Mr. Gaddis: Inasmuch as there is no appearance on the other side, I will have to read these articles of incorporation."

We think any fair interpretation of what took place leads to the conclusion that Mr. Hatfield had no authority to appear for the California corporation; that he did not intend to appear for it, and did not, in fact, so appear. The contention of plaintiffs' counsel at the hearing was that he had a right to amend, and in this view he was sustained by the court. The amendment was not allowed, nor was it asked, on the theory that Mr. Hatfield appeared for the California corporation. "The only question is," said the court, "the question to amend, which seems to me to be proper; there is nothing else before the court."

Mr. Hatfield, throughout the proceeding, distinctly stated that he did not appear for the California corporation, and had no authority to appear for it; and that he had no such authority appears by the uncontradicted affidavits, submitted with the motion of J. G. Blake, president of that company, William Hearn, vice president, S. Elberg, secretary and treasurer, and also by Mr. Hatfield's affidavit. Mr. Blake deposed:

"That during all said time he was the only person authorized to employ attorneys for said corporation defendant. That affiant never at any time employed, retained, or instructed L. T. Hatfield, Esq., or any other attorney or any other person to represent the said defendant in the above-entitled action until after the return of the verdict by the jury at the trial of said action; that after the trial of said action, and after receiving notice of the result of said trial, affiant employed J. S. Spilman, Esq., as attorney for said defendant and L. T. Hatfield, Esq., as counsel, * * * for the purpose of procuring relief from such judgment by having the same annulled or vacated or set aside by such proceedings as they might be advised to be proper in the premises."

He also deposed that:

J. K. Beede "is not, and never has been, an officer or a managing agent of the defendant corporation"; that he "is and at all times herein mentioned has been, the chief operator and in charge of the company's telegraph station at the city of Sacramento; that he has not and never has had, any power or authority to transact any other business for or on behalf of the defendant corporation, * * * or to accept service of process against or to appear for it in any court."

With the motion was filed the verified answer of defendant, in which answer, among

other things, it denied having willfully or at all cut down or injured the trees mentioned in the complaint, or that it has caused the plaintiffs or either of them the damage claimed or any damage.

[3] "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." Code Civ. Proc. § 1014. The Supreme Court has held that an appearance may be made in an action by acts other than those enumerated in the statute, but they must be of an unequivocal character showing a submission to the general jurisdiction of the court, such as calling for some affirmative relief. Judge Temple, speaking for the court, said, in *Vrooman v. Li Po Tai*, 113 Cal. 302, 305, 45 Pac. 470, 471:

"This statute was intended to settle all disputes upon the subject. There can be no chance for argument about equivocal acts. *State v. McCullough*, 3 Nev. 202, seems to be the other way, but the reasoning is far from satisfactory. There was no need of a statute to tell us that the acts specified would constitute appearance. The occasion for a rule was to dispose of questions upon which there might be dispute."

See the subject considered in *Salmonson v. Streiffer*, 13 Cal. App. 395, 110 Pac. 144, where it was held that written objections filed to the sufficiency of the sureties upon the undertaking given by plaintiff did not constitute an appearance.

It will be observed that all the proceedings during which "the course of conduct created by L. T. Hatfield," which, it is now claimed, constituted an appearance, took place before there was any amendment of the complaint, and before the California corporation was made a party to the action. He promptly withdrew as soon as the amendment was made. There was, in fact, no action pending against that corporation during these proceedings, and it cannot with legal propriety be held that an appearance was made when no action was pending.

[4] But, aside from all other considerations, the undisputed fact is that Mr. Hatfield had no authority to appear for the California corporation, and, having taken steps within the statutory period for relief by the remedy afforded by section 473, Code of Civil Procedure, it seems to us, conceding that the learned trial judge had discretion to grant or deny the relief asked, it was an abuse of such discretion to deny it. *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232, was a case where an attorney at law assumed to represent the plaintiff at the hearing of a certain matter, but had no authority to do so. It was held that, irrespective of section 473, a court of equity had power to set aside the judgment. In *Merced County v. Hicks et al.*, 67 Cal. 108, 7 Pac. 179, summons was not served on any of the defendants, but, at the request of one of them, an attorney signed a demurrer which on its face purported to be the joint demurrer of all of them. But the attorney

had no authority to appear for any of the defendants other than Hicks. The court held that there was no appearance of the other defendants. *Hill v. City Cab, etc., Co.*, 79 Cal. 188, 21 Pac. 728, was a case where it appeared that judgment was obtained without service of summons. One S. D. Wood assumed to represent the defendant, but, in fact, had no power or authority to appear for or represent it. The court held the judgment to be void.

Section 473 of the Code of Civil Procedure, among other grounds of relief in certain cases, provides:

"When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

No question of estoppel arises here. We think appellant has fairly shown its right to be heard on the merits.

The order is reversed, with directions to grant defendant's motion and allow it to file an answer.

We concur: HART, J.; BURNETT, J.

170 Cal. 88

HECKER v. MORLEY et al. (L. A. 3476.)
(Supreme Court of California. April 20, 1915.)
APPEAL AND ERROR ⇨1010—REVIEW—FIND-
INGS OF FACT.

An appellate court will not interfere with the findings of the trial court, where there is substantial evidence to sustain them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. ⇨1010.]

Department 1. Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by F. H. Hecker against Miles Morley and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Charles M. Ackerman, of Los Angeles, for appellant. H. C. Millsap, of Los Angeles, for respondents.

SHAW, J. This was an action by a creditor of Miles Morley to set aside a conveyance of property by Miles Morley to James Morley, on the ground that the conveyance was made to defraud the plaintiff as a creditor of Miles Morley. The court found that there was no intent to defraud, and that

there was a valuable consideration, and upon those findings gave judgment for the defendants. The plaintiff on his appeal makes the point, and this is the only point, that the evidence is not sufficient to sustain the findings.

The only question being whether or not the findings are sustained by the evidence, the decision must go upon the familiar ground that an appellate court cannot interfere with the findings of the trial court where there is substantial evidence to sustain it. There is sufficient evidence here to support the findings of the court below. It is useless to recapitulate the evidence or state the reasons upon which the conclusions of the court may be upheld.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

170 Cal. 79

LAPIQUE v. AGOURE et al. (L. A. 3462.)
(Supreme Court of California. April 19, 1915.)

1. DEATH $\hookrightarrow$ 31 — ACTIONS FOR CAUSING —
RIGHT OF ACTION—NATURE.

Under Code Civ. Proc. §§ 376, 377, giving the right of action for death caused by negligence only to parent, personal representative, heir, or guardian of an heir of decedent, surviving partner could not maintain an action for death of his partner; since the right of action is purely statutory.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. $\hookrightarrow$ 31.]

2. COSTS $\hookrightarrow$ 260 — PROSECUTION OF FRIVOLOUS APPEAL—AWARD OF DAMAGES TO DEFENDANT.

The prosecution of an appeal, upon dismissal of a frivolous complaint, for no purpose other than to annoy defendants or to exhort some compromise, rendered the case a proper one for the award of damages to defendants.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. $\hookrightarrow$ 260.]

Department 1. Appeal from Superior Court, Los Angeles County; F. R. Willis, Judge.

Action by John Lapique against Catherine Agoure and others. Judgment for defendants, and plaintiff appeals. Affirmed, with order that defendants recover from the plaintiff the sum of \$100 as damages because of this appeal.

John Lapique, of Orange, in pro. per. W. I. Foley, of Los Angeles, for respondents.

SHAW, J. The action in this case was begun by the filing of a paper, designated as a complaint, on January 20, 1913. Summons was served upon the defendants on January 22, 1913. On January 24, 1913, the court below of its own motion entered this order:

"In this case the complaint states no cause of action in favor of plaintiff nor any other person. It is not signed or filed by any attorney of this court or by any person having an interest in any cause of action stated therein. The references therein to the probate department of

this court are contumacious and disrespectful, and, this court believing that citizens should not be harassed by legal proceedings instituted by irresponsible persons, and that courts ought not to waste time and incur expense considering such pleadings, the court, on its own motion, orders plaintiff's complaint stricken from the files, and the cause dismissed."

This order was duly entered as a judgment, and the plaintiff appealed. It does not appear that either party was present when the order was made. The proceeding would perhaps have been more orderly and regular if the court had cited the plaintiff to appear before it at some fixed time to show cause why such an order should not be made, and had then made the order. Regardless, however, of any question of the regularity of the proceedings, the order must be affirmed on the ground that by no possibility could it have produced any harm to the plaintiff.

[1] The so-called complaint presents a pretended cause of action so preposterous that it should not be tolerated by any court. The plaintiff claims \$1,000,000 damages because of the death of Pierre Agoure, which it is alleged, was caused by the negligence of the defendants. The defendants are the widow and heirs of Agoure, and are the only persons in whose behalf an action could be maintained for Agoure's death from the negligence of another. Actions for death caused by negligence cannot be maintained at all except in cases where the statute so declares. Sections 376 and 377 of the Code of Civil Procedure give the right to maintain such actions only to the parent, the personal representative, or the heir, or the guardian of an heir, of the person whose death has been so caused. The plaintiff does not show any relationship whatever to Mr. Agoure. He alleges that there was a partnership once existing between Agoure and two other persons named Menendez and he describes himself as a surviving partner—that is, a surviving partner of a firm of which he was not a member—and he alleges that the damages were caused by the loss to the partnership of the "society" of Agoure. Nothing quite so preposterous has, to our knowledge, ever been presented in any court. The only thing for a court to do with such a pretended cause is to dismiss it. Such dismissal could not have injured Mr. Lapique in the slightest degree.

[2] The taking of this appeal could have had no other motive than that of keeping alive an action on a claim that was utterly without foundation. It could not have been for any other purpose than to cause the defendants the annoyance and delay that ensued from taking the appeal, and perhaps as a means of securing some sort of a compromise. It is a case in which damages should be awarded.

The order appealed from is affirmed, and it is further ordered and adjudged that the

defendants recover from the plaintiff the sum of \$100 as damages because of this appeal.

We concur: SLOSS, J.; LAWLOR, J.

170 Cal. 84

KELLOGG v. KELLOGG. (L. A. 3461.)

(Supreme Court of California. April 19, 1915.)

APPEAL AND ERROR ⇨901—DIVORCE ⇨285
—ALIMONY—REVIEW—PRESUMPTIONS.

As an order will not be reversed unless error is shown and the burden of showing it is on the appellant, an order in divorce, requiring the plaintiff husband to pay counsel fees and furnish his wife with expense money, will not be disturbed, where the wife's affidavit on which the order was granted was not in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670; Dec. Dig. ⇨901; Divorce, Cent. Dig. § 768; Dec. Dig. ⇨285.]

Department 1. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Frank M. Kellogg against Clara Kellogg. From an order requiring plaintiff to pay counsel fees and furnish his wife with expense money, he appeals. Order affirmed.

L. E. Dadmun, of San Diego, for appellant. G. F. Hoff and J. M. Chatterson, both of San Diego, for respondent.

SHAW, J. The court has examined the briefs, and, in the absence of the parties, will proceed to determine the case without further delay.

The action is brought by the husband against the wife, to obtain a divorce. The appeal is from an order made by the court during the progress of the case, requiring the husband to pay to the wife certain sums of money for counsel fees and for expenses in traveling from Michigan to San Diego to attend the trial. It is claimed on the part of the appellant, the husband, that the evidence taken by the court does not show any proof of the husband's abilities. In the condition of the record we cannot assent to this proposition. The case comes within the principle, so often stated, that a judgment or order will not be reversed unless error is shown, and that the burden is upon the appellant to show the error. An affidavit of the wife was introduced and set out in full. It refers to and makes a part thereof another affidavit made by her in a previous case between the parties for the same cause. The record shows that the affidavit in the other case, which was referred to in the affidavit filed, was received and considered by the court, but the transcript does not set forth its contents. There is nothing in the record to show its contents, or the facts it proved or tended to prove. Under the rule just stated, the court, on appeal, must assume that it contained facts

sufficient to support the order of the court below. For that reason the order of the court will have to be affirmed.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

170 Cal. 95

ARNOLD v. LOOMIS et ux. (S. F. 5876.)

(Supreme Court of California. April 23, 1915.)

1. FRAUDS, STATUTE OF ⇨56—FORMATION OF PARTNERSHIP—PAROL EVIDENCE.

A partnership to deal in real estate may be created by parol agreement, and its continuance may be shown entirely by oral testimony.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. ⇨56.]

2. PARTNERSHIP ⇨54 — FIRM DEALING IN REAL ESTATE—EXISTENCE—SUFFICIENCY OF EVIDENCE.

In plaintiff's action against the wife of his partner to compel her to convey to him his half of a tract of land alleged to have been purchased by the partnership, but the title taken in the wife's name, evidence held sufficient to support finding that such partnership existed.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 77, 79; Dec. Dig. ⇨54.]

3. HUSBAND AND WIFE ⇨25 — ADMISSION BY HUSBAND AS AGENT—EFFECT.

In plaintiff's action against the wife of his partner to compel her to convey to him his half of a tract of land alleged to have been purchased by the partnership, but the title taken in the wife's name, where such wife testified that her husband acted as her agent in all matters relating to the property, she was bound by his admissions, oral and written, that plaintiff was entitled to one-half of the net proceeds of the land.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 148-151, 153, 154, 525; Dec. Dig. ⇨25.]

4. TRUSTS ⇨89—RESULTING TRUSTS—PAYMENT OF PORTION OF PRICE BY TRUSTEE—REPAYMENT—SUFFICIENCY OF EVIDENCE.

In plaintiff's action against the wife of his partner to compel her to convey to him his half of a tract of land alleged to have been purchased by the partnership, but the title taken in the wife's name, evidence held sufficient to support finding that portion of the price advanced by the wife had been repaid by her.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. ⇨89.]

5. TRUSTS ⇨72 — VOLUNTARY TRUSTS — ACCEPTANCE OF DEED AS DEPOSITORY OF TITLE.

Where a wife accepted a deed to property which had been purchased by a firm dealing in real estate, composed of her husband and the plaintiff, with the knowledge that the conveyances made to her were solely for the benefit of the partnership, and that she was only a temporary depository of title, the transaction gave rise to a voluntary trust for the benefit of the partnership.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 102, 103; Dec. Dig. ⇨72.]

6. LIMITATION OF ACTIONS ⇨103—STATUTE OF LIMITATIONS — TRUSTS — VOLUNTARY TRUSTS.

The statute of limitations does not begin to run against an action to enforce a voluntary trust until repudiation by the trustee, although

it runs against an involuntary trust immediately upon creation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 500, 506-510; Dec. Dig. § 103.]

Department 2. Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by C. M. Arnold against B. E. Loomis and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

William H. Schooler, of Chico, for appellants. W. S. Tinning, of Martinez, and Lee D. Windrem, of Port Richmond, for respondent.

MELVIN, J. The complaint alleges that on May 1, 1899, plaintiff and B. E. Loomis were partners engaged in buying, selling, and dealing in real property in Contra Costa county, and that on that date they entered into an agreement to buy a tract of about 20 acres from one A. F. Pacheco and his wife. Certain details of the transaction, not necessary for consideration here, are also set out in the complaint, and the subsequent payment of one-half of the purchase price for the land by each of the copartners is alleged. There are further averments that the Pachecos, at request of the copartners, conveyed the property to Mollie A. Loomis, wife of B. E. Loomis; that part of the property was afterwards sold by the copartners, the proceeds being used to discharge the liens of certain mortgages; that 8.66 acres of the land remained unsold; and that plaintiff had vainly demanded conveyance of a half interest therein from defendants. The prayer was for judgment decreeing that Mollie A. Loomis held the property in trust for her husband and for the plaintiff, share and share alike, and that she be compelled to execute a conveyance of plaintiff's interest to him, or to sell the land under order of court and distribute the proceeds in equal parts to the copartners. In their answer the defendants denied the existence of the alleged copartnership, and the payment for the land in the manner alleged, but averred that the property was purchased by Mollie A. Loomis with her separate funds. The statute of limitations was also pleaded. Findings and judgment were in favor of plaintiff. Defendants have appealed from the judgment and from the order denying their motion for a new trial.

The formation of a copartnership rests upon the testimony of Mr. Arnold alone. He did not prove any written contract of copartnership. The only writing in evidence which at all relates to the interest of plaintiff and B. E. Loomis in the land is as follows:

"San Francisco, March 4, 1901.

"This will certify that C. M. Arnold is entitled to one-half of the net proceeds of the eight

and a fraction acres situated on Wild Cat creek when sold. Said land being in Contra Costa county, and that said Loomis shall in like manner share in the commissions to be made in case of sale of the Horton tract or any portion of said land adjoining the 8.66 acres.

"[Signed] C. M. Arnold.
"B. E. Loomis."

Mrs. Loomis, as a witness, stated that she had read this document but had regarded it as merely an agreement to divide commissions. The plaintiff testified that he had never conversed with Mrs. Loomis about the property either before or after the deed was executed and delivered to her, as grantee of the Pachecos. His theory was that a trust in his favor had been thrown upon Mollie A. Loomis by her acceptance of the deed.

[1-3] Appellants insist that there is no evidence to support the finding with reference to the existence of a partnership between plaintiff and Mr. Loomis. It is true that the formation of the copartnership rests upon Mr. Arnold's testimony, but a copartnership of this kind may be created by parol (Coward v. Clanton, 79 Cal. 26, 21 Pac. 359; Bates v. Babcock, 95 Cal. 484, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133), and necessarily proof of its continued existence may depend entirely upon oral testimony. But there was other evidence that B. E. Loomis had admitted the existence of a partnership in the ownership of the land. Plaintiff's wife and another witness testified to such admissions, and the written instrument clearly recognizes the right of C. M. Arnold to share equally in the "net proceeds" of the land in question. But appellants say that Mrs. Loomis was not bound by any of these things. While it is true that she was not present when the copartnership was formed or when the admissions in evidence were made by her husband, it is equally true that she knew of the writing in which Mr. Loomis unqualifiedly admitted that Mr. Arnold was entitled to one-half of the "net proceeds." This admission was made within two years after the land was purchased. Mrs. Loomis testified that her husband acted as her agent in all the matters pertaining to the property. She knew, as she admitted, that her husband and Mr. Arnold were to help sell the land, and, as sales of parts of it were made from time to time, she signed the deeds. As Mr. Loomis was her agent, his acts were binding upon her.

[4] But appellants insist that, as Mrs. Loomis furnished part of the money for the property, she acquired an interest which must be recognized. The court found that she advanced part of the money paid by her husband, but that she was afterwards repaid. This finding is supported by plaintiff's testimony that the entire purchase price of the land was realized and paid from the sales of a portion of it, and it is therefore immaterial how much was advanced by either partner

or the source from which Mr. Loomis derived the money which he put into the purchase from the Pachecos. The written declaration also supports the conclusion that, at the date thereof, all matters relating to the purchase price had been settled.

[5, 6] Acceptance of the deed to the property with knowledge of the purpose for which it was made to her and of the agreement between her husband (who was her agent) and C. M. Arnold implied a promise on Mrs. Loomis' part to reconvey. It was a voluntary trust, not, as appellants contend, an involuntary one against which the statute of limitations begins to run immediately upon its creation. It was not merely a constructive trust, but it was one voluntarily assumed and intended by the parties to be a continuing one. Against such a trust, the statute of limitations does not begin to run until the trustee repudiates it. *Butler v. Hyland*, 89 Cal. 581, 26 Pac. 1108; *Odell v. Moss*, 130 Cal. 359, 62 Pac. 555; *Taylor v. Morris*, 163 Cal. 722, 127 Pac. 66.

No other alleged errors require consideration.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

170 Cal. 91

CRIFE v. CRIFE. (L. A. 3471.)

(Supreme Court of California. April 22, 1915.)

1. HUSBAND AND WIFE ⇨333—ALIENATION OF AFFECTIONS—EVIDENCE.

In an action against the father of plaintiff's husband for damages for alienation of the husband's affections, where plaintiff's evidence was that defendant had been active in inducing plaintiff to leave the ranch upon which she resided with her husband and in preventing her from rejoining him, and had advised the husband to leave plaintiff and threatened to disinherit him if he should again live with her, questions to defendant as to what his son said in a conversation shortly after the marriage, as to whether his son had ever complained of plaintiff's treatment of him, as to whether he had said that he could not get along with her, and as to whether his son had told him that she drank to such an extent that he could not control her, was improperly excluded, as the declarations sought to be shown were admissible as showing the state of the husband's feelings.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124; Dec. Dig. ⇨333.]

2. HUSBAND AND WIFE ⇨325—ALIENATION OF AFFECTIONS—RIGHT OF ACTION.

A charge of alienating the affections of a husband from his wife is not sustained, if it appears that, before the defendant acted, the husband entertained no affection for his wife, and that his actions toward her were the result of his own feelings instead of being caused by any persuasion or inducement of the defendant.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1119; Dec. Dig. ⇨325.]

3. HUSBAND AND WIFE ⇨325—ALIENATION OF AFFECTIONS—RIGHT OF ACTION.

In an action for alienating affections, it must appear that the defendant has acted from improper motives, and a much stronger case

must be made out where the defendant is the parent of a spouse alleged to have been alienated.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1119; Dec. Dig. ⇨325.]

4. HUSBAND AND WIFE ⇨333—ALIENATION OF AFFECTIONS—EVIDENCE—MOTIVE OF DEFENDANT.

In an action against plaintiff's father-in-law for damages for the alienation of her husband's affections, evidence of the husband's declarations to defendant that plaintiff had not treated him well, that he could not get along with her, and that she drank to such an extent that he could not control her, were admissible as bearing upon the motives actuating the defendant in advising or seeking to bring about a separation.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124; Dec. Dig. ⇨333.]

5. APPEAL AND ERROR ⇨1058—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In such case, error in the exclusion of evidence bearing upon defendant's motive was prejudicial, and was not cured by permitting the husband to testify to some of the matters he had told his father, where the scope of the inquiry was not so broad as that included in the questions to defendant, and where the son's credibility as a witness was also impeached.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. ⇨1058.]

6. TRIAL ⇨46—OBJECTIONS TO EVIDENCE—OFFER OF PROOF.

The rule that the sustaining of objections to questions will not furnish ground for reversal without a statement indicating to the court the nature of the testimony sought to be elicited has no application, where the questions themselves are so framed as to clearly show the nature and purport of the testimony sought; nor was the defendant called upon to explain the purpose for which the testimony was offered, when it was admissible generally on the main issues of the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 115-117; Dec. Dig. ⇨46.]

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Dolly Crife against Samuel Crife. Judgment for plaintiff, and, from an order denying his motion for a new trial, defendant appeals. Reversed.

Carpenter & Gibbons, of San Luis Obispo, for appellant. Lamy & Putnam, of San Luis Obispo, for respondent.

SLOSS, J. The defendant is the father of plaintiff's husband, and is sued for the recovery of damages on account of the alleged alienation of the husband's affections. The cause was tried without a jury, and the court awarded the plaintiff a judgment in the sum of \$1,500. Defendant appeals from an order denying his motion for a new trial.

The findings on the main issues are attacked as unsupported by the evidence, but we are satisfied, from an examination of the record, that there was sufficient evidence to justify the findings complained of.

[1, 2] The only remaining point made by

the appellant is that the court erred in sustaining objections to various questions put to the defendant while he was testifying as a witness in his own behalf. The plaintiff had introduced testimony tending to show that the defendant had been active in inducing the plaintiff to leave the ranch upon which she resided with her husband, and that when she attempted to return, the defendant took steps to prevent her from rejoining her husband. There was further testimony tending to show that the defendant had advised his son to leave the plaintiff and had threatened to disinherit him if he should again live with her.

In this state of the case the defendant sought to prove that during the marriage and before the separation of the plaintiff and her husband, and before the defendant had sought to bring about such separation, the husband had made certain declarations and statements to the defendant. The nature of these declarations is clearly indicated by the questions asked, some of which were as follows:

"What did he [the son] say in that conversation [a conversation which took place shortly after the marriage]?" "After the marriage and before Dolly [the plaintiff] and Henry [the husband] moved to Huasna, did Henry ever complain to you of Dolly's treatment of him?" "After the marriage between your son and Dolly, and before the 8th day of August, 1911, did Henry ever tell you that he could not get along with Dolly?" "After the marriage of your son and daughter, and before Dolly left the ranch at Huasna in August, 1911, did your son ever tell you that Dolly drank to such an extent that he could not control her, or did he ever tell you during that time that she abused him so bad that he could not live with her?"

These questions were objected to on the ground that they were irrelevant, incompetent, and immaterial, self-serving and hearsay, and the court sustained the objections, on the theory, as it said, "that self-serving declarations are not admissible as such." The rulings, which were not based on any merely formal ground, were erroneous. In an action for alienating the affections of a husband or wife, the state of the feelings of such husband or wife is material. A charge of alienating the affections of a husband from his wife is not sustained if it appears that, before the defendant acted at all, the husband entertained no affection for his wife, and that his actions toward her were the result of his own sentiments, instead of being caused by any persuasion or inducement of the defendant. In this case, therefore, the relations between the plaintiff and her husband, and the nature of his feelings toward her, were a proper subject of inquiry. It is a general rule of evidence that, where the state of a person's affections or feelings is material, the declarations of such person as to his or her own state of affections are admissible. *Wigmore on Evidence*, § 1730. This rule has been applied in many cases similar to the one before us. A few of these

may be cited: *Gilchrist v. Bale*, 8 Watts. 335, 34 Am. Dec. 469; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085; *Price v. Price*, 91 Iowa, 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. Rep. 360; *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485. See, also, note to *Fratini v. Caslini*, 44 Am. St. Rep. 849.

[3] It is also well settled that, in an action for alienating a wife's affections and enticing her away, a material point of inquiry is the intent with which the defendant has acted. It must appear that the defendant has acted from improper motives. The decisions require a much stronger case to be made out where the defendant is a parent of the spouse alleged to have been enticed. *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Glass v. Bennett*, supra.

[4] The evidence here offered not only tended to show the state of the husband's feelings toward the plaintiff, but it also had a legitimate bearing upon the motives actuating the defendant in advising or seeking to bring about a separation. It was a part of the information upon which he acted, and he was entitled to have it considered by the court in the determination of the question whether he was acting maliciously or in good faith and for the legitimate protection of his son.

[5] It was virtually conceded on the argument that the testimony should have been admitted. It was argued, however, that its exclusion was harmless because the son was permitted to testify to some of the matters that he had told his father. This did not cure the error. The scope of the inquiry permitted in questioning the son did not cover as broad a field as that included in the questions above quoted. Furthermore, the son's credibility as a witness was impeached, and it is quite evident from the record that the judge himself viewed his testimony with suspicion. Under these circumstances, there can be no doubt of the prejudicial effect of the refusal to allow the defendant's own testimony regarding the declarations made to him by his son.

[6] The additional point is made that the sustaining of an objection to questions like those under discussion will not furnish ground for reversal, in the absence of a statement indicating to the court the nature of the testimony sought to be elicited. But the rule thus invoked can have no application here, since the questions themselves were so framed as to show clearly the nature and purport of the declarations sought to be proved. Nor was the defendant called upon to explain the purpose for which the testimony was offered. Such explanation may be necessary where testimony is admissible for a limited purpose only. But here the declarations were admissible generally, and had a direct bearing on one of the main issues in the case. We think the appellant

was entitled to have this evidence heard and considered by the court.

The order denying a new trial is reversed.

We concur: LAWLOR, J.; SHAW, J.

170 Cal. 85

In re LOYD'S ESTATE.

HICKS v. LOYD et al.

(L. A. 4108.)

(Supreme Court of California. April 19, 1915.)

1. BASTARDS ⇐13—ILLEGITIMACY—LEGITIMIZATION—RECOGNITION AND ACKNOWLEDGMENT—STATUTORY PROVISIONS.

Civ. Code, § 1387, providing that every illegitimate child is an heir of the person who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of the child, does not require an acknowledgment in any precise form, and a writing need not declare that the child therein acknowledged is illegitimate, and need not be attested nor signed by the competent witness in whose presence it is executed, and a person signing in the presence of a competent witness an instrument reciting that he is the father of an illegitimate child, and agrees to pay the mother a specified sum for the support of the child, acknowledges himself to be the father, within the statute.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. ⇐13.]

2. BASTARDS ⇐97—PROPERTY RIGHTS—STATUTES—APPLICABILITY.

Civ. Code § 1387, providing that every illegitimate child is heir of the person who in writing, signed in the presence of a competent witness, acknowledges himself to be the father, is merely a statute of succession or inheritance, and, where a person dying subsequent to the enactment of the statute had prior to the statute sufficiently acknowledged himself to be the father of an illegitimate child, the child is within the statute, since, under sections 1384, 1385, no right vests in a presumptive heir until the death of the ancestor, so that the persons entitled to succeed must be ascertained according to the law in force at the date of the ancestor's death.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 248; Dec. Dig. ⇐97.]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Proceedings by Charles Hicks against Elizabeth J. Loyd and others to establish heirship of George E. Loyd, deceased. From a judgment for plaintiff, defendants appeal. Affirmed.

Hammack & Hammack, of Los Angeles, for appellants. T. W. Duckworth, of San Bernardino, and Valentine & Newby, of Los Angeles, for respondent.

SLOSS, J. George E. Loyd died, leaving a will which contained no mention of Charles Hicks. The will was duly admitted to probate, and at the proper time Hicks instituted a proceeding to determine heirship, claiming to be entitled to succeed to a portion of the estate as the illegitimate acknowledged son of the decedent. The findings and decree were in favor of his claim, and the bene-

ficiaries named in the will appeal from the decree and from an order denying their motion for a new trial.

The court found that the plaintiff, Charles Hicks, is the illegitimate son of George E. Loyd and one Mary Hicks, and was born to them out of wedlock on March 4, 1861, in the state of Iowa. It further found that on June 22, 1861, at Centerville, in the state of Iowa, said George E. Loyd—

"in a writing signed by him in the presence of one Archibald Hicks, a competent witness, acknowledged himself to be the father of the said Charles Hicks, plaintiff; that said writing, so signed as aforesaid, was and is in the words and figures following, to wit:

"Centerville, Iowa, June 22nd, '61.

"This is to certify that Geo. Loyd as father of Chas. Hicks agrees to pay Mary Hicks the sum of five hundred dollars, for the support of Chas. Hicks, the amount to be paid on or before August 22nd, '61. Geo. E. Loyd."

The statement on motion for new trial shows that there was a conflict in the evidence on the issues in controversy, and the findings are therefore beyond review here. The appellants assign no errors of any consequence on rulings of the court in admitting or excluding evidence. The appeal from the order denying a new trial is without merit.

The real question is whether the findings support the conclusion that Hicks is entitled to succeed to a part of the estate as heir of Loyd, and this question is properly raised on the appeal from the judgment.

[1] Section 1387 of the Civil Code provides that:

"Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child. * * *

If this is the law governing the rights of the parties, the findings quoted fully establish plaintiff's status as heir. The construction of section 1387 has been settled by Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40. It was there decided that the section is to be liberally construed; that it does not require an acknowledgment in any precise or set form of words; that the writing need not declare that the child therein acknowledged is illegitimate; and that it need not be attested or signed by the "competent witness" in whose presence it is executed. Every fact necessary to make a case under the section as thus construed was found by the court below.

[2] The appellants contend, however, that plaintiff's rights must be defined by the statutes of 1850 (St. 1850, p. 220), in force when the paper of acknowledgment was signed. The statute is very similar in terms to the foregoing provision of section 1387, but it had been held, in two cases decided prior to the enactment of the Codes, and of the rules of construction therein contained (Civ. Code, § 4), that such statute, being in derogation of the common law, should be strictly construed. Estate of Sandford, 4 Cal. 12; Pina

v. Peck, 31 Cal. 359. Since the writing here involved was executed in 1861, the appellants seek to refer plaintiff's claim to the statute then in force, read in accordance with the construction given to it by the courts.

Whether plaintiff's position could be maintained under the statute of 1850, as interpreted in the Estate of Sandford and Pina v. Peck, need not be here decided, for we are satisfied that section 1387, rather than the statute of 1850, is the measure of plaintiff's rights. Section 1387 appears in the chapter of the Civil Code dealing with succession. It declares that certain persons are heirs of certain others. It is simply a statute of succession or inheritance. And so this court has decided. Estate of Magee, 63 Cal. 417; Blythe v. Ayres, supra. But since no right vests in a presumptive heir until the death of the ancestor (Civ. Code, §§ 1384, 1385), it is thoroughly settled that the persons entitled to succeed must be ascertained according to the law in force at the date of the ancestor's death. Tyrrell v. Baldwin, 78 Cal. 470, 21 Pac. 116; Estate of Fath, 132 Cal. 609, 64 Pac. 995. The writing of 1861 vested no right in the plaintiff when it was executed. If the statute had been repealed before Loyd's death, and no similar law had taken its place, the plaintiff could not have claimed as an heir. He must found his claim on the law in force when rights of heirship attached, and that law is section 1387 of the Civil Code. The contrary view was suggested in the opinion in the Jessup Case, 81 Cal. 419, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, but the expression was plainly obiter; the case involving, not a right of heirship under section 1387, but the creation of the relation of parent and child by virtue of an alleged adoption under section 230 of the Civil Code.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; LAWLOR, J.

(170 Cal. 81)

In re EMERSON'S ESTATE. (L. A. 3931.)

(Supreme Court of California. April 19, 1915.)

1. APPEAL AND ERROR 977—RULINGS ON NEW TRIAL—REVIEW.

Ruling on a motion for new trial is not reviewable on appeal unless abuse of discretion is shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. 977.]

2. NEW TRIAL 150—MOTION—GROUNDS—NEWLY DISCOVERED EVIDENCE.

A motion for new trial based on the ground of newly discovered evidence will not be granted unless the new evidence is reasonably calculated to change the result of the former trial, and the affidavit shows reasonable diligence in discovering such evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 306-310; Dec. Dig. 150.]

3. NEW TRIAL 108—GROUNDS—NEWLY DISCOVERED EVIDENCE—SUFFICIENCY OF EVIDENCE.

On motion for new trial on the ground of newly discovered evidence showing the contents of a will destroyed by decedent, testimony at the trial held so to discredit such evidence as to render improbable that it would change result upon second trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. 108.]

4. APPEAL AND ERROR 979—REFUSAL OF NEW TRIAL—DISCRETION OF TRIAL COURT.

In determining whether a trial court has abused its discretion in denying motion for new trial, the fact that such court may observe the demeanor of witnesses while testifying is an element to be considered by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. 979.]

Department 1. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Appeal by Collins P. Emerson from an order of the court denying his motion for new trial in proceedings to admit to probate a will of Thomas B. Emerson, deceased. Order affirmed.

Fred N. Arnoldy and Irwin, White & Rosecrans, all of Los Angeles, for appellant. Hanson, Hackler & Heath, James W. Miller, and John E. Carson, all of Los Angeles, for respondent.

SHAW, J. The appeal is from an order denying appellant's motion for a new trial, made upon the ground of newly discovered evidence. The proceeding was an application under section 1339, Code of Civil Procedure, by Collins P. Emerson, a brother of the decedent, to admit to probate a will which, it is alleged, was destroyed after the death of the decedent. The court made findings that the provisions of the alleged will were not proven by two credible witnesses; that the proposed document was not the will of the decedent; that there were no witnesses to the document; and that it was not written, signed, or dated by the decedent himself.

[1, 2] The decision of the appeal is controlled by the well-established rules that the courts look with distrust and disfavor upon motions for new trials based on the ground of newly discovered evidence; that such motions should not be granted by trial courts unless the new evidence is such as to make it reasonably probable that it would change the result upon another trial; that the moving party must state in his affidavits facts which show that he exercised reasonable diligence from the beginning in endeavoring to discover the evidence before the first trial; that the decision of these questions rests in the sound discretion of the trial court; and that its decision will not be reversed on appeal unless an abuse of that discretion clearly appears.

[3, 4] Tested by these rules, we are satis-

fied that the order of the court below cannot be disturbed. The petitioner testified that he saw the alleged will before its destruction and copied it; that it was destroyed in his presence by the widow; and that it was olographic in character. The widow testified that the document was not signed by the decedent, and that it was partly printed. The testimony of each of them was contradictory and unsatisfactory in itself. The new evidence consisted of the testimony of Mrs. Manz, a niece of the decedent, who deposed that he showed it to her shortly before his death while he was visiting her in Illinois, and that she read it. She performed a remarkable feat of memory in stating the contents of the will, nearly three years afterwards, giving it in the identical words of the copy which the petitioner testified he had made. She wrote a letter to the petitioner about three months after the death of Emerson, saying that on his visit to Illinois Emerson had said to her that he had his matters fixed before he left California, and asking petitioner if he "had found anything," but saying nothing of having seen or read a will. The petitioner, although he received this letter nine months before the trial, made no inquiry of Mrs. Manz about the matter at any time. He wrote two letters to the widow regarding the alleged will before he filed the petition for probate, in which he referred to the contents of the will in a manner showing that he was relying on his memory entirely, and indicating very clearly that he did not copy it, as he testified he had, and that he had no copy. In these letters he gave the contents of the will, in part, and professedly from memory. But his version there given was materially different from the proffered copy which he now claims he then had in his possession. These circumstances, and others not mentioned here, tend to discredit the alleged newly discovered evidence, and also the evidence given at the trial relating to the contents of the proposed will. It must also be remembered that the judge of the court below had seen the witnesses, and could best determine their relative credibility. We cannot say that the court below abused its discretion in denying the motion.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(170 Cal. 89)

WARRING et al. v. SOUTHERN PAC.
BRANCH RY. CO. et al.
(L. A. 3493.)

(Supreme Court of California. April 22, 1915.)
APPEAL AND ERROR ⇐1173—REVIEW—DETERMINATION.

Two plaintiffs sued to quiet title, claiming by prescription based upon adverse possession. The evidence failed to show that continuous adverse possession by one of them necessary to ripen into title. *Held* that, as the record

did not disclose the respective interests of the parties, judgment for plaintiffs must be reversed as to both.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4562-4572, 4656; Dec. Dig. ⇐1173.]

Department 1. Appeal from Superior Court, Ventura County; S. E. Crow, Judge.

Action by Hugh Warring and another against the Southern Pacific Branch Railway Company and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Frank Thunen and W. M. Singer, both of San Francisco (William Singer, Jr., of San Francisco, of counsel), for appellants. Kidder & Warring, of Los Angeles, for respondents.

SHAW, J. The plaintiffs have sued to quiet their title, pleading the narrow ground that they are the owners under title by prescription, based upon an adverse possession for the required length of time. The evidence in the record fails to show, as to Hugh Warring, that continuous adverse possession without interruption which the law requires to constitute title by prescription. For this reason it is necessary to reverse the judgment. The record does not show the respective interests claimed or possessed by the two plaintiffs, and, because of that fact we cannot make a decision which will limit the judgment to the interest of M. D. Warring alone, and it is necessary to reverse the entire judgment. The plaintiffs upon the going down of the remittitur should have leave to amend their pleadings. The claims are apparently not the same as they appear to be by the complaint, and the allegations should be made to correspond to the facts as they claim them to be.

It is ordered that the judgment be reversed, and the plaintiffs have leave to amend their pleadings as they may be advised.

We concur: SLOSS, J.; LAWLOR, J.

26 Cal. App. 727

FAWCETT v. GREGG. (Civ. 1549.)

(District Court of Appeal, Second District, California. March 11, 1915. Rehearing Denied by Supreme Court May 10, 1915.)

1. TRUSTS ⇐89—RESULTING TRUSTS—SUFFICIENCY OF EVIDENCE.

In plaintiff's action against his mother to have himself declared the owner of real estate standing in her name, evidence *held* sufficient to support a finding that he had no interest in the property, as not having had an interest in a hardware store conducted by his father with the proceeds of which the land in suit was purchased.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. ⇐89.]

2. EVIDENCE ⇐91—BURDEN OF PROOF—PARTY PLEADING FACT.

The burden is on a party pleading a fact to prove it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 113; Dec. Dig. ⇐91.]

3. APPEAL AND ERROR ⇨1011—REVIEW—CONFLICTING EVIDENCE.

A finding by the court on conflicting evidence presents no question of law for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ⇨1011.]

4. TRUSTS ⇨89—RESULTING TRUSTS—SUFFICIENCY OF EVIDENCE.

In plaintiff's action against his mother to have himself declared the owner of real estate standing in her name, evidence held insufficient to show an understanding between plaintiff and his father, from whom his mother derived title, that land in controversy should be plaintiff's.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. ⇨89.]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Pearl M. Fawcett against Frances Fawcett, revived after her death against Wallace Gregg, her executor. Judgment for defendant, and plaintiff appeals. Affirmed.

Anderson & Anderson, of Los Angeles, for appellant. G. P. Adams, of Los Angeles, and Newman Jones, of Riverside, for respondent.

SHAW, J. Action by plaintiff brought against Frances Fawcett, his mother, to have himself declared the owner of certain real estate, the legal title to which was in the name of the mother. During the trial Frances Fawcett died, and the action was continued in the name of the executor. In addition to an answer denying the material allegations of the complaint, defendant filed a cross-complaint, the purpose of which was to secure from plaintiff an accounting for the proceeds derived by him from the use of said real estate while in possession thereof. On the issues joined the court found in favor of defendant, and, upon an accounting had, gave judgment against plaintiff. The appeal is from the judgment and an order denying plaintiff's motion for a new trial.

In substance, the complaint alleges: That in 1895, in the state of Iowa, plaintiff and his father, Mahlon Fawcett, were copartners engaged in the hardware business under the firm name and style of Fawcett & Son. That during said year they exchanged said hardware business for a farm, known as the Doxsee farm, title to which was taken in the name of the father. That in 1905 the latter came to California, where he made a contract for the purchase of the real estate herein involved, known as the Whittier ranch or lemon grove. That in making the purchase thereof he agreed to pay \$5,000 in cash, and gave his note for \$6,000, secured by a mortgage upon the real estate. Pursuant to the contract, he made a payment of \$300, and returned to Iowa and borrowed the sum of \$5,000 upon the Doxsee farm with which to make the first payment upon the purchase price of said lemon grove. He proposed to plaintiff, who was then living in Iowa, that plaintiff with his family remove to California

and take care of the lemon grove, promising plaintiff that if he would do so and take the entire management and control thereof, and out of the proceeds and profits of the same pay off the deferred payment thereon, and pay the mortgage on the Doxsee farm, that he, Mahlon Fawcett, was willing to give said lemon grove to plaintiff as his share of the property which they through their joint efforts had acquired, and agreed to convey the same to plaintiff when fully paid for; to all of which plaintiff agreed. Upon the making of the first payment due upon the lemon grove, the owner thereof executed a deed to Mahlon Fawcett, who executed his notes and mortgage thereon to secure the deferred payments of \$6,000. That plaintiff took possession of said lemon grove, and with his family resided thereon, having entire charge and management of the same, and from the proceeds thereof paid off the balance of the purchase price, and also the mortgage upon said Doxsee farm. That about one year prior to the death of Mahlon Fawcett plaintiff suggested to his father that, in order to avoid probate proceedings and keep the property standing in the name of Mahlon Fawcett, the latter make deeds to the same to plaintiff's mother, and thereupon Mahlon Fawcett made deeds to all of the property standing in his name to Frances Fawcett, and placed them in a box used in common by Mahlon Fawcett and plaintiff, requesting that upon his death plaintiff have the deeds recorded. That in the month of December, 1908, Mahlon Fawcett who was about to undergo a surgical operation, stated to plaintiff in the presence of defendant that he wished to arrange with plaintiff about their property interest and make provision for plaintiff's mother during her life, and proposed to plaintiff that his mother should during her life hold title to the lemon grove and keep possession and control of the same, and upon her death he should come into full ownership thereof, pursuant to the agreement theretofore made between plaintiff and his father, and plaintiff should, out of the proceeds of the properties and income thereof, pay off incumbrances upon the property, and the income from the lemon grove should be his, and the income from the Doxsee farm should belong to his two sisters, and that the defendant should make a deed of the lemon grove to plaintiff and place it in escrow to be delivered to plaintiff upon her death. That defendant at all times had full knowledge of the said understanding, arrangement and agreement between plaintiff and Mahlon Fawcett that plaintiff should have the said Whittier ranch as his (plaintiff's) share of the property which plaintiff and said Mahlon Fawcett had acquired through their joint efforts. That upon Mahlon Fawcett's death the deeds so executed by him conveying the property to defendant

were filed for record, and plaintiff thereafter requested defendant to execute a deed conveying the lemon grove to him in accordance with the agreement so made with his father, to which his mother was a party, which request was by defendant refused.

The alleged errors of which appellant complains are: First, that the evidence is insufficient to support the finding made by the court to the effect that Mahlon Fawcett was the owner of a hardware business conducted in the name of Fawcett & Son, and that plaintiff had no interest therein; second, it is claimed the evidence establishes an understanding between plaintiff and his father that the lemon grove should be the plaintiff's; third that the court erred in giving judgment against plaintiff upon the accounting had.

[1-3] No good purpose could be subserved in making particular reference to the voluminous evidence, most of which was of a circumstantial nature. The partnership claimed to have been entered into between plaintiff and his father in 1890, at which time the latter, in exchange for a farm owned by him, purchased a hardware business, rests in an alleged parol agreement, proof of which depends upon inferences drawn largely, if not wholly, from the circumstantial evidence introduced. While it may be conceded that such evidence was sufficient to establish a prima facie case as to the existence of such alleged partnership, other evidence and circumstances are fully as cogent in proving its nonexistence. That it is, as claimed by appellant's counsel, incredible that a man with a family of eight or nine children should devote his time during a period of 20 years to the care and management of another's property is answered by the fact shown that during all of said period plaintiff and family had received their support from the proceeds of this ranch and other lands owned by the father, which, in addition to, presumably, sharing in the property as an heir, might well compensate him for his labor. At all events the burden rested upon him to establish the fact that a partnership existed. That the evidence presents a substantial conflict is practically conceded by counsel, who suggest that in weighing the testimony the judgment of the trial court was influenced against plaintiff by the fact of defendant's death occurring during the course of the trial. Be it so, since such conflict exists, no question of law is presented for review by this court.

[4] The second contention, namely, that there was an understanding between plaintiff, his father, and defendant that he should have the property, possesses even less merit. Plaintiff testified to facts which, if true, and aside from any question of law involved, might be deemed sufficient to establish such understanding. But in this he is flatly contradicted by the testimony of his mother, who states the deed conveying the property

was delivered to her unconditionally, and in the absence of any suggestion or understanding that plaintiff should have the same. Moreover, there was evidence which tended to prove that the alleged understanding had with the father was subsequent to the delivery of the deed, at which time title to the property immediately vested in Mrs. Fawcett; hence it follows that Mahlon Fawcett had no interest in the ranch which he could make the subject of trust or such understanding, and the mother's assent thereto, if made, being oral and after acquiring the title, is nonenforceable.

Objection to the judgment given upon the accounting had seems to be based solely upon the alleged errors hereinbefore discussed. Since the rulings of the court in making the findings attacked are sustained, it follows that the court did not err in rendering judgment upon the accounting.

Judgment and order affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 773

Ex parte WORSHAM. (Cr. 385.)

(District Court of Appeal, Second District, California. March 16, 1915.)

INTOXICATING LIQUORS — 10 — ORDINANCES — VALIDITY.

An ordinance of a city, which prohibits the sale of intoxicating liquors within the city and declares that every person who at any time visits or is present at any place where liquors are sold, kept for sale, offered for sale, furnished, or distributed shall be guilty of a misdemeanor, makes it criminal for one to visit such a place, no matter how innocently or how lawful his purpose, and is invalid because beyond the power of the city to enact.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7-12; Dec. Dig. § 10.]

Habeas corpus by Charles Worsham for his discharge from custody under a commitment on conviction for violation of a city ordinance. Petitioner discharged.

Russell Graham, of Whittier, for petitioner. C. R. Holton, of Whittier, for respondent.

CONREY, P. J. The petitioner is in custody of the city marshal of the city of Whittier and is held by virtue of a commitment, on sentence of fine, issued out of the recorder's court of said city. It appears that petitioner was convicted before the recorder of the crime of misdemeanor committed in the city of Whittier. The complaint charged that the defendant did willfully and unlawfully visit a place within the city of Whittier where intoxicating drinks were delivered, divided, and distributed. Ordinance No. 157 of said city is an ordinance prohibiting the sale of intoxicating liquors within the city, and, among other things, it is therein provided that:

"Every person who at any time visits or is present at any place within the city of Whittier where spirituous, vinous, malt or mixed liquors,

or any alcoholic or intoxicating drinks are sold, kept for sale, offered for sale, furnished, distributed, divided, delivered or given away in violation of this ordinance, shall be deemed guilty of a misdemeanor."

This language is very broad and includes every possible case of visiting such a place as that described. It is identical in principle with an ordinance of the city of Modesto which was under consideration in the case of *Ah Jow*, in the United States Circuit Court for the District of California, reported in 29 Fed. 181. Referring to words which made any person, who visited such room or place as the one described in that case, guilty of a misdemeanor, the court said:

"Under this section it would not be lawful for any person, whether Caucasian citizen, or other inhabitant, to enter such a place or drug store for many of the ordinary and proper purposes of life, as to purchase other goods, to collect bills, or transact any legitimate business. To lawfully prohibit, under penalties, the citizens or inhabitants from entering such a place, innocently, not knowing its character, or for any lawful purpose, and without reference to its object, is, in my judgment, entirely beyond the power of the city of Modesto. It is to prohibit an act which is innocent in itself, and lawful under the general laws of the land, and therefore inconsistent with the laws of the land."

We think that the foregoing decision is a correct statement of the law as applicable in the present case. In so ruling we recognize and approve of the decisions in such cases as *Ex parte Meyers*, 7 Cal. App. 528, 94 Pac. 870, and *People v. Conness*, 150 Cal. 114, 88 Pac. 821, cited on behalf of respondent. In the first of these two cases the petitioner was held under a charge that he permitted a minor to remain in and visit a pool room, contrary to the provisions of an ordinance which prohibited the proprietor of such place to permit a minor to remain therein. In *People v. Conness* the conviction was under a statute forbidding a man to allow or permit his wife to remain in a house of prostitution. The provisions of the ordinance of the city of Whittier go beyond the limits of the restrictions mentioned in those cases. Being thus general in their terms and intentionally made applicable to all persons and inclusive of all purposes, the attempted prohibition is beyond the power of the city. It will be a very easy matter to amend the ordinance so that it will not violate any law and will still be effective as a prohibition ordinance.

The petitioner is discharged from custody.

We concur: JAMES, J.; SHAW, J.

26 Cal. App. 758

GRISWOLD et al. v. WINTERS et al.
(Civ. 1612.)

(District Court of Appeal, Second District, California. March 15, 1915.)

1. APPEAL AND ERROR—933—PRESUMPTIONS—GROUNDS FOR MOTION FOR NEW TRIAL.

Where, on appeal from an order denying a new trial, there is a statement containing speci-

fications of errors, the presumption is that the specifications constituted the grounds upon which the motion was made, although such grounds are not directly shown by the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. 933.]

2. TRIAL—392—ACTION FOR PRICE—FINDINGS—SUFFICIENCY.

In an action on a note for the price of a stallion sold by plaintiffs to defendants, in which the defense was that such stallion had been warranted to be up to a described standard for breeding purposes, or the sellers would take him back and surrender the note, a finding "that no misrepresentations were made or fraud practiced by plaintiffs in the sale of said stallion to defendants; that plaintiffs performed each and every part of their contract of sale and gave full consideration for said note"—was insufficient to sustain judgment for plaintiffs, since it failed to decide the facts with respect to the alleged agreement, while a trial court must specifically find on all the material issues, independently of request by either party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 916-917; Dec. Dig. 392.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Ray C. Griswold and another against Charles A. Winters and others. Judgment for plaintiffs, and defendants appeal from an order denying their motion for new trial. Reversed.

Conkling & Brown, of El Centro, for appellants. Farr & Myers, of Imperial, and McPherrin & Nichols, of Los Angeles, for respondents.

CONREY, P. J. This appeal is by the defendants from an order denying their motion for a new trial. The action is brought upon a note for \$1,000 executed by appellants to respondents. Concurrently with the delivery of this note and another of like amount, and in consideration of said notes, the respondents sold and delivered to appellants a stallion at an agreed price of \$2,000, payable as specified in the notes. The answer alleges that the respondents represented that the stallion was "an 80 per cent. foal-getter," and promised that if defendants would buy the horse and give their promissory notes to plaintiffs for the purchase price thereof, in the event that said horse did not prove to be wholly sound, free from blemishes, and an 80 per cent. foal-getter plaintiffs would take back the horse and surrender the notes. The answer contains allegations further showing that the purchase was made in reliance upon these representations and promises; that a fair test was made during the season following the sale; that the horse was an almost entire failure and was wholly valueless for breeding purposes; that respondents knew the representations to be false when made; that on ascertaining the facts aforesaid appellants have promptly offered to return the horse to respondents, and have demanded surrender of the notes, all of which offer and demand have been refused.

[1,2] Although evidence was received in respect to these matters of defense, the court has failed to decide the issues raised thereby, except as such decision may be found in the finding:

"That no misrepresentations were made or fraud practiced by plaintiffs in the sale of said stallion to defendants; that plaintiffs performed each and every part of their contract of sale and gave full consideration for said note."

This is not sufficient, and the error is distinctly relied upon in the specifications in the statement on motion for a new trial, which specifications presumably contain the grounds on which the motion was made (*Cross v. Mayo*, 167 Cal. 594, 598, 140 Pac. 283), although, as too often occurs, the grounds of the motion are not directly shown by the record. The finding above quoted may perhaps be sufficient as a decision that the representations alleged to have been made concerning the horse were not made, or that if made, they were in good faith and without any fraudulent practice. But the court wholly fails to decide the facts with respect to the defense that respondents had promised that if the horse did not come up to the described standard for breeding purposes, they would take him back and surrender the notes; that the horse was an almost total failure for those purposes; that on discovering the fact of such failure appellants had offered to return the horse in as good condition as that in which he was received. Appellants were entitled to findings which would decide these issues of fact which were a substantial part of their defense. *Cargnani v. Cargnani*, 16 Cal. App. 96, 116 Pac. 306.

The order denying the motion for a new trial is reversed.

We concur: JAMES, J.; SHAW, J.

26 Cal. App. 725

CREDITORS' ADJUSTMENT CO. v. ROSSI.
(Civ. 1509.)

(District Court of Appeal, First District, California, March 11, 1915. Rehearing Denied April 10, 1915.)

1. BROKERS' 86—AGREEMENT TO PAY COMMISSION—CONDITIONS—SUFFICIENCY OF EVIDENCE.

In an action by a broker for a commission earned by negotiating a lease, evidence held sufficient to justify finding that the agreement to pay was not conditioned upon the procuring of a lessee who would not require the lessor to install a vault and steam-heating apparatus.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. 86.]

2. PARTNERSHIP 64—FICTITIOUS NAME—RIGHT TO MAINTAIN ACTION—STATUTE.

Where a broker's claim for commissions was assigned, before the passage of the act, to a copartnership doing business under a fictitious name, which had failed to file and publish the certificate required by Civ. Code, §§ 2466, 2468, as a condition precedent to the right of one so doing business to maintain an action, the statute had no application to deny the right of the assignee of such first assignee to maintain

an action on the claim; the law obtaining previous to the passage of the act being applicable.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 87-91; Dec. Dig. 64.]

3. PARTNERSHIP 64—FICTITIOUS NAME—RIGHT TO MAINTAIN ACTION—STATUTE—"MAINTAIN."

Where plaintiff sued as assignee of an assignee, a copartnership doing business under a fictitious name, of a claim for commissions, the action was maintainable, although Civ. Code, §§ 2466, 2468, providing that no person doing business under a fictitious name or his assignee shall "maintain" an action unless he has filed and published the required certificate, was enacted subsequently to the bringing of the action, since the word "maintain," as used in the statute, means to commence, institute, begin, or bring.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 87-91; Dec. Dig. 64.]

For other definitions, see *Words and Phrases*, First and Second Series, *Maintain*.]

Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Action by the Creditors' Adjustment Company against Peter Rossi. Judgment for plaintiff, and defendant appeals. Affirmed.

Leon Samuels, of San Francisco, for appellant. Peter A. Breen, of San Francisco, for respondent.

KERRIGAN, J. This is an action for services rendered by J. B. Albert, who assigned his claim to the Benjamin S. Brown Agency, who, in turn assigned the claim to the plaintiff. The action is based upon a written agreement.

The defendant Rossi had an option of a ground lease of certain real property in San Francisco, and was seeking a tenant who would take a lease of a building to be erected by him. His efforts in this behalf had progressed so far that he had entered into an agreement for a lease of the property with the Harry J. Moore Furniture Company, and on account thereof had received a deposit of \$2,000, but subsequently, owing to a dispute between them concerning the installation of a vault and steam-heating apparatus, the agreement for the lease was canceled by mutual consent, and the deposit was returned to the furniture company. Shortly after that the defendant secured the services of J. B. Albert, who had assisted him in negotiating the agreement for a lease just mentioned, to approach the furniture company and reopen negotiations for a lease. This was done, with the result that a second agreement for a lease was made with the furniture company, and the defendant received a deposit of \$2,000. For this service the defendant agreed to pay J. B. Albert \$500; and, two days after the agreement for the lease was executed, the defendant gave Albert the instrument which is the basis of this action, and according to the terms of which he promised to pay to Albert \$500 when the lease should be exe-

cuted. Subsequently the lease was executed by an assignee of the defendant.

Plaintiff recovered judgment for the amount sued for, with interest and costs, from which judgment the defendant has appealed.

[1] Defendant's main contention on the facts is that Albert was to be paid the \$500 only if he succeeded in getting the furniture company to sign a lease or an agreement for a lease which would not require the defendant to install a vault and steam-heating apparatus. If this be true, why did not the defendant see to it that the provision concerning this matter was incorporated in the contract, and why did he give to Albert the written agreement to pay the \$500 two days after the agreement for a lease was executed, which agreement called for the installation of the vault and heating apparatus? In any event, the testimony introduced by plaintiff was to the effect that this condition was no part of the agreement for commissions. The findings are abundantly supported by the evidence.

[2, 3] As before stated, J. B. Albert assigned his claim to the Benjamin S. Brown Agency, which in turn assigned it to the plaintiff. At the trial it developed that the first assignee was a copartnership doing business under a fictitious name, and that it had failed to file and publish the certificate required by the provisions of sections 2466 and 2468 of the Civil Code. As the statute stands today, and as it has stood since the amendment to those sections of 1911, neither a copartnership doing business under a fictitious name nor its assignee may maintain an action in any court of this state; but this action was commenced before the amendment, and is governed by the law as it stood at that time, which permitted assignees of such partnerships to maintain suits. Gray v. Wells, 118 Cal. 11, 50 Pac. 23. And there is no merit in the defendant's suggestion that, while plaintiff was within its rights in bringing the action, the action cannot now be sustained because the statute employs the word "maintain," reading, "No person doing business under a fictitious name, * * * his assignee, * * * shall maintain an action," etc. The word "maintain," as here used, means to commence, institute, begin, or bring. 25 Cyc. 1664.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

26 Cal. App. 732

PEOPLE v. SUE CHUNG KEE. (Cr. 342.)
(District Court of Appeal, Second District,
California. March 12, 1915.)

1. INTOXICATING LIQUORS 236—ILLEGAL SALES—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of selling intoxicating liquors in no-license terri-

tory in violation of the Wylie Act (St. 1911, p. 599).

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. 236.]

2. CRIMINAL LAW 1171—TRIAL—ARGUMENT OF DISTRICT ATTORNEY.

Where at the request of accused charged with selling intoxicating liquor in no-license territory, the jury viewed his premises in charge of one instructed to point out the different rooms, tables, entries, stairways, etc., the argument of the district attorney that the jurors during their visit saw 17 men eating at accused's restaurant, and that it was for them to say whether that was a public place, that the persons there were the hangers-on around Chinatown, and that accused, a Chinese, boasted of being the richest Chinaman in that part of the country, was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. 1171.]

3. CRIMINAL LAW 448—EVIDENCE—CONCLUSION OF WITNESS.

Where accused charged with selling intoxicating liquor in no-license territory sought to show that he served the liquor to his guests, an answer to a question asked a witness of accused as to what had been his observation as to the general public going into the place where the liquor was served unless invited, "I have had friends with me, but we could not have gone down below unless we were asked to," was properly excluded as a conclusion of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. 448.]

4. INTOXICATING LIQUORS 235—EVIDENCE—ADMISSIBILITY.

Where accused, charged with selling intoxicating liquor, sought to show that he served the liquor to his guests, evidence as to persons not going to the place where the liquor was received unless invited by accused was properly excluded, in the absence of any reference as to the time when persons did not enter the place unless invited.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 299; Dec. Dig. 235.]

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Sue Chung Kee was convicted of selling and dispensing alcoholic liquors in no-license territory, and he appeals. Affirmed.

Dixon L. Phillips and Jno. F. Pryor, both of Hanford, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted upon an information charging him with selling and dispensing alcoholic liquors in no-license territory contrary to the provisions of what is known as the Wylie Act. Stats. 1911, p. 599. He appeals from the judgment and an order denying his motion for a new trial.

[1] Counsel for appellant insists that the evidence is insufficient to justify the verdict. The evidence fairly tended to prove that defendant was a Chinese merchant in the town of Hanford. The building in which he conducted his business consisted of two

stories and a basement, the latter being divided into several rooms which were used, among other purposes, for storage of merchandise and as a place for the cooking and serving of food to others than the family of defendant. His family, consisting of his wife and four children, lived and made their home in the second floor of the building, while the first floor was used as a storeroom in which the mercantile business was conducted. The alleged offense was committed on the evening of December 2, 1913, at which time one man alone, and later two together, went to defendant's place and without, so far as shown, any invitation so to do, went down into the basement, where they found defendant, and expressed themselves as being "awfully dry" and desirous of obtaining a drink, in response to which defendant gave to each of them a bottle of beer, and to one a second bottle. While they were sitting at a table engaged in drinking the beer from the bottles, the city marshal appeared and arrested defendant. It appears that the day before defendant had purchased and had delivered at his place a quantity of beer, and while he admits serving to these men in the basement under his storeroom, over which his family resided, it is nevertheless insisted that the serving thereof was at his own home to these men as his guests as an act of hospitality, where no money or thing of value was received in return therefor, and that the place where served was not a place of public resort, and hence the act constituted no offense, as provided in the first subdivision of section 16 of the act aforesaid. The court embodied this provision of the law in an instruction given to the jury, and it is apparent from the verdict rendered that they were not satisfied the evidence established the claim made by defendant. Considering all the evidence, both direct and circumstantial, we are of the opinion the jury were justified in reaching a conclusion inconsistent with the theory urged by appellant that these three men found in the basement drinking beer were so doing at his home as his guests. We entertain no doubt as to the sufficiency of the evidence to justify the verdict.

[2] At the close of the evidence, at the request of defendant, the jury, in charge of the city marshal and another person instructed to point out the different rooms, tables, entries, stairways, etc., visited defendant's place for the purpose of viewing the same. During the argument appellant objected to certain portions thereof made by the district attorney, and assigned the same as error. These portions were references made by the district attorney to what the jurors saw on their visit to defendant's place, among other things, saying:

"You saw 17 men eating in that restaurant. Who were they? It is for you as jurors to say whether or not that is a public place. You saw, if you counted them, 17 men eating at de-

fendant's tables and every table was filled to its fullest capacity. * * * There was not a laboring man in that bunch, not one. Those were the hangers-on around Chinatown."

And again:

"Chung Kee boasts of being the richest Chinaman in this part of the country; everybody knows that."

The contention of defendant is that, while counsel for appellant at the time assigned the action of the district attorney as error, he meant and intended it as misconduct. Accepting it as a sufficient assignment, and conceding that the district attorney in making his argument went outside of the record, nevertheless it is impossible to perceive how the substantial rights of defendant could have been prejudiced by the argument. Presumably he referred to what the jurors had seen on their visit, and if there was no one eating at the tables, as stated by him, or a less number than 17, the statement so made would have been idle in convincing the jury that the statements so made rather than what they say were true.

[3, 4] Error is predicated upon rulings of the court in sustaining objections of the district attorney to evidence offered. As an instance of such rulings, a witness on behalf of defendant was asked:

"What has been your observation with reference to the general public (that is, in going into this basement unless invited to do so)? A. I have had friends with me, but we could not have gone down below unless we were asked to."

The court, on motion of the district attorney, struck out this answer. There was no error in this ruling. It was not only a conclusion of the witness, but no reference was made to the time when the witness and his friends felt that it would be improper for them to enter the basement unless invited to do so.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 771

GRIBLING v. BOHAN. (Civ. 1602.)

(District Court of Appeal, Second District, California. March 16, 1915.)

1. APPEAL AND ERROR $\S$ 934 — FINDINGS — PRESUMPTION.

Where written findings are waived, the appellate court must assume such findings as will support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S$ 3777-3781, 3782; Dec. Dig. $\S$ 934.]

2. ASSIGNMENTS $\S$ 19 — EXECUTORY CONTRACT—PERSONAL SERVICES.

Certain contracts, involving the performance of services which call for a peculiar personal capacity on the part of the promisor cannot be assigned by him without the consent of the person entitled to performance so as to transfer the obligation of such person to the assignee.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. $\S$ 28-31; Dec. Dig. $\S$ 19.]

3. ASSIGNMENTS ⚡19 — EXECUTORY CONTRACT—PAINTING OF BUILDING.

An executory contract to paint and finish a building did not imply such special reliance upon the personal skill and responsibility of the contractor as to render it unassignable to another contractor without the owner's consent; the satisfactory performance of the work, not the fact of having it done by the contractor, being the consideration for the owner's obligation to pay.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 23-31; Dec. Dig. ⚡19.]

4. ASSIGNMENTS ⚡109 — EXECUTORY CONTRACT—PERFORMANCE BY ASSIGNEE.

Although an assignment of an executory contract to paint and finish a building did not in specific terms provide that the assignee should perform, where, on receiving the assignment, he informed the owner that a person selected by him was going to run the job from that time, thus treating the assignment as one obligating him to responsibility for the work, although he thereafter left the job uncompleted so that it could not be finished within the contract price, such assignee was bound by his interpretation of the assignment that it bound him to performance, and was estopped to deny the fact.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 188; Dec. Dig. ⚡109.]

5. ASSIGNMENTS ⚡56 — EXECUTORY CONTRACT — FAILURE TO PROVIDE FOR PERFORMANCE — STATUTE.

Held, that the assignment, under the circumstances, was not invalid under Civ. Code, § 1698, providing that a contract in writing may be altered by a contract in writing, or by executing an oral agreement, but not otherwise.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 66; Dec. Dig. ⚡56.]

Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by A. L. Gribling against E. R. Bohan. Judgment for plaintiff, and defendant appeals. Affirmed.

G. L. Whitham, of Los Angeles, for appellant. Sheldon Borden and Richard J. Culver, both of Los Angeles, for respondent.

CONREY, P. J. On September 7, 1912, an agreement in writing was made between respondent, A. L. Gribling, and L. Wetherall, whereby Wetherall was to do certain painting and finishing in a building then under construction by Gribling as general contractor. Before any work was done under this contract of September 7th, Wetherall executed to appellant, Bohan, a writing in which he said that for a valuable consideration "I hereby assign to Mr. Bohan" the said contract, and "I direct Mr. Gribling to pay all moneys to Mr. Bohan." Thereafter work was done in part performance of the painting contract. This work was done by S. Thomas and men under his supervision, engaged therefore by appellant and payments on account were made by respondent to appellant. On December 21, 1912, appellant informed respondent that he would furnish nothing more on the job, and that respondent could take any action or employ any men that he saw fit to employ to finish the work. The work having been abandoned by appellant, respondent

caused it to be completed at a reasonable cost, which was in excess of the contract price. The appeal is taken by defendant from a judgment against him for the amount of this excess.

[1] Appellant contends that the contract was assigned by him to Thomas; that respondent accepted Thomas as the party to perform the contract; and that the job was abandoned by Thomas. Written findings having been waived, we must assume the facts against this contention; since there is evidence tending to support implied findings in favor of respondent as to these facts. The propositions of law urged by appellant's counsel are that the contract between Gribling and Wetherall is personal, and could not be assigned; that the acceptance of the assignment by respondent and by appellant is not mutual, because they did not agree upon the same thing in the same sense; that the acceptance is invalid because it is an alteration not in writing relating to a written contract; and that the assignment does not provide for performance of the contract by appellant.

[2-5] There are contracts for personal service or other personal performance which cannot be assigned so as to transfer the concurrent obligation without the consent of the person entitled to such performance. This is illustrated by the contract of an artist to paint a portrait, or a sale of land under agreement by the purchaser to execute his own promissory note for a part of the purchase price. *Taylor v. Palmer*, 31 Cal. 241, 247; *Montgomery v. De Picot*, 153 Cal. 509, 96 Pac. 305, 126 Am. St. Rep. 84. But the contract under consideration here is not one where there was any special reliance upon the personal skill and responsibility of Wetherall, the contractor, and respondent seems to have been satisfied to have the work done by another. If this contract had been fully performed by the assignee, and payment refused, he could have recovered the contract price the same as if the work had been done by his assignor. The satisfactory performance of the work, not the fact of having it done by Wetherall, was the consideration for respondent's obligation to pay therefor. *Taylor v. Palmer*, supra; *La Rue v. Groezinger*, 84 Cal. 281, 285, 24 Pac. 42, 18 Am. St. Rep. 179. It is true that the assignment does not in specific terms provide for the performance of the contract by appellant. But on receiving the assignment he informed respondent that Thomas, a person selected by him, was going to run the job. Appellant from that time treated the assignment as one obligating him to do or to be responsible for the doing of the work, and by his own act placed and left the job in condition where it could not be completed at a cost within the contract price. Having done a part of the work, and having received practically the entire contract price upon the understanding that he was responsible for the job, appellant is bound

by his own interpretation of the contract, and this, upon the principle of estoppel, he should not be permitted to refute upon finding the contract unprofitable. The assignment, under these circumstances, is not rendered invalid under the terms of section 1698, Civil Code, providing that:

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

26 Cal. App. 735

PEOPLE v. CORY et al. (Cr. 327.)

(District Court of Appeal, Second District, California. March 12, 1915. Rehearing Denied by Supreme Court May 10, 1915.)

1. CONSPIRACY ⇨43—INFORMATION—CRIMINAL MEANS—FALSE REPRESENTATIONS.

An information, under Pen. Code, § 182, making punishable a conspiracy to commit any crime or to cheat or defraud any person by means which are in themselves criminal, or to obtain money or property by false pretenses, which charges that the defendants conspired to defraud the prosecuting witness by representing to her that a lot which they were to convey to her was level, tillable, and free from rocks, charges a criminal means, since those representations were of facts, and not matters of opinion, and were sufficient to have made the defendants guilty of obtaining money by false pretenses, contrary to Pen. Code, § 532.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. ⇨43.]

2. CONSPIRACY ⇨43—INFORMATION—INTENT TO DEFAUD.

An information charging conspiracy to defraud by false pretenses, which alleges that the defendants willfully and corruptly conspired together and agreed to cheat and defraud the prosecuting witness, that the representations made were false to the knowledge of defendants, and that they were made pursuant to the conspiracy, sufficiently charges an intent to defraud.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. ⇨43.]

3. CONSPIRACY ⇨47—PROSECUTION—PROOF.

The prosecution need not prove all the false pretenses alleged in an information charging a conspiracy to defraud, but proof of any one of them is sufficient.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Dec. Dig. ⇨47.]

4. CRIMINAL LAW ⇨422—EVIDENCE—DECLARATION OF CONSPIRATOR.

After a conspiracy has been established by either direct evidence or proof of circumstances from which the jury can infer its existence, declarations of one conspirator are not incompetent against the others because they were made out of the presence of the others.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. ⇨422.]

5. CRIMINAL LAW ⇨1186—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Under Const. art. 6, § 4½, providing that no conviction shall be reversed for error in the admission of evidence unless after an examination of the entire cause, including the evidence, the judges are satisfied that the error has resulted in a miscarriage of justice, the erroneous

admission of statements by a conspirator, made out of the presence of his co-conspirator after the object of the conspiracy has been fully accomplished, does not require a reversal, where a consideration of the evidence shows that there was no miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. ⇨1186.]

6. CRIMINAL LAW ⇨369—EVIDENCE—SIMILAR TRANSACTIONS.

In a prosecution for conspiracy to defraud plaintiff by false representations as to the value of property, evidence of similar transactions between defendants and other persons is competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. ⇨369.]

7. CRIMINAL LAW ⇨822—INSTRUCTION—CONSTRUCTION AS A WHOLE.

Where portions of the charge told the jury that the allegations of the information must be proved to sustain a conviction, and other portions, which might indicate that a conviction could be had on proof of facts not charged in the information, were sufficiently limited to the particular purpose of such proof, there was no error in the charge, since it must be construed as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. ⇨822.]

8. CONSPIRACY ⇨43—INFORMATION—COMPLETION OF OBJECT.

An information, charging a conspiracy to defraud by false pretenses, need not allege that the person to be defrauded either had property out of which she might be defrauded, or that property was actually obtained, since the conspiracy is complete when the agreement and some overt act is committed in pursuance thereof, though the crime be not complete.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. ⇨43.]

9. CONSPIRACY ⇨47—SUFFICIENCY OF EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

The fact that evidence was circumstantial does not make it insufficient to sustain a charge of conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Dec. Dig. ⇨47.]

10. CRIMINAL LAW ⇨90—JURISDICTION—POLICE COURTS—MISDEMEANORS.

Under St. 1913, p. 469, giving the police courts of the city exclusive jurisdiction over misdemeanors punishable by fine or imprisonment, the court does not have exclusive jurisdiction to punish a conspiracy formed within the limits of the city, where the only overt act was committed outside the limits, since the offense was not complete until that act was committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129-136; Dec. Dig. ⇨90.]

11. CRIMINAL LAW ⇨93—JURISDICTION—POLICE COURTS—MISDEMEANORS.

Where a city charter adopted by the freeholders created police courts with jurisdiction only such as was given to justices' courts, which does not include high-grade misdemeanors, under the provision of Const. art. 11, § 8½, authorizing a city by its charter to provide for the constitution and jurisdiction of police courts, St. 1913, p. 469, giving city police courts exclusive jurisdiction over such misdemeanors, does not apply, and jurisdiction over a conspiracy consummated by an overt act in such

city can be prosecuted in the circuit court under Const. art. 6, § 5, giving that court jurisdiction over all misdemeanors not otherwise provided for.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129, 137-166; Dec. Dig. 93.]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Leon Cory and another were convicted of a conspiracy to defraud by means of false pretenses, and they appeal. Affirmed on original hearing and on rehearing.

E. B. Coil, of Los Angeles, for appellants. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Decision was heretofore made herein affirming the judgment, and order denying the motion for a new trial, both of which had been appealed from. Thereafter a rehearing was granted. After argument upon the rehearing and consideration of the various matters urged at that argument, the court is satisfied to readopt the opinion heretofore rendered herein as to its main text, with the addition of some further discussion as to certain of the points urged by appellants as grounds for their claim for a reversal. The opinion referred to is as follows:

"Appeal from a judgment of imprisonment and order denying a motion for a new trial.

"Defendants were charged by an information of the district attorney with the crime of conspiracy as defined in section 182 of the Penal Code. By that section the crime of conspiracy is made to consist of the conspiring together by two or more persons: '1. To commit any crime; * * * 4. To cheat and defraud any person of any property by any means which are in themselves criminal, or to obtain money or property by false pretenses.' The foregoing quotations are of the parts of the section noted which are material to the charge as laid in the information. The allegations contained in the information are quite lengthy and, in brief, set out that the defendants with two other persons conspired and agreed to cheat and defraud one Gladys I. Stewart out of money and property by means of trick, artifice, and device and false and fraudulent representations and pretenses; that said persons agreed together that one of their number, not either of the defendants, should represent to the complainant that Cory and Ford and a corporation called the Mutual Benefit & Loan Society were about to distribute certain parcels of land near Elsinore, in the county of Riverside, for advertising purposes, by chance; that the defendants should further represent that the complainant had been selected as a person to receive one of the lots, and that in consideration of the payment to them of \$12.50 they would deliver a free and clear title to the lot; and that it was further to be represented that the land was located within one-half mile from Elsinore Cemetery, and within 1½ miles from Elsinore Lake and within three miles from the town of Elsinore, and that the lot was a slightly lot on level land in a desirable location, well adapted and suitable for building and residence purposes, and located in a tract no part of which was hilly and all of which was level and was tillable and arable land, free from rock, and was valuable; that the representations set forth were made to complainant. An allegation followed that each of the represen-

tations as alleged were false and untrue to the knowledge of the defendants at the time they were made. The evidence introduced on behalf of the people shows that the complainant, who was a resident of Pasadena, received a call from a woman at her house; that this woman told her that the society mentioned were distributing lots for advertising purposes, and delivered to her a coupon which she told her would cost her nothing. A few days later a man made his appearance at complainant's house and informed her that she had been fortunate in the drawing and was entitled to a lot in the Elsinore subdivision, which he said she might obtain by paying \$12.50, which he represented as the cost of preparing a deed and furnishing an abstract of title. This man made statements as to the alleged level character of the land, and complainant paid him the money and later received a deed and abstract. Upon some investigation being made she learned that the land was not desirable, nor as represented, and immediately called at the office of the defendants Cory and Ford and demanded the return of her money. She first met Ford, and he refused to return the money and insisted that the land was good land and level. When complainant first entered the office both Ford and Cory were present together, but Cory withdrew, and the first statements were made by Ford, in response to her demand, without the presence of Cory. Soon, however, Cory entered the room and appeared to be very angry at the accusations made, and he then insisted and represented that the land was level and was of good character and favorably located. It was claimed on the part of the defendants that a portion of the money paid by complainant was for the purpose of supporting an application made by her to become a member of the society, but the testimony of the complainant was that she made no such application and had no notice of any such contention until she received through the mails, after she had paid the money demanded, a notice that some part of it had been applied on account of her pending application to become a member of defendants' corporation. All of the evidence, direct and by circumstance, tended to show a fraudulent scheme entered into and carried out by the defendants and their agents with the design to secure money unlawfully.

[1] "Appellants contend that the information did not state sufficient facts to constitute a public offense. It is argued that 'there was no attempt to charge or prove that a conspiracy existed to defraud the complaining witness by any means which were in themselves criminal.' It must be said, we think, that the information did contain allegations of pretenses which were actionable and which, if they resulted in the accomplishment of the designs of the persons making them, would have made the perpetrators subject to prosecution for having fraudulently obtained the property of another, as that crime is described in section 532 of the Penal Code. Excluding from consideration many of the alleged false pretenses, the representations that the lot was level and was tillable and free from rock were sufficient upon which to found an action where such representations were deceitfully made. These statements were as to matters of fact of which the complainant had no knowledge, and were not mere expressions of opinion as to which persons might differ.

[2] "That the false representations alleged to have been made with fraudulent intent appears when all of the charging clauses of the information are read together. It is first alleged that the defendants 'unlawfully and corruptly conspired together and agreed to cheat and defraud' the complainant; it is further alleged that the representations made were false to the knowledge of the defendants, and that

they were made pursuant to the agreement of conspiracy. The intent to defraud thus appears to be plainly charged.

[3] "The prosecution was not required to prove all of the false pretenses alleged. Proof of any one of the material matters charged, other essential facts being established, would support a conviction. *People v. Smith*, 3 Cal. App. 62, 84 Pac. 449; *People v. Ward*, 5 Cal. App. 37, 89 Pac. 874; *People v. Moxley*, 17 Cal. App. 466, 120 Pac. 43; *People v. Meadows*, 22 Cal. App. 313, 134 Pac. 337.

"The evidence introduced by the people showed that the business concern of which defendants were the active managers and operators was engaged in a fraudulent enterprise. The methods adopted to induce credulous persons to pay money in the belief that they were securing valuable lots by merely paying the cost of title certificates and deeds were of a dishonest character throughout. Nor did either of the appellants disclaim responsibility for the misleading statements made by their agents as to the character of the land. There was testimony showing, as has been before referred to, that both affirmed that the land was level and of good character. The evidence showed that these statements were false and that a lot of the size and description which it was proposed to transfer to complainant would have been practically worthless; its value would be a matter of cents and not dollars.

[4] "The claim that the court committed prejudicial error in allowing proof of statements of one of the appellants made outside of the presence of his alleged co-conspirator is not sustained by the facts. The statement of a co-conspirator made outside of the presence of his confederate is always admissible after proof has been made of the existence of the conspiracy. This proof may be by a showing of circumstances only, and where there is some evidence pointing in that direction of a substantial nature, it is not for this court to question the sufficiency thereof. As was said in *People v. Donnelly*, 143 Cal. 398, 77 Pac. 177: "The ultimate fact here, of course, was the conspiracy on the part of the defendant with the other parties named in the commission of the crime, but it is not necessary in order to establish that fact to prove that the parties met and actually agreed to jointly undertake such criminal action. From the secrecy with which unlawful undertakings are adopted it would be generally impossible to make such proof by direct testimony. Evidence is indirect as well as direct, consisting of inferences and presumptions, and it is code law that upon the trial of a case evidence may be given of any facts from which the facts in issue are presumed or are logically inferable; and the jury, by the exercise of their judgment or reason, warranted by a consideration of the usual propensities or passions of men, may make such deductions or draw such inferences from the facts proven as will establish the ultimate fact or facts in issue. * * * From all the facts and circumstances disclosed in this case on the trial of the defendant, it cannot be said that there was not evidence from which the jury could draw the inference or find the ultimate fact of a conspiracy on the part of the defendant."

[5] "In the same decision it is pointed out that the order in which the testimony is introduced at a trial where conspiracy is charged is immaterial and subject to reasonable regulation by the trial judge. If it be admitted, in order to give point to that objection, that the object of the alleged conspiracy had been fully accomplished before the making of the incriminating statements by appellants, and that for such reason the admission of one could not be received in evidence against the other, it may be answered that, even though the objection is well founded, it abundantly appears by an examination of the entire evidence that any error committed in the regard mentioned has

not, in this case, resulted in a miscarriage of justice. Section 4½, art. 6, Const. Cal.

[6] "It was competent to allow proof of similar transactions had by appellants and their agents with persons other than the complainant. *People v. Whalen*, 154 Cal. 472, 98 Pac. 194.

[7] "The instructions as given by the court must be considered in their entirety, and when so considered they seem to present a very fair statement of the law of the case. In portions thereof the jury was distinctly advised that the allegations of the information must be proved before a conviction could result, and other portions of the instructions which might seem to indicate that the evidence to justify a conviction could be gathered from proof of facts not included within the charge were sufficiently limited to the particular and relevant purpose for which they were given."

To the foregoing opinion a further discussion of propositions especially argued on the rehearing may be added:

[8] We do not believe it was essential to the statement of a good charge to aver in the information that the complainant was actually possessed of the money out of which she might be defrauded. Counsel is correct in his statement that the information did not charge that the complainant actually parted with property, although the proof showed that she did. It was only necessary to charge the agreement of conspiracy, together with a description of some overt act done in pursuance thereof—not that the crime agreed upon was actually accomplished.

[9] It has been stated in the foregoing that we view the evidence as being entirely sufficient to sustain the charge contained in the indictment. That the evidence was circumstantial in part is not to say that it was insufficient; for the proof of a conspiracy, which is usually hatched under cover and out of the view of others than those directly concerned, is perhaps most frequently made by proof of a chain of circumstances only. *People v. Stokes*, 5 Cal. App. 209, 89 Pac. 997.

The question as to the jurisdiction of the superior court over the offense is made the subject of much earnest argument on the part of appellants.

[10] The crime of conspiracy is a misdemeanor punishable by a fine not exceeding \$1,000, or imprisonment in the county jail not exceeding one year, or by both. Pen. Code, § 182. It is urged that the superior court was without jurisdiction to try the offense if committed within the corporate limits of the city of Los Angeles, because the crime belonged to a class called "high-grade misdemeanors" of which the police court of the city of Los Angeles is given exclusive jurisdiction. The Constitution of the state provides that the superior court shall have jurisdiction of all cases of misdemeanor not otherwise provided for. Section 5, art. 6. Under this provision it has been held that the Legislature may repose exclusive jurisdiction in police courts of all classes of misdemeanors committed within the municipal boundaries. *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *Ex parte Westenberg*, 167 Cal. 309, 139 Pac. 674. By act of the Legis-

lature of 1901 (Stats. 1901, p. 95) the police court of the city of Los Angeles is given exclusive jurisdiction of all misdemeanors punishable by fine or imprisonment. The same provision was continued in the succeeding act, approved June 6, 1913. Stats. 1913, p. 469. So that if it may be said, under the circumstances of this case, that the conspiracy was fully accomplished within the boundaries of the city of Los Angeles, then the contention of appellants must be sustained. Section 184 of the Penal Code provides that no agreement, except to commit a felony upon the person of another, or to commit arson, or burglary, amounts to a conspiracy, unless some act, beside such agreement, be done to effect the object thereof, by one or more of the parties to the agreement. The unlawful act here attempted, that of defrauding the complainant of money, does not fall within either of the exceptions; therefore the crime was not complete upon the concert of minds being arrived at with the unlawful object in view. There was required an overt act, which act was consummated when the false representations were made to the complainant at the city of Pasadena. The crime, therefore, was made complete only when the overt act was accomplished.

[11] But, says counsel for appellants, the police court of the city of Pasadena then had exclusive jurisdiction of the offense. However, this is not true. The city of Pasadena is governed under a freeholders' charter which was approved by the Legislature in the year 1901. Stats. 1901, p. 922. By this charter a police court is established within the city, and the jurisdiction thereof is defined in the same terms as are used to describe the jurisdiction of justices' courts created by general laws; in other words, jurisdiction is not given to such courts to try cases termed "high-grade" misdemeanors. It has been held that the state law creating police courts in municipalities is valid, except where the cities have exercised their right under section 8½, art. 11, of the state Constitution, to provide in their charters for the creation and organization of such courts. Where this has been done, then the state law ceases to apply. *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620. Therefore it follows that the crime of conspiracy committed within the limits of the city of Pasadena would properly be prosecuted by information in the superior court after preliminary examination, or by indictment by the grand jury, as was done in this case. To the point just discussed may be quoted the following observation found in *Ruling Case Law*, vol. 5, page 1076:

"A prosecution may be brought against conspirators in the county where the alleged combination or agreement was entered into. On the other hand, if an overt act in pursuance of the conspiracy is committed in a jurisdiction other than that where the combination was made, the conspirators may be prosecuted in the place where the overt act was committed.

The law considers that wherever the conspirators act, there they continue their agreement, and this agreement is continued as to all whenever any one of them does an act in furtherance of the conspiracy" (citing cases).

For the reasons given, the judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

26 Cal. App. 744

ROWE v. ROSE, Mayor. (Civ. 1724.)

(District Court of Appeal, Second District, California. March 12, 1915.)

1. CLERKS OF COURTS ⇐7—RIGHT TO OFFICE — FAILURE TO FILE BOND — STATUTE — "COUNTY OFFICER"—"TOWNSHIP OFFICER."

Pol. Code, § 996, provides that an office becomes vacant upon failure of the officer to file his official bond within the time prescribed. Section 950 provides that county and township officers must file their bonds with the county clerk. *Held*, that a clerk of a police court of the city of the first and one-half class, appointed under St. 1913, p. 470, § 6, providing that such clerks shall be appointed by the judges of the court, and shall hold office for four years, was not an officer whose office became vacant upon his failure to file bond with the county clerk; he not being a "county or township officer."

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. §§ 21-25; Dec. Dig. ⇐7.]

For other definitions, see *Words and Phrases*, Second Series, Township Officer; also First and Second Series, County Officer.]

2. CLERKS OF COURTS ⇐8—RIGHT TO OFFICE—POWER OF REMOVAL—STATUTE.

The office of clerk of the police court of the city of Los Angeles, a city of the first and one-half class, created by St. 1913, p. 470, § 6, is not regulated by the provision of the city charter that all appointed officers of the city shall hold office for four years, provided that the appointing power shall have power to remove, in all cases, the provision of the charter touching removal relating only to city officers, which the clerk is not.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. §§ 26-29; Dec. Dig. ⇐8.]

3. COURTS ⇐43—POLICE COURTS—LEGISLATIVE AUTHORITY.

The Legislature has authority to create police courts and to classify cities for that purpose.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 164-170, 181-183; Dec. Dig. ⇐43.]

Petition for mandamus by W. H. Rowe against H. H. Rose, Mayor of the City of Los Angeles. Denied.

Fredericks & Hanna, of Los Angeles, for petitioner.

PER CURIAM. [1] Petition for mandate to compel respondent to approve a certain bond offered by petitioner who claims to have been regularly appointed as a clerk of the police court of the city of Los Angeles and to be entitled to qualify thereunder. The petition sets out that on the 13th day of August, 1913, a clerk was appointed for the same office which petitioner seeks to qualify himself for, and that said clerk so appointed on said date did not file a bond with the

county clerk for the faithful performance of his duties. One of the claims of petitioner is that, because of the failure to file this bond with the county clerk, the office became vacant under the provisions of section 996 of the Political Code. The clerk of the police court, whose office is brought into question, was appointed under the provisions of an act of the Legislature approved June 6, 1913 (Stats. 1913, p. 469), which created police courts for cities of the first and one-half class, and continued generally the plan of organization of such courts which were originally created under what is commonly known as the Whitney Act. Section 6 of the act now in force provides that the clerks of the police court shall be appointed by the judges of that court, and that such clerks shall hold office for a term of four years from the date of appointment. It is then provided that:

"Each of said clerks shall give a bond in the sum of five thousand dollars, with at least two sureties, to be approved by the mayor, conditioned for the faithful discharge of the duties of his office."

It is then provided that the clerk shall render each month to the city council a detailed account of moneys collected, et cetera. The sections of the Political Code to which our attention has been directed, and which relate to the filing of official bonds, do not, in our opinion, cover the case of the clerks of the police court. Under section 950, Political Code, the official bonds required to be filed with the county clerk are those of "county and township officers." The clerks of the police court are neither county nor township officers, and our attention is not pointed to any provision of the law which seems to require that the bonds of such clerks must be filed in the same place as are the bonds of county and township officers. A reasonable requirement would be, in view of the fact that the bond is given to protect the city against any misappropriation of fees and other funds which these clerks are required to make account for, that the official bonds of police court clerks, after being approved by the mayor, should be filed in the city clerk's office. For aught that the petition shows, the clerk whom petitioner seeks to displace did furnish a bond which was approved by the mayor and presumably filed with the city clerk.

[2, 3] A second point is urged, and that is this: That the clerks of the police court are city officials, and the city charter of the city of Los Angeles provides that all appointed officers of the city shall hold office for the term of four years, provided, however, that the appointing power shall have the power to remove in all cases. The office of clerk of the police court is created by general statute. The city charter, so far as our examination of it discloses, and we are not furnished with any reference which indi-

cates the contrary, makes no provision for the appointment of clerks of the police court. The provision of the charter referred to, providing that the appointing power shall have power of removal, must be considered as relating to city officers only, among which the clerks of the police court are not numbered. The validity of the acts of the Legislature creating police courts and classifying cities for that purpose has long been upheld. A somewhat recent case in which several former decisions are reviewed is that of *Ex parte Westenber*, 167 Cal. 309, 139 Pac. 674. See, also, *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620.

We think that no sufficient showing is made which will authorize the issuance of the writ sought.

The petition is denied.

26 Cal. App. 746

MUSSER v. FITTING et al. (Civ. 1529.)

(District Court of Appeal, Second District, California. March 13, 1915.)

1. MINES AND MINERALS ⚡38—ACTIONS—BURDEN OF PROOF—ASSESSMENT WORK.

The locator of a junior mining claim has the burden of proving that the senior conflicting claim was forfeited by failure to do the required annual assessment work.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 87½-113; Dec. Dig. ⚡38.]

2. MINES AND MINERALS ⚡23—ACTIONS—FINDING—ASSESSMENT WORK.

Under Civ. Code, § 1426m, providing that the affidavit of the owner of a mining claim that he had performed his annual assessment work shall be prima facie evidence that the work was done, it was error for the court not to find that such work was done, where the affidavit was in evidence, and was not controverted.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 51-59, 114; Dec. Dig. ⚡23.]

3. MINES AND MINERALS ⚡23—ASSESSMENT WORK—WORK BY STOCKHOLDER.

A member of a mining association or a stockholder in a corporation has such an interest in the claims owned by the association or corporation that the assessment work done by him inures to the benefit of the association or corporation so as to prevent a forfeiture.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 51-59, 114; Dec. Dig. ⚡23.]

4. JUDGMENT ⚡490—COLLATERAL ATTACK—RECITAL OF SERVICE.

Where the affidavit of service on a foreign corporation was defective, but the default judgment recited that the complaint and summons had been duly served, the judgment is good against collateral attack; since the recital of service does not show that it was based on the service which was defective, and the record, therefore, does not positively contradict the recital.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 926-928; Dec. Dig. ⚡490.]

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by Sam G. Musser against J. P.

Fitting and another. Judgment for the plaintiff, and defendant Salisbury appeals. Reversed.

P. W. Forbes, of Bishop, and Boyd & Salisbury, of Reno, Nev., for appellant. A. H. Swallow, of Bishop, and Wm. J. Clark, of Los Angeles, for respondent.

SHAW, J. Action to quiet title to a mining claim of which plaintiff claimed ownership and right to possession. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant Salisbury appeals.

In January, 1910, plaintiff duly located a lode mining claim which he designated as the Lead Hill lode mining claim, the exterior boundary lines of which conflicted with and overlapped certain claims known as the Monster No. 4 mining claim and Monster No. 5 mining claim, ownership of which was claimed by appellant. This conflict, as between the Lead Hill lode mining claim and Monster No. 4 mining claim, covered 9.54 acres, and, as to the former claim and Monster No. 5 mining claim, covered 7.03 acres.

By answer, Fitting disclaimed any interest in the premises, and defendant Salisbury, in addition to answer denying the material allegations of the complaint, alleged that in April, 1907, J. P. Fitting duly located and perfected his claim to Monster No. 4 and Monster No. 5 mining claims, title to which claims Fitting conveyed to him by deed duly executed on December 3, 1909, since which date said defendant has been the owner in possession and, save a short time during the pendency of an order restraining him from so doing, engaged in developing and working the same and extracting ore therefrom; that Fitting, in making said location, and down to the time of such conveyance to defendant Salisbury, had complied in all respects with the laws, rules, and regulations pertaining to the location and acquisition of mining claims and mineral locations upon the public domain, and during the year 1909 had done or caused to be performed upon each of said claims work and labor of the value of \$100.

Plaintiff's right depends upon whether or not the expenditure of \$100 upon each of said claims was made during the year 1909 in the improvement and development thereof. If not, it is conceded that the former locator and his grantee, appellant here, forfeited all right thereto, leaving the property free and open to location by plaintiff. Upon this issue the court found:

That on April 25, 1907, J. P. Fitting was a member of a firm or association known as the J. P. Fitting Company, which employed Fitting to locate mining claims, and one D. H. Duncan was likewise employed by said company, who, on said date, and while so employed, located two claims known as Monster No. 4 and Monster No. 5, posting notices thereon, wherein J. P. Fitting was named as the locator thereof; that thereafter, on July 29, 1907, J. P. Fitting executed a deed of conveyance whereby he conveyed to said J. P. Fitting Company all of his right, title, interest, and estate in and to each

of said claims, and from said date until January 1, 1910, said company was the owner and entitled to the undisputed possession of the land embraced within the boundaries of said claims; "that said J. P. Fitting Company did not do or perform any labor of any kind or description whatever upon, or make any improvement or spend any money for the benefit or improvement of said mining claims or either of them for or during the year 1909, and that no person made any such expenditure or did or performed any work or labor or made any improvement upon either of said mining claims for or in behalf of said J. P. Fitting Company, for or during said year, and that said J. P. Fitting Company was not prevented from making such improvement or from performing work and labor upon said mining claims or either of them by force or otherwise during said year."

The effect of the finding is that, while the claims were located in the name of J. P. Fitting, he thereafter, on July 29, 1907, conveyed his interest therein to the J. P. Fitting Company and that neither said company nor any person for or on its behalf did any work or performed any labor of any kind or description whatever upon said mining claims or made any improvements thereon during the year 1909.

[1] The right of Fitting to the property attached in April, 1907, when the location of the mining claims was made in his name. Plaintiff's right thereto is by virtue of a like location made in 1910. The acts of plaintiff in thus locating the claims, so far as the same overlapped or conflicted with the claims of Fitting, were ineffectual for the purpose of vesting any right thereto in plaintiff, unless there had been an abandonment by Fitting or a forfeiture of his rights by reason of failure to do the annual assessment work for the year 1909. *Gear v. Ford*, 4 Cal. App. 556, 88 Pac. 600. The burden of establishing such forfeiture rested upon plaintiff. *Goldberg v. Bruschi*, 146 Cal. 708, 81 Pac. 23; *Whalen Cons'd Copper M. Co. v. Whalen* (C. C.) 127 Fed. 611. Hence defendant, having established the fact of his prior location and the conceded conflict in the exterior boundary lines of the claims and conveyance made to him by said locator, might have rested his case.

[2] Defendant, however, while not required so to do, offered in evidence his affidavit made in form as provided in section 1426m, Civil Code, duly filed on January 27, 1910, as proof that he had performed the requisite annual work upon the claims for the year 1909. Under the section of the Code supra, this constituted prima facie evidence that the annual work upon said claims was duly done and performed by Fitting, as alleged in the answer. No evidence was offered tending to controvert such fact so established. The question as to whether or not the work had been done was the material issue in the case upon which the rights of the parties depended; nevertheless the court made no finding thereon. Had such been made in accordance with the evidence, it must have followed that, since Fitting's location of the claims was prior to that made by plaintiff, and since

there had been no abandonment or forfeiture thereof, his conveyance to Salisbury vested in the latter good title to the property, and that plaintiff, by virtue of his attempted location, acquired no right or interest in the same. The failure of the court to make such finding was error, and, unless cured by other sufficient finding unaffected by error, entitles appellant to a reversal of the case.

[3] The court, as hereinbefore stated, found that in July, 1907, J. P. Fitting by deed conveyed the claims so located by him to a company or association (whether incorporated is not found) known as the J. P. Fitting Company, of which he was a member, and that said company failed to do the annual assessment work thereon. Conceding such fact established by proper evidence—as to which, however, we express no opinion—nevertheless, since Fitting was a member of such company or association (or, if a corporation, a stockholder therein), he had an equitable and beneficial interest in the property by reason of which the assessment work done by him inured to the benefit thereof so as to prevent a forfeiture. *Wailes v. Davies* (C. C.) 158 Fed. 667, and cases there cited; *Anderson v. Caughey*, 3 Cal. App. 22, 84 Pac. 223.

[4] Moreover, for the purpose of avoiding the effect of this deed so made by Fitting to the J. P. Fitting Company, defendant offered in evidence a judgment and decree wherein the superior court of Inyo county on June 8, 1909, in an action brought by Fitting against the company, declared said deed null and void, and ordered, adjudged, and decreed the same and the record thereof canceled and annulled for fraud practiced in procuring it. Plaintiff's objection to the reception of such document in evidence was sustained upon the ground that it appeared upon an inspection of the judgment roll that the judgment was void. The ground upon which respondent relies in support of this ruling is that it appeared from the judgment roll that defendant was a nonresident corporation doing business in this state, and that the return of service indorsed upon the summons was that the same was served "on the 4th day of May, A. D. 1909, on Charles F. Curry, as secretary of state of the state of California, by delivering to him, said secretary of state, personally in said county of Sacramento, a copy of said summons attached to a true copy of the complaint in the action therein mentioned." In the case of *Willey v. Benedict Co.*, 145 Cal. 601, 79 Pac. 270, relied upon by respondent, it was held that proof of service so made upon a nonresident corporation, since the existence of a condition upon which service upon the secretary of state is permitted was not made to appear, was insufficient to give the court jurisdiction to render a judgment by default. The question there, however, arose upon a direct attack upon the judgment (*Reinhart v. Lugo*, 86 Cal. 400, 24 Pac. 1089, 21 Am. St. Rep. 52), while here the attack is made in another action, and there-

fore collateral. Hence the case cited cannot be deemed an authority supporting respondent's contention.

Considering the whole record, we find that the affidavit of service is not the only evidence that defendant was served with process. The jurisdictional recitals in the judgment which constitute a part of the record are that:

"It appearing to the court that defendant, the J. P. Fitting Company, a corporation, was duly served with summons and complaint herein, and having failed to answer plaintiff's complaint filed in the above-entitled action, and the legal time for answering having expired, and no answer or demurrer having been filed herein, or other appearance made by defendant, and the default of said defendant, the J. P. Fitting Company, a corporation, in the premises having been duly entered according to law."

Notwithstanding the insufficiency of proof contained in the affidavit indorsed upon the summons, this recital must be taken on collateral attack as true, unless the record affirmatively shows the facts upon which it is based to be untrue. There is nothing to indicate that such finding was predicated upon proof of service indorsed upon the summons found in the judgment roll. The recital makes no reference to such proof as a basis for the conclusion, as was the case in *Harris v. Sargeant*, 37 Or. 41, 60 Pac. 608. It is not inconsistent therewith, since other sufficient proof of service or admission thereof might have been presented which justified the finding. Mr. Black, in his work on Judgments (section 273) says the recital as to due service of process in a judgment is conclusive of such fact in collateral attack, unless it be "positively contradicted by the record itself"; and, further that such "contradiction must be explicit and irreconcilable; it is not enough that the recital seems to be contradicted by inferences drawn from other parts of the record." See, also, *Freeman on Judgments*, § 130. The rule is that upon collateral attack every presumption should be indulged in support of the validity of the judgment. Hence, since the proof indorsed upon the summons was insufficient to justify the recital solemnly made in a judgment which imports verity, we must presume that the court had before it other and sufficient proof of service of process. This conclusion seems to be fully supported by the case of *Sacramento Bank v. Montgomery*, 146 Cal. 345, 81 Pac. 138. The court, therefore, erred in excluding this judgment from evidence. That it was prejudicial follows from the fact that, in the absence of any conveyance by Fitting to the J. P. Fitting Company, title to the mining claims remained vested in him at the time when the evidence shows that during the year 1909 he performed the requisite work and labor upon the claims as alleged and upon which the court failed to make any finding, as hereinbefore stated.

For the reasons given, the judgment and order are reversed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 752

ROUGHTON v. BROOKINGS LUMBER & BOX CO. (Civ. 1524.)

(District Court of Appeal, Second District, California, March 13, 1915. Rehearing Denied April 10, 1915. Denied By Supreme Court May 10, 1915.)

1. CONTRACTS — 322 — PERFORMANCE — REASONABLE TIME — STATUTES.

In an action on a contract for the installation of automatic sprinklers, not specifying any time for completion, evidence held to sustain a finding that 60 to 90 days was not a reasonable time.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1306, 1307, 1339, 1347, 1348, 1465, 1492, 1534–1542, 1754, 1768, 1772, 1801, 1802, 1804–1808, 1815, 1816; Dec. Dig. — 322.]

2. CONTRACTS — 328 — ACTION FOR CONTRACT PRICE — DEFENSES.

Under a contract to furnish materials and labor for the installation of automatic sprinklers and fire extinguishers, providing that if the work should be discontinued before completion, by fire, etc., defendant should pay for all goods destroyed, and materials and labor furnished up to that time, under which plaintiff proceeded with reasonable diligence, the fact that if the system had been installed and in operation the fire might have been extinguished, would not relieve defendant from liability for materials furnished but not destroyed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1571–1584; Dec. Dig. — 328.]

3. EVIDENCE — 442 — PAROL EVIDENCE — CONTRACT.

Such contract, though silent as to the time within which the work should be completed, was performable, under Civ. Code, § 1657, within a reasonable time, so that parol evidence to fix a shorter time for performance than a reasonable time was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874–1897; Dec. Dig. — 442.]

4. CONTRACTS — 319 — BUILDING CONTRACTS — CONSTRUCTION — STATUTE — "MATERIALS FURNISHED."

Under a contract for the installation of a sprinkler system, providing that if the work was discontinued by fire, etc., before completion, defendant should pay the value of all goods destroyed, materials furnished, and labor rendered at the time of discontinuance, and in view of Civ. Code, § 1641, requiring a construction to give effect to all provisions of a contract, the term "materials furnished" referred to other goods than such as might be destroyed, and included material furnished and delivered upon defendant's premises upon which plaintiff had expended labor and cost, but which was not destroyed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1458, 1476, 1477, 1479, 1493–1507; Dec. Dig. — 319.]

5. CONTRACTS — 322 — ACTION — EVIDENCE — REASONABLE TIME.

In an action on a contract for the installation of a sprinkler system within a reasonable time, the testimony of the superintendent of construction as to the preliminary work and assembling of necessary materials was admissible on the question of reasonable time.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1306, 1307, 1339, 1347, 1348, 1465, 1492, 1534–1542, 1754, 1768, 1772, 1801, 1802, 1804–1808, 1815, 1816; Dec. Dig. — 322.]

6. CONTRACTS — 349 — ACTION — EVIDENCE.

In an action to recover under a contract for the installation of a sprinkler system, providing that if the work was discontinued by rea-

son of fire, etc., the defendant should be liable for the value of all goods destroyed, materials furnished, and labor rendered, evidence as to a railway fare, and a per diem charge of plaintiff's superintendent after the fire was inadmissible, though evidence as to a similar per diem charge before the fire was admissible.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1096, 1781–1784, 1788–1798, 1809, 1811–1814, 1817, 1818; Dec. Dig. — 349.]

7. APPEAL AND ERROR — 1052 — HARMLESS ERROR — ADMISSION OF EVIDENCE.

Error in the admission of such evidence was harmless, where the court excluded such amount from that allowed to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171–4177; Dec. Dig. — 1052.]

8. APPEAL AND ERROR — 1171 — HARMLESS ERROR — DE MINIMIS.

In such case, conceded error in allowing to plaintiff a railway fare of \$4 could not, under the rule of de minimis, justify a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4546–4554; Dec. Dig. — 1171.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by A. P. Roughton against the Brookings Lumber & Box Company. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order affirmed.

Eugene C. Campbell, of Long Beach, for appellant. Herbert H. Chase, of San Bernardino, for respondent.

SHAW, J. On July 7, 1910, plaintiff's assignor, Manufacturers' Automatic Sprinkler Company, made a written proposal to defendant, whereby it proposed, for a sum therein specified, to furnish materials and labor therefor and install in the box factory of defendant its system of automatic sprinklers and fire extinguishers, which proposal was, in writing, duly accepted by defendant. The proposal as accepted contained no provision fixing the time within which the installation of the plant should be made, but did provide that no change or modification of the contract should be binding upon the Automatic Sprinkler Company other than such as in writing should be indorsed thereon by the president of the company. It also contained a provision as follows:

"If at any time prior to the completion of the equipment, the work thereon be discontinued by fire or any cause other than the fault of the Manufacturers' Automatic Sprinkler Company, there shall be immediately due and payable from you (the defendant) a sum equal to the value of all goods destroyed; materials furnished, labor and services rendered at the time of discontinuance."

Thereafter plaintiff's assignor proceeded with the work of installing the plant as called for by the terms of the contract, when, on September 22, 1910, at which time the installation of the plant was partially complete, a fire occurred, as a result of which the buildings and fire extinguishing system so far as

installed therein were destroyed. Thereupon, pursuant to the provisions of the contract hereinbefore quoted, work was discontinued. This action is to recover the value of the goods destroyed, materials furnished, labor and services rendered up to the time when the work of installation of said plant was discontinued on account of said fire. The court gave judgment for plaintiff, from which, and an order denying defendant's motion for a new trial, it appeals.

The court found that it was untrue that the contract made between plaintiff's assignor and defendant was in part oral; that it was not agreed that the sprinkling apparatus should be installed in defendant's buildings within three weeks from July 7, 1910; that it was untrue that the proximate cause of the destruction of the buildings and plant partially installed therein was the delay of plaintiff's assignor in the performance of the work—all of which facts were affirmatively alleged in the answer as a defense to the action. The court further found that under the implied terms of the contract a reasonable time was fixed for the completion of the work, and that when discontinued by reason of the fire a reasonable time had not elapsed for the performance thereof; all of which findings are attacked by appellant for want of sufficient evidence to justify them.

[1] In the absence of any time being specified in the written proposal for doing the work, the law fixed a reasonable time for the performance thereof. Section 1657, Civ. Code.

The fact that in assembling the material for doing the work much of it had to be shipped from distant parts of the country, when considered with other circumstances shown in connection with the testimony of several witnesses to the effect that a reasonable time for installing the plant would be two or three months, fully justified the finding that such reasonable time had not elapsed when the fire occurred, at which time, the evidence tends to show, a very few days would have sufficed for completing the installation. Conceding that with an extra force of men, shipments of material by express, and special effort, it might have been completed in a shorter period, such fact in no wise tends to prove that 60 to 90 days was an unreasonable time for installing the plant.

[2] When completely installed, the sprinkling apparatus would have been valueless as a means of extinguishing fire, unless connected with a sufficient supply of water for such use. The evidence tends to show that defendant, upon whom the duty devolved, had done nothing toward the work of connecting the plant with the city water system. But, however this may be, the sprinkling company prosecuted the work, as found by the court, with reasonable diligence, and, conceding that had the plant been installed and in operation the fire might have been extinguished, nevertheless, since the company assumed

no obligation under its contract to have the plant completed within other than a reasonable time, which time had not elapsed when the fire occurred, it could not be held liable for loss resulting therefrom.

[3] Appellant further insists that at the time of entering into the written contract it was orally agreed that plaintiff's assignor would complete the installation within three weeks from the date thereof. In support of this contention, counsel directs our attention to parol testimony tending to show that an employé of the sprinkler company stated that, if defendant accepted the proposal, the work would be done in not exceeding 30 days. Not only did the written proposal contain the provision that modifications thereof, other than in writing signed by the president, should not be deemed binding upon plaintiff's assignor, but inasmuch as the contract was silent as to the time within which the work should be done, the law (section 1657, Civ. Code) supplies the omitted term as to the time required for doing the work as fully and completely as though the parties had by writing in express words fixed such time. This being true, it follows that, reading the written contract in connection with said section of the Civil Code, it provided that the work should be done within a reasonable time. Hence parol evidence tending to prove a change of such term and fixing a shorter period than that which would constitute a reasonable time for doing the work would be obnoxious to the rule that the terms of a written contract cannot be varied by parol testimony. In our opinion, the court committed no error in making the findings hereinbefore complained of.

[4] The court found that at the time of the discontinuance of the work the value of the goods destroyed, materials furnished, labor and services rendered was the sum of \$709.42, consisting of materials of the value of \$328.31 destroyed, labor and services rendered of the value of \$150.50, and materials furnished for said work delivered upon the premises, but which were not destroyed, valued at \$230.61. Appellant insists that this material so valued at \$230.61, which was delivered upon the premises but not installed in place, was not material furnished within the meaning of the terms used in the contract. By the terms of the contract it had agreed, not only to pay for the "goods destroyed," but for "materials furnished, labor and services rendered." If defendant was to pay only and alone for the goods destroyed, then no purpose could be subserved by the use of the words "materials furnished," to which in construing the contract some meaning must be accorded. We think it clear that in making the contract the parties in using the words "materials furnished" intended thereby to refer to other goods than such as might be destroyed, and which in this case meant material furnished and delivered upon the premises of defendant and upon which it appears some considerable labor and cost had been expended in as-

sembling, cutting, fitting, and preparing it for use in the installation of this particular plant. Otherwise construed, no effect would be given the provision, thus violating a cardinal rule of interpretation of such instruments. Section 1641, Civ. Code.

[5] By supplemental brief, appellant directs our attention to several alleged erroneous rulings made by the court in admitting and rejecting evidence offered. The testimony of the superintendent of construction as to the preliminary work and assembling of materials necessary to make the installation was proper as tending to establish what constituted a reasonable time within which to perform the same.

[6-8] Evidence as to railway fare paid from Los Angeles to Highlands, and per diem charge of E. Barney, in charge of construction, for trip made after the fire, was improperly admitted; but since the court, as shown by its finding, excluded such sum from the amount allowed, defendant was not prejudiced by the ruling.

Evidence as to a similar charge for a like trip made prior to the fire was proper, in so far as it covered the per diem of the witness; and, conceding error in allowing railway fare of \$4, such fact will not, under the rule of *de minimis*, justify a reversal.

We find no error in other rulings which are complained of.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 760

PETERSON v. BEGGS et al. (Civ. 1209.)

(District Court of Appeal, Third District, California. March 15, 1915.)

1. MINES AND MINERALS ⚡97 — "MINING PARTNERSHIP"—WHAT CONSTITUTES.

Where defendants agreed that one of them, who held the legal title to mining property, should operate such properties, holding the title in trust for himself and his codefendants, that after such properties had repaid him certain advances the sums remaining were to be divided equally between the parties, and that if after such repayment any property remained unsold it was to be held by the defendant trustee, one half to belong to him and the other half to his codefendants, such defendants were not associated in a mining partnership under Civ. Code, § 2511, providing that when two or more persons, who own or acquire a mining claim for the purpose of working it and extracting the minerals therefrom, actually engage in working the same, they are such a partnership, since the actual working of the mine by the parties together, contributing expenses and sharing profits, is essential to the existence of the relation.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 222; Dec. Dig. ⚡97.]

For other definitions, see Words and Phrases, First and Second Series, Mining Partnership.]

2. MINES AND MINERALS ⚡97 — MINING PARTNERSHIP—COTENANTS.

Cotenants of a mine are not mining partners, unless all of them actually join in its working, and one not so engaged is under the

liabilities only of a cotenant in respect to the mine.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 222; Dec. Dig. ⚡97.]

3. MINES AND MINERALS ⚡97 — MINING PARTNERSHIP—NECESSITY FOR JOINT WORKING.

An agreement between parties combining to acquire, develop, and deal in mines, creates no mining partnership unless it contemplates the actual joint working of such mines by the associates upon acquisition and development.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 222; Dec. Dig. ⚡97.]

4. MINES AND MINERALS ⚡97 — MINING PARTNERSHIP—JOINT WORKING—SUFFICIENCY OF EVIDENCE.

In an action against associates alleged to have been mining partners, evidence held insufficient to show that such alleged partners departed from the agreement between them that constituted one of their number sole operator of the mines, so as by an actual joint working to have become such partnership.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 222; Dec. Dig. ⚡97.]

5. ATTACHMENT ⚡101—AFFIDAVIT—STATUTE.

Where an affidavit of attachment, in an action against three defendants, stated that it was not sought to hinder, delay, or defraud any creditor or creditors "of said defendant," thus referring only to one defendant, it was insufficient under Code Civ. Proc. § 538, prescribing the necessary requirements of such an affidavit.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 258-262; Dec. Dig. ⚡101.]

6. ATTACHMENT ⚡122—AFFIDAVIT—AMENDMENT—STATUTE.

Such affidavit was not void, being defective only in a substantive particular, and could have been amended by plaintiff at or before the application to discharge the writ, under Code Civ. Proc. § 558, providing that an improperly or irregularly issued writ of attachment must be discharged upon application unless amended.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 323-327; Dec. Dig. ⚡122.]

Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by O. Peterson against Will M. Beggs and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

R. C. McComish, of San Jose, for appellant Beggs. E. L. Rhodes, of San Jose, for appellants Morrell and another. Webe & Redding, of Downieville, for respondent.

SHIELDS, J. pro tem. Plaintiff prosecuted this action to recover for services rendered as a watchman or keeper of a mining property known as the Kate Hardy mine. He was employed by the defendant John W. Morrell, but, alleging that all of the defendants were mining partners, claims that they were jointly liable as such for the value of his services. Plaintiff recovered judgment. An attachment was issued in the case which defendants later moved to vacate. This is an appeal from the judgment and an order refusing to dissolve the attachment. The sole ground of attack upon the judgment is that there is no evidence to support it. This appears to be a fact.

[1, 2] On July 8th, 1909, one Tyler Dudley appears to have been the owner of the Kate Hardy mine. On that day he entered into a contract by which he agreed to sell the mine to defendant Will M. Beggs. Beggs, having possession of the mine under a previous contract, retained it under this agreement, and on the 13th day of July, 1909, entered into an agreement with the defendants Morrell which seems to be decisive of this case. This agreement recites that a number of mines and mining properties belonging to the Morrells had been conveyed to Beggs, and that they had given him a power of attorney; that Beggs had in his own name a contract to buy the Kate Hardy and other mines; that he had expended in and about said mines a considerable sum of money in behalf of the Morrells; and that he had also performed valuable legal services for them. The contract then provided that, although the title to all of the mining properties described stood in the name of Beggs, yet as between the parties he was not the owner of them, but simply held the title in trust for the parties, substantially as follows: That he was to sell the mining property, or some portion of it, and from the purchase price from time to time deduct a sum sufficient to repay to him all sums paid out by him, either to the Morrells or for the benefit of the mining properties and to compensate him for his services as an attorney in behalf of the defendants Morrell. After the repayment of these sums and the payment of the expenses of the sales, the sums remaining were to be divided equally between the parties. If after such repayment any property remained unsold, it was to be held by defendant Beggs, one half to belong to him and the other half to the defendants Morrell. By the terms of this agreement it is provided that it was made "in order that the respective rights of the parties" thereto might "be definitely settled and determined." Does it constitute them mining partners?

A concise statement of the law defining mining partnerships will help us to answer this question. Such a partnership exists "when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the minerals therefrom, actually engage in working the same." Civ. Code, § 2511. The actual working of the mine by the joint owners is essential to a mining partnership. 22 Am. & Eng. Ency. Law, p. 228. The partnership arises only when the co-owners unite and co-operate in working the mine. *Hartney v. Gosling*, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005; *Skillman v. Lachman*, 83 Am. Dec., note 104; *Dorsey v. Newcomer*, 121 Cal. 213, 53 Pac. 557; *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689. The actual working of the mine by the parties together for their mutual benefit seems to be essential to the existence of the partnership relation, the parties to contribute

to the expenses of the work and to share in the profits according to their respective interests. The agreement of July 13th does not seem to have contemplated any such condition. By its terms, Beggs was in sole charge of the property, and whatever work was provided to be done by it was to be done by Beggs. No money for expenses was to be advanced by the Morrells, and, under the testimony, no money was advanced by them. By this contract, if any mining work was done by Beggs and profits resulted from it, no share of such profits was to be paid to the defendants Morrell. On the contrary, all moneys realized were to be retained by Beggs to be applied to indebtedness existing in his favor. In a sense it is true that the Morrells were interested in having this indebtedness discharged and the mining properties developed, and that any moneys so applied were paid to their benefit. But their interest in profits which might be so used was not a right to the profits as such, but an interest only in any balance which might remain after profits had been so used by Beggs. Their interest was similar to that of an owner who lets a mine to be worked upon shares. The latter's interest is not a property in the profits as such, but a claim against them as a fund out of which, when ascertained, he is to be compensated. This does not constitute him a mining partner. *Le Fevre v. Castagnio*, 5 Colo. 564; *Skillman v. Lachman*, 83 Am. Dec., note 105; 22 Am. & Eng. Ency. Law, p. 227. The same conclusion must be reached if we regard the agreement of July 13th as having constituted the parties tenants in common of the Kate Hardy mine. Cotenants of a mine are not necessarily mining partners, or partners at all; the actual working of the mine by the joint owners is essential to such a partnership. 22 Am. & Eng. Ency. Law, p. 228; *First National Bank v. G. V. B. Mining Co. (C. C.)* 89 Fed. 449. And it must be a joint working by all of the co-owners. If one co-owner of mining property engages in working it for ore, as Beggs did in this case, and as later J. W. Morrell did, the remaining owner not so engaged does not thus become a partner; he will be left to his rights and chargeable according to his duties as a cotenant only. *Madar v. Norman*, 13 Idaho, 585, 92 Pac. 572.

[3] There appears to be nothing in the agreement under discussion about working any of the mines mentioned in it. As a consequence, even if that writing evidenced an association of the parties for the purpose of acquiring, developing, and dealing in mines, unless it further provided that, when acquired and developed, they should be then worked on joint account, no mining partnership was created by it. *Doyle v. Burns*, 123 Iowa, 488, 99 N. W. 195.

Without discussing it further, it may be safely concluded that this agreement created no partnership relation. It appears to be

a simple declaration of trust under which the defendant was to deal with the property as a trustee, wholly independent of his co-defendants, subject only to the conditions of his trust.

[4] This writing, however, is not necessarily determinative of this case. The parties could have departed from or acted independently of it, and either by agreement, or as the result of what they did, become liable as mining partners. But the evidence does not show this. Everything that was done by defendant Beggs was in harmony with his rights and duties under this trust agreement, and was done presumably in pursuance of it. When Beggs worked the mine, he did it without any association with his codefendants. He employed the men who worked it, he directed their labors, and himself compensated them. He at no time worked in association with the Morrells. When J. W. Morrell took possession of and worked the mine, he did so in the absence of Beggs and without his knowledge. Beggs had previously employed men to keep Morrell off the property, and, when he learned that he was at the mine and working it, both by letter and by telegram he ordered him to cease work. Plaintiff was employed by J. W. Morrell after this has been done by Beggs. The record discloses no agreement to work the mine together, and no co-operation in actually working it, and consequently does not establish a liability by Beggs for the acts of Morrell.

This conclusion renders it unnecessary to consider the sufficiency of the evidence as to the reasonable value of plaintiff's services. Upon a retrial of the cause, persons competent from knowledge and experience should be found to furnish this evidence.

[5, 6] A writ of attachment was issued in this case on behalf of plaintiff. His affidavit for this attachment stated "that the said attachment is not sought * * * to hinder, delay, or defraud any creditor or creditors of the said defendant." As there were three defendants, and the affidavit referred only to one, it did not meet the requirements of section 538, Code of Civil Procedure. *Pajaro Valley Bank v. Seurich*, 7 Cal. App. 732, 95 Pac. 911. This affidavit was not void, however; it lacked only in a substantive particular, and could have been amended upon motion of the plaintiff at or before the hearing of the application to discharge the writ of attachment. Section 558, Code Civ. Proc.; *Nichols v. Davis*, 23 Cal. App. 67, 137 Pac. 41. But no such amendment was suggested by plaintiff. As a consequence, the attachment should have been discharged. In justice to the trial judge, it should be stated that the deficiency in the affidavit was not pointed out by counsel, and, when the motion was passed upon, the court was apparently without knowledge of it. The failure of counsel to call the particular point upon

which he relied to the attention of the court, and later to rely upon it as error, on appeal, is not commendable. Such practice, whether or not so intended, operates to entrap courts and to prolong litigation without serving justice.

The order refusing to discharge the attachment is reversed. The judgment is likewise reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

26 Cal. App. 765

TAYLOR v. NORTHERN ELECTRIC RY. CO. (Civ. 1284.)

(District Court of Appeal, Third District, California. March 15, 1915.)

1. NEW TRIAL ⇐75 — SETTING ASIDE VERDICT — VERDICT CONTRARY TO EVIDENCE — AMOUNT.

In an action for personal injuries, the trial court, if of the opinion that under the evidence the amount awarded is not legally adequate, may grant a new trial on plaintiff's motion, on the ground that the evidence does not justify the verdict.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 151, 152; Dec. Dig. ⇐75.]

2. APPEAL AND ERROR ⇐1015 — REVIEW — ORDER GRANTING NEW TRIAL.

Where there is a substantial conflict in the evidence as to the compensation which plaintiff should receive for personal injury, the rule as to the conflict of evidence upon material issues is to be applied on an appeal from an order granting plaintiff a new trial the same as though the new trial had been granted on defendant's motion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3876; Dec. Dig. ⇐1015.]

3. NEW TRIAL ⇐137 — NOTICE OF INTENTION — SUFFICIENCY — STATUTE.

Under Code Civ. Proc. § 659, requiring a party intending to move for a new trial to file and serve a notice of intention, specifying the grounds on which the motion will be made, a notice, specifying that the defendant's evidence as to the defectiveness of its switch, the extent and effect of the plaintiff's injury, whether it would permanently or temporarily incapacitate him, and the amount he was compelled to spend for medical treatment, etc., was not sufficient to overcome the plaintiff's evidence on those points, and that the evidence as to the character and extent of his injuries did not justify a verdict for more than \$500, and which named the witnesses testifying for plaintiff upon such points, was sufficient, within the liberal construction to be given the provision, since it informed opposing counsel what evidence should be put in the statement, and enabled the court to strike out redundant matter.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 277, 273; Dec. Dig. ⇐137.]

4. NEW TRIAL ⇐109 — PROCEDURE — NOTICE OF INTENTION AS MOTION.

Where a notice of intention to move for a new trial was duly filed and served, the act of plaintiff's counsel in reading to the court the notice of intention, which as the statute requires specified the grounds upon which he intended to rely in support of his motion, apprising the court of the grounds of the motion, was

sufficient, without a formal motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 230; Dec. Dig. 109.]

Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by D. L. Taylor against the Northern Electric Railway Company. Judgment for plaintiff, and from an order granting plaintiff's motion for a new trial, defendant appeals. Affirmed.

Theo. W. Chester, of Sacramento, T. T. C. Gregory, of San Francisco, W. H. Carlin, of Marysville, and A. F. Jones, of Oroville, for appellant. D. L. Taylor, in pro. per.

HART, J. This is an action for damages for personal injuries. The cause was tried by a jury, who returned a verdict in favor of the plaintiff in the sum of \$500. Dissatisfied with the verdict, the plaintiff applied for a new trial, which was granted. This appeal is prosecuted by the defendant from the order granting a new trial.

The accident resulting in the injuries to the plaintiff occurred in the city of Chico, at about the hour of 12 o'clock, on the night of December 24, 1910. The defendant, at the time of the accident, was operating a line of railway extending from the city of Chico to the city of Sacramento, said line passing through the first-named city over and along a street therein which is designated and known as "Main street." The complaint, in substance, alleges that on the night above mentioned, the defendant's train left its depot at the corner of Main and First streets, in said city of Chico; that the train was started and run through Main street at a rapid and dangerous rate of speed; that the switch and frogs on the track and the valve of the air brake were defective, which defectiveness was due to the negligence of the officers, agents, and employes of the defendant; that, as plaintiff was in the act of crossing Fifth street from the Plaza, in said city, and after he had crossed the railway track, the rear truck of the rear car of said train left the main line and took the street railway track down Fifth street; that the plaintiff was struck, bruised, and wounded by the car, which had left the main line, and—

"was seriously, dangerously, and permanently injured, and will so remain the rest of his life; that the injury consists of injury to his spine, and since said time he has been unable to use his left leg; that the same is now paralyzed, and he is compelled to go on crutches, and will ever remain a permanent cripple."

It is further alleged that the defectiveness of the switch and frogs on the defendant's track at the time and place that the plaintiff received the injuries complained of was known, or by the exercise of ordinary diligence, could have been known, to the defendant through its officers, agents, and employes in charge of said track. Among the grounds of the motion for a new trial designated in

the motion of intention are insufficiency of the evidence to justify the verdict and errors in law occurring at the trial and excepted to by the plaintiff, the motion being made on the minutes of the court, supported by a statement of the case. The points made by the defendant for a reversal of the order appealed from are: (1) That the specifications of the insufficiency of the evidence to justify the verdict are insufficient; (2) that the plaintiff made no motion for a new trial.

[1] Of course, it is well settled that, in an action for damages for personal injuries, a trial court, if of the opinion that, under the evidence, the amount awarded by the jury is not legally adequate or commensurate with the extent of the injuries received, may grant a new trial on the motion of the plaintiff on the ground that the evidence does not justify the verdict.

[2] And, there being in this case a substantial conflict in the evidence upon the question of the amount of compensation which the plaintiff ought to receive for the injuries sustained by him, the established rule as to the conflict of evidence upon material issues is to be applied here the same as though the new trial had been granted on the behest of the defendant.

[3] Obviously the sole reason moving the plaintiff to ask for a new trial was that the damages awarded him by the jury were inadequate under the evidence, and we think that the specifications, while inartificially expressed, sufficiently point to the particular respects in which it is claimed that the evidence warranted a verdict in a larger sum than that returned by the jury. The rule requiring such specifications (section 659, Code Civ. Proc.) has been given a very liberal construction and application in this state in recent years. The idea is that it should be given a liberal rather than a strict construction in order that cases on appeal may be heard on their merits and to promote justice. And so it has been said that:

"If the specification is sufficient to enable the opposing counsel to determine what evidence should be put in the statement, and the judge to strike out redundant and useless matter, it is enough. The statute in this matter is not primarily for this court, but for the trial court. That court should not hear the motion unless the statement contains such specifications. Upon that subject the trial judge, who tried the case, has a decided advantage over this court in determining whether the specifications are sufficient. * * * It is in the nature of a notice, the sufficiency of which should be tested by inquiring whether the opposite party is injured by defects. It is not even to be regarded with the strictness with which an error of the court must be. If error at all, it is committed by a party and in a matter in which great liberality should be exercised by courts. Whenever there is a reasonably successful effort to state 'the particulars' and they are such as may have been sufficient to inform opposing counsel and the court of the grounds, and the trial court has entertained and passed upon the motion, in my opinion, this court ought not to refuse to consider the case on appeal." Amer-

ican Type, etc., Co. v. Packer, 130 Cal. 459, 62 Pac. 744. See, also, Harris v. Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58; Jones v. Goldtree Bros. & Co., 142 Cal. 383, 77 Pac. 939; S. P. Co. v. Lipman, 148 Cal. 480, 83 Pac. 445.

The specifications objected to here, in substance, state that the evidence produced by the defendant upon the questions of the defectiveness of the switch, the extent and effect of the plaintiff's injuries, whether the result thereof was to permanently or only temporarily incapacitate him, and the amount of money he was compelled to expend for medical treatment, etc., was not sufficient to overcome the effect of the evidence produced by the plaintiff upon those points, and that the evidence as to the character and extent of the injuries sustained by the plaintiff did not justify the jury in awarding to him damages in no greater sum than \$500. Thus the *particulars* in which the plaintiff claims that the verdict, so far as the amount of the damages allowed thereby was concerned, was not justified by the evidence were plainly pointed out and sufficiently so to enable the defendant to have inserted in the statement, if it could, evidence of which it might reasonably be said that the jury could reasonably and justly have concluded that the sum of \$500 constituted fair and reasonable compensatory relief, and that the verdict was therefore justified. Besides, the witnesses who testified for the plaintiff upon the points mentioned are referred to in the specifications by name, and this was sufficient to inform the defendant and the court of the particular testimony which it was claimed showed that in the particulars referred to the evidence did not justify the verdict, and thus counsel for the defendant were given sufficient information to enable them to present in the statement any evidence which might rebut the specifications or show that they were not well founded. The form of the specifications is not to be commended, but we cannot say that the defendant was in any degree injured or suffered any disadvantage by the defects in the form in which the specifications are set forth. As was said in *American Type, etc., Co. v. Packer*, supra, the trial judge, who tried the case, had a decided advantage over this court in determining whether the specifications were sufficient for the purposes for which they are required.

[4] There is no substantial merit to the point that the plaintiff did not make a motion for a new trial. The notice of intention to move for a new trial was duly filed and served, and at the time fixed for the hearing of the motion, the attorney for the plaintiff, while not making a formal motion, or, in so many words, moving for a new trial, read to the court the notice of intention which, as the statute requires, designated the grounds upon which he intended to rely to support his motion. This was sufficient to apprise the court of the grounds of the motion. A for-

mal motion could have accomplished no more. Indeed, it is difficult to perceive how it may reasonably be held that the reading to the court of a notice of intention to move for a new trial may not itself be said to constitute a formal motion. In effect, such a proceeding is in no respect lacking in the essentials of a formal motion. The notice of intention is a notice that the moving party proposes to apply to the trial court for a trial *de novo*. The reading of the notice to the court, at the time fixed for the hearing of the motion, cannot well be interpreted to mean anything but a proposal to execute the intention expressed in that notice.

The matter which is of primary importance, so far as the making of the motion is concerned, is to inform the court to which the motion is addressed of the grounds thereof, and the manner in which the moving party may convey such information to the court is a matter of minor importance. Of course, "he must, in some way," as the proposition is expressed in *Williams v. Hawley*, 144 Cal. 97, 100, 77 Pac. 762, 763, "inform the court what are the grounds of the motion, but this may be done as well by reference to some paper on file in the action, in which the grounds are stated, as by word of mouth," and when this is done court and counsel well know that the purpose of it is to carry out the intention expressed in the notice. This is all that should be required.

This disposes of all the objections urged upon this appeal against the legality of the action of the trial court in granting the plaintiff a new trial, and the order appealed from is, for the reasons herein given, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

26 Cal. App. 775

RICH v. SMITH et al. (Civ. 1454.)

(District Court of Appeal, First District, California. March 17, 1915. Rehearing Denied by Supreme Court May 13, 1915.)

1. PARTITION ⇨73—PROPERTY SUBJECT TO—PROPERTY INCUMBERED BY MORTGAGES AND EXECUTORY CONTRACTS OF SALE.

Mortgagees and purchasers under executory contracts of sale cannot be deprived of their rights by decree of partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 196-208; Dec. Dig. ⇨73.]

2. PARTITION ⇨88—PROPERTY INCUMBERED BY MORTGAGES AND EXECUTORY CONTRACTS OF SALE—DECREE OF PARTITION—EFFECT.

A decree of partition of lands, subject to mortgages on separate and described portions and to executory contracts of sale of separate and specified portions, which declares that the mortgages and contracts are valid and subsisting liens, and which provides for the appointment of referees to make physical partition and allotment to plaintiff and defendant, according to their respective interests, and that the referees, in making partition, shall allot the share to each cotenant so as to embrace the improvements made by each on the property as previ-

ously ascertained and adjudged, but in so doing exclude the value of improvements made by each from the valuation in making allotments, and value the land without regard to improvements, does not impair the effect of the mortgages or contracts, and the referees must consider the existence and effect of the outstanding mortgages and contracts, and, when making partition, treat the particular parts and parcels of the common property covered by the mortgages and contracts as so many distinct estates, and separately partition them as such, and then allot them in severalty to one or the other of the cotenants, subject to the existence and satisfaction of the mortgage and contract liens, and the decree so construed is proper.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 254; Dec. Dig. ¶ 88.]

3. PARTITION ¶ 46 — NECESSARY PARTIES — MORTGAGEES AND EXECUTORY CONTRACT HOLDERS.

Under Code Civ. Proc. § 761, providing that, where lienholders are not made parties to an action for partition, the court must either order them to be made parties or appoint a referee to ascertain whether they have been paid, and, if not, what amount remains due, etc., mortgagees and purchasers in executory contracts of separate parcels of lands sought to be partitioned are necessary and proper parties to a suit for partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 114; Dec. Dig. ¶ 46.]

4. SUBROGATION ¶ 22 — RIGHT TO — PAYMENT OF MORTGAGE.

Where lands, incumbered by mortgages on separate parcels, are partitioned between the tenants in common, one of the tenants, who is later compelled to pay a mortgage debt, will be subrogated to the extent of the excess payment to the interests of the mortgagee, in a proceeding instituted for that purpose under Code Civ. Proc. § 709.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 48, 55, 59; Dec. Dig. ¶ 22.]

5. PARTITION ¶ 53 — EXECUTORY CONTRACTS OF SALE — RIGHTS OF PARTIES.

Where lands, in part subject to executory contracts of sale of separate parcels, are partitioned, each parcel of the common estate covered by a contract of sale may be treated as a distinct estate and partitioned in severalty, subject to the condition of the contract, and, if the interested parties cannot agree to whom payments shall be made, the court, in aid of final judgment of partition, may appoint, under Code Civ. Proc. § 564, a receiver for that purpose.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 147; Dec. Dig. ¶ 53.]

6. PARTITION ¶ 14 — RIGHT TO PARTITION.

A tenant in common, entitled as such to the possession of the land, has generally an absolute right to partition, and a partition cannot be denied either because of any supposed difficulty nor on the suggestion that the interest of cotenants will be promoted by a postponement thereof to secure a rise in value.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 37; Dec. Dig. ¶ 14.]

7. PARTITION ¶ 94 — PROCEEDINGS — OBJECTIONS.

Where referees appointed to make partition fail to comply with the interlocutory decree, and thereby fail to preserve the rights of all persons interested, objections to their report afford ample remedy to a party aggrieved thereby.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 287-299, 305; Dec. Dig. ¶ 94.]

8. APPEAL AND ERROR ¶ 1002 — FINDINGS — CONCLUSIVENESS.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ¶ 1002.]

9. PARTITION ¶ 63 — INTEREST OF TENANTS IN COMMON — EVIDENCE — FINDINGS.

In an action for partition, evidence held to justify a finding that plaintiff and defendant each hold an undivided half interest in a parcel of land sought to be partitioned.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 183-185; Dec. Dig. ¶ 63.]

10. DEEDS ¶ 136 — INTEREST OF GRANTEEES — PRESUMPTIONS.

A deed conveying land to two grantees, without designating the portions conveyed to each, presumptively conveys to each an undivided half interest as tenants in common.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 372, 431-433; Dec. Dig. ¶ 136.]

11. PARTITION ¶ 87 — LIEN FOR PAYMENT BY TENANT IN COMMON.

The court partitioning land may charge the share of the common property awarded to a tenant in common with a lien for the payment of sums found to be due to the cotenant for advancements made for the benefit of the common property.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 253; Dec. Dig. ¶ 87.]

12. APPEAL AND ERROR ¶ 931 — PRESUMPTIONS — FINDINGS.

Where books of account were admitted in evidence on the trial, the court on appeal will presume, in the absence of a showing to the contrary, that the books justified the findings, though the books were never finally balanced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. ¶ 931.]

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action for partition by George O. Rich against C. B. Smith and others, in which defendant Smith filed a cross-complaint. From an interlocutory judgment for partition, defendant named appeals. Affirmed.

R. P. Henshall and Martin Stevens, both of San Francisco, for appellant. J. J. Lermen, of San Francisco, and Ross & Ross, of San Mateo, for respondent George O. Rich. Daniel A. Ryan and Louis V. Crowley, both of San Francisco, for respondents Wienke and others. A. Kincaid, of Redwood City, for respondents Hendrickson and others.

LENNON, P. J. In this action plaintiff's complaint prayed for partition of several tracts of land located in the county of San Mateo, which, as the complaint alleged, were owned and held by the plaintiff and the defendant Smith as tenants in common. Defendant M. A. Rich is the wife of the plaintiff, and she and the remaining defendants were made parties to the action under an allegation that they held liens upon the property by virtue of existing mortgages jointly executed by the plaintiff and the defendant

Smith upon certain separate parcels of the common property. The plaintiff's complaint showed further that he and the defendant Smith had entered into executory contracts of purchase and sale covering specific portions of the common property, which contracts were still extant and unexecuted, and that, as a consequence, the other parties thereto, the defendants Nye et al., claimed some interest in the property. Incidentally the plaintiff's complaint alleged that he, with the knowledge and consent of and at the specific instance and request of the defendant Smith, advanced and expended a sum of money aggregating \$19,265.04 for the improvement of the common property, and paid out and advanced for the extinguishment of liens existing upon the common property the sum of \$10,890.99 over and above certain sums of money advanced by Smith for the same purposes.

Answering the plaintiff's complaint, the defendant Smith denied the existence of the alleged tenancy in common, and alleged, in substance, that whatever interest he had in the property arose out of his rights as the exclusive owner of certain contracts to purchase the property, and that by virtue thereof he conveyed to the plaintiff the lands in controversy for the alleged purpose of carrying on and conducting a partnership business which had been previously entered into between him and the plaintiff for the purpose of ultimately buying and selling the lands in controversy. The answer of the defendant Smith admitted that he and the plaintiff had sold certain parts and parcels of the property, and in effect admitted the execution and existence of the mortgages and executory contracts referred to in the plaintiff's complaint.

The defendant Smith also filed a cross-complaint, in which the allegations of his answer were again set forth, coupled with other allegations, which tended to show a cause of action to quiet title, and one for damages claimed to have been suffered by him as a result of a claimed conspiracy against him entered into by the plaintiff and his wife, the defendant M. A. Rich.

The several parties who held outstanding mortgages and executory contracts of sale covering specified portions of the property appeared in the action, and prayed for appropriate relief.

Upon all of the issues thus raised, the court made its findings of fact, which, in so far as they relate to the points presented in support of the appeal, are to the effect that the plaintiff and the defendant Smith were the owners in fee as tenants in common and in the possession of and each entitled to an undivided one-half portion of all of the lands in suit, save and excepting, however, certain designated and described lands and parcels of the whole, which the plaintiff alleged and the court found had been sold by the plaintiff and said defendant prior to the institution of the action; that the plaintiff and defendant

Smith had made, executed, and delivered certain mortgages upon certain separate, designated, and described portions of the common property, upon which there remained due and unpaid on account of principal an aggregate balance of \$38,879.82; that these mortgages constituted valid and subsisting liens upon such portions of the common property as were covered thereby, save as to certain parts or parcels separately described, which had been released from the lien of the mortgage; that the defendant Smith had made, executed, and delivered contracts of sale of certain separate and specified portions of the whole property to various persons, who were named in detail; that the defendants C. T. Nye and Leslie M. Cain held executory contracts of purchase and sale in force and effect from the plaintiff and defendant for the sale and purchase of certain designated lots which were portions of the whole property in controversy; that there were no liens or incumbrances on the common property sought to be partitioned, save and except those specifically referred to hereinabove; that the defendant M. A. Rich, the wife of the plaintiff, claimed an interest in the property in controversy under the Foley mortgage, which claim, notwithstanding the fact that the defendant Rich held of record in her name title to a one-half interest in said mortgage, was without any right whatsoever, because of the fact that the consideration for the transfer, namely, \$1,778.93, was paid by the plaintiff for the use and benefit of the plaintiff and the defendant Smith; that on the 22d day of December, 1908, as alleged in the plaintiff's complaint, the defendant Smith made, executed, and delivered to one Nellie Cracknell a mortgage, covering all of a certain lot of land included within the common property, which was subsequently released by the executor of the estate of the mortgagee to the plaintiff upon the payment by him of the sum of \$5,210, which payment was made for the benefit of the plaintiff and the defendant Smith. Finally the trial court found the facts with reference to the claimed advances of money by the plaintiff and defendant Smith for the benefit of certain of the common property to be substantially as alleged in the plaintiff's complaint; that no co-partnership existed between the plaintiff and the defendant Smith.

As conclusions of law from these findings the trial court declared that the plaintiff and the defendant Smith owned, as tenants in common, the property in controversy, excepting certain designated and described portions, in the proportion of an undivided one-half interest in each; that the defendant M. A. Rich had no claim or interest in any of the property; that partition of the property be made, subject to the outstanding and existing liens of the designated mortgages and executory contracts of sale; that the plaintiff was entitled to a lien upon the portion of the property to be allotted to the defendant

Smith for one-half of the amount of \$21,485.83, found to have been advanced and paid by the plaintiff for the benefit and improvement of the common property; that all of the lands found to be owned by the plaintiff and the defendant Smith, as tenants in common, can be partitioned according to the respective and ascertained rights of the interested parties, without prejudice to either or both.

An interlocutory decree in keeping with the findings of fact and conclusions of law was made and entered, which, after declaring the several mortgages and executory contracts of sale to be valid and subsisting liens, provided for the appointment of referees to make physical partition and allotment of the common property, which was specifically described, to the plaintiff and the defendant Smith according to their respective interests as found by the court and designated in the decree; that the referees, in making such partition, allot the share of each cotenant so as to embrace the improvements made by each of said cotenants upon the property as previously ascertained and adjudged, but in so doing to exclude the value of the improvements made by each of the tenants in common from the valuation in making said allotments, and value the land without regard to such improvements.

The appeal is by the defendant Smith alone from the interlocutory decree upon a certified record of all of the proceedings had in the lower court; and in support of the appeal the principal contention of the defendant Smith is that:

"The court was without any authority to order partition of the property in suit for the following reasons: (a) The existence of the mortgages found in the findings precludes the making of any partition. (b) The existence of the contracts for the sale of parts and portions of the property which were not completed precludes the making of any partition."

This contention seems to be based upon the theory that, because of the several subsisting mortgage and contract liens covering a portion of the property, actual physical partition was impossible; or, if possible, that the probable resulting inequities to one or both of the cotenants would be so manifest and grievous as to make an order for such partition rather than a sale of the property an abuse of the discretion vested in the trial court by the provisions of section 763 of the Code of Civil Procedure. This contention is in effect that the mortgagees and other incumbrancers are entitled, as a matter of legal right, to have the security for their respective liens kept intact upon each of the particular parcels of the whole property covered by the mortgage or called for by the executory contracts of sale; and that the order for their physical partition must necessarily result in dividing the debt and splitting the respective liens of the several incumbrancers.

[1-3] Undoubtedly the mortgagees and the parties to the subsisting executory contracts

of sale could not be deprived of the right granted to them by their respective mortgages and contracts to look and resort wholly and solely to the particular pieces of property, originally mortgaged or contracted for in satisfaction of the mortgages or in execution of the contracts; and, if the decree in the present case called for anything to the contrary, it would certainly be subject to reversal upon the appeal of any or all of the aggrieved incumbrancers. But the decree entered in the present case does not, either expressly or impliedly, in any manner alter or impair the scope and effect of the security of the mortgages or the subject-matter of the contracts. On the contrary, the integrity of the several mortgage liens and contracts which the trial court found to be valid and subsisting is by implication and in express terms recognized and maintained by the decree. Counsel for the defendant Smith insists, nevertheless, that physical partition is impracticable, if not impossible, unless the decree directing the same contemplates and compels the splitting of the mortgage and contract liens. This must be done, it is said, because it cannot be ascertained where, in making specific allotments to the respective parties, the lines of physical division will be run. In other words, it is erroneously assumed that the referees selected and appointed to make the partition will and must treat all of the lands in controversy as a single tract, and then proceed to divide the same into two equal parts, quantity and quality considered, without regard to the existence of the outstanding mortgages and contracts. If this course were pursued, it certainly would result in a splitting of the security of the mortgages and the subject-matter of the contracts of sale, and could not be countenanced, for the reason that, aside from the inequalities that would be likely to accrue to one or both of the cotenants, it would seriously impair, if not utterly destroy, the respective obligations of the mortgages and the contracts of sale. *Cummings v. Cummings*, 73 Cal. 434, 17 Pac. 442; *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466; 1 *Jones on Mortgages*, § 706. That the interlocutory decree neither contemplates nor compels the method of partition suggested upon behalf of the defendant Smith is in a measure confirmed, if confirmation be needed, by the fact that the mortgagees and contract holders, who are necessary and proper parties to the proceeding (Code Civ. Proc. § 761), have not appealed. In our opinion, the decree contemplates that, in making physical partition, the referee shall consider the existence as well as the scope and effect of the outstanding mortgages and contracts of sale, and may, when making such partition, treat the particular parts and parcels of the common property covered by the mortgages and the contracts of sale as so many distinct estates, and separately partition them as such,

and then allot them in severalty to one or other of the cotenants, subject, however, to the existence and satisfaction of the mortgage and contract liens. There can be no valid objection to thus treating and disposing of the incumbered portions of the common property. *Green v. Arnold*, supra; *Cheney v. Ricks*, 168 Ill. 533, 48 N. E. 75.

[4] No objection to such method of partition has been suggested, save that, in the event of a foreclosure of any one or all of the mortgages, one or other of the cotenants may perchance be compelled to pay the mortgage debt in full. The answer to this objection is that, in the event that foreclosure proceedings become necessary by reason of the failure of the owners in severalty of the mortgaged property to contribute equally to the payment of the mortgage debt, then the particular owner who may be compelled to pay the entire debt will be rightfully and readily subrogated, to the extent of the excess payment, to the interests of the mortgagee in a proper proceeding instituted for that purpose. Code Civ. Proc. § 709; *Quick v. Brenner*, 101 Ind. 230.

[5] It is apparent that what might be done with the mortgage liens might likewise be done with the contracts of sale (that is to say, each parcel of the common estate which is covered by a contract of sale may be treated as a separate and distinct estate, and so partitioned in severalty, subject to the condition of the contract); and while at first blush there may appear to be some slight difficulty in dealing with the receipt of any moneys which may from time to time become due and payable under the terms of the contract, yet, upon second thought, it seems to us that, if the interested parties cannot agree as to whom such payments may be made, the court may, in aid of the final judgment of partition, appoint a receiver for that purpose, under the provisions of section 564 of the Code of Civil Procedure, which permits the appointment of a receiver in an action between parties jointly interested in any property or fund. *High on Receivers* (4th Ed.) p. 607.

[6] Before passing from this phase of the case, it should be noted that the defendant Smith alleged in his answer that a foreclosure sale of the mortgaged premises would result in a sacrifice of the property; and it was asserted and not disputed upon the oral argument that a partition by a sale of the entire property would result in the insolvency of both parties. In brief, it seems to be conceded by both parties that a partition by sale would prove disastrous; and therefore it may be safely assumed that this was the reason which prompted the lower court to exercise its discretion in favor of an order for physical partition. That this was so is further evidenced by the fact that the defendant Smith, while complaining of physical partition, still insists that, under all the pleaded

and proven facts in the case, partition by sale should not be ordered, because of the grievous loss which result therefrom to both parties. It will thus be seen that the ultimate contention of the defendant Smith is that partition of any kind should be denied until such time as partition would result in the fullest profit to both parties.

This position is utterly untenable. Ordinarily, if the party seeking partition is shown to be a tenant in common, and as such entitled to the possession of the land sought to be partitioned, the right to partition is absolute, and cannot be denied, "either because of any supposed difficulty, nor on the suggestion that the interest of the cotenants will be promoted by refusing the application or temporarily postponing action, to secure the advantages to result from a rise in market values." 30 Cyc. 177, 178, 189.

[7] We are satisfied that the referees appointed to make partition may readily do so in keeping with our views as to the scope and effect of the interlocutory decree, without substantial injustice to either cotenant, and at the same time preserve the rights of the mortgagees and other incumbrancers, without diminution or entanglement. If, however, they fail to do so, objections to their report will afford ample remedy to the party claiming to be aggrieved thereby. *Cheney v. Ricks*, supra.

[8] The finding of the trial court that the plaintiff and the defendant Smith were tenants in common and not copartners in the land in controversy is, in our opinion, sufficiently sustained by the evidence adduced upon the whole case. The best that can be said in favor of the defendant Smith on this phase of the case is that there is a substantial conflict in the evidence, which, of course, will not suffice to overthrow the findings.

[9, 10] There is no merit in the contention that the trial court awarded to plaintiff an interest in the "Wienke tract" greater than that to which the evidence showed him to be entitled. The court directed that one-half of that particular piece or parcel be allotted to the plaintiff and the defendant Smith, and, in our opinion, the evidence warrants and sustains such allotment. True, the contract between plaintiff and the defendant Smith, dated April 1, 1906, provided for a distribution in the proportion of one-third to two-thirds, respectively, to the plaintiff and the defendant Smith, of any and all the profits arising from the sale of the "Wienke tract"; but this contract was not conclusive evidence of the interest actually owned by each cotenant in that particular tract. There is other evidence upon this phase of the case to the effect that, some time after the making of the contract referred to, a deed to the "Wienke tract" was executed to the plaintiff and the defendant Smith by Wienke, which did not designate the portions conveyed to each grantee. Other evidence was to the ef-

fect that the plaintiff consented to the making and acceptance of such deed only after an understanding with the defendant Smith that they and each of them were to receive and own an undivided one-half of the tract conveyed by the deed. The latter evidence fortifies the presumption arising from the execution of the deed that, nothing to the contrary appearing therein, the plaintiff and the defendant Smith took the particular tract in question as tenants in common to the extent of an undivided one-half interest therein. 13 Cyc. 664, subd. "g." Therefore it cannot be said that the finding and award of the court with reference to the Wienke tract is not supported by any evidence.

[11] The contention that the trial court should not have made provision for charging the defendant Smith's share of the common property to be awarded to him upon partition, with a lien for the payment of the sums found to be due to the plaintiff for and on account of advancements made for the common benefit of the joint property, is answered, we think, by the opinion in the case of *Willmon v. Koyer*, 168 Cal. 369, 143 Pac. 694, where, in disposing of practically the same contention, the court said:

"The rule is that when one tenant in common has paid a debt or obligation for the benefit of the joint property, or has discharged a lien or assessment imposed upon it as a common burden, he is entitled, as a matter of right, to have his cotenant, who has received the benefit of it, refund to him his proportionate share of the amount paid. * * * The court decreed a partition and found that plaintiff had paid the expenditures claimed * * * that defendant was liable for one-half thereof, * * * gave judgment in favor of plaintiff therefor, and established the lien as prayed for. * * * It was an appropriate judgment to enter under the pleadings. In fact, it is always appropriate to do so in partition as the only effectual way to secure a cotenant making advances and obtaining judgment therefor."

See, also, *Ventre v. Tiscornia*, 23 Cal. App. 598, 138 Pac. 954.

[12] It is finally contended that there is no evidence upon which the court could base any conclusion as to the amount of the advances made by Rich over Smith. In this behalf the record shows the admission in evidence of two separate sets of books covering advances and expenditures made by each of the cotenants for the improvement of certain portions of the common property and the extinguishment of liens existing thereon. But it is asserted that these books were never bal-

anced, and that therefore it could not be ascertained therefrom, with any degree of accuracy, the amount of the plaintiff's payments and advances over those of the defendant Smith.

Conceding that these books were never formally and finally balanced, nevertheless their contents were disclosed as a matter of evidence to the trial court, from which it will be presumed, nothing to the contrary appearing, that a balance of the account existing between the plaintiff and said defendant might be readily and rightfully made which would suffice as a foundation for a finding fixing the sum due to plaintiff for advancements made for the benefit of the common property over and above the advancements found to have been made by said defendant for the same purpose. Although stipulated to be a part of the record on appeal, the books did not accompany the record, and as a consequence are not before us. The books having been admitted in evidence upon the trial, the lower court presumably investigated them, and based its findings, in part at least, upon the result of its investigation. In the absence of a showing to the contrary, it will be presumed upon appeal that the contents of the books referred to justified and fully supported the findings of the trial court. *Fay v. Fay*, 165 Cal. 469, 132 Pac. 1040; *Whitaker v. Moran*, 23 Cal. App. 758, 139 Pac. 901.

But, even if it be conceded that a formal balancing of the books was necessary to an accurate understanding of the account existing between plaintiff and said defendant, the record shows that the books had been experted, and that the report of the expert, with the exception of certain designated items, was admitted in evidence, and that subsequently the plaintiff, as a witness in his own behalf, gave testimony which tended to establish the existence of certain disputed items in the account which the trial court held were not established by the report of the expert. Upon the whole, we are satisfied that the evidence sufficiently supports the finding last complained of.

This disposes of all the points made in support of the appeal, and, for the reasons stated, the judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

road must exercise a high degree of care in placing wires so as not to interfere with the ordinary traffic on the road, and so as to avoid contact with and injury to any person or object, which may reasonably be expected to pass under the wires.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. ¶14.]

2. *ELECTRICITY* ¶19—INJURIES INCIDENT TO PRODUCTION OR USE—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

In an action against an electric power company maintaining a power transmission line along a public road, about 27 feet above the surface, for injuries to one attempting to pass under the line with a hay derrick, coming into so close proximity to the wire as to become charged with electricity, and thereby causing personal injuries, evidence *held* not to show negligence in the placing or maintenance of the wire at the height specified.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. ¶19.]

Department 1. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by John Fairbairn, by J. T. Fairbairn, guardian ad litem, against the American River Electric Company. From a judgment for plaintiff, defendant appeals. Reversed.

L. A. Redman and Chickering & Gregory, all of San Francisco (Devlin & Devlin, of Sacramento, of counsel), for appellant. Stanley Moore, of San Francisco, and Gibson & Woolner, of Oakland, for respondent.

SHAW, J. The plaintiff recovered judgment for damages in an action for bodily injuries alleged to have been caused by the negligence of the defendant. The appeals are from the judgment and from an order denying a new trial.

The alleged negligence of the defendant was the maintaining of a power line carrying a heavy current of electricity along a public road with the wires too close to the surface of the ground, and without covering the wires with insulating material, in consequence whereof the boom of a hay derrick, which the plaintiffs and others were passing under said wires to enter said road from a lane leading into it, came into close proximity to the wires and electricity therefrom passed down the boom cable into the body of the plaintiff, causing the injuries complained of. The defendant answered, denying the alleged negligence, and alleging that the injuries were caused by the plaintiff's negligence. We are of the opinion that the plaintiff failed to prove the alleged negligence of the defendant.

No evidence was offered to show that the power wires should or could have been insulated by a covering for that purpose. The only evidence on the subject of insulation was given in behalf of the defendant, to the effect that wires carrying over 20,000 volts of electricity could not be successfully insulated by any known covering; that if the wire

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FAIRBAIRN v. AMERICAN RIVER ELECTRIC CO. (Sac. 2132.)

(Supreme Court of California. April 29, 1915
Rehearing Denied May 27, 1915.)

1. *ELECTRICITY* ¶14—INJURIES INCIDENT TO PRODUCTION AND USE—CARE REQUIRED.

One maintaining an electric power transmission line along or over a public or private

carried more than 10,000 volts it was preferable to use bare wires; and that such was the invariable custom of electrical power companies. The defendant's line consisted of three wires carrying, at the time of the accident, 44,000 volts in all. This, according to the evidence, was the equivalent of a little over 25,000 volts to each wire.

[1] Owing to the highly destructive power of electricity when carried in quantities sufficient for power purposes, and to the fact that it is not visible to the eye or apparent to the other senses, a person or company maintaining an electric power transmission line along or over a public or private road is required to exercise a high degree of care in placing the wires so as not to interfere with traffic on the ordinary highway and so as to avoid contact with and injury to any person or object which may reasonably be expected to pass under the wires. *Giraudi v. Electric I. Co.*, 107 Cal. 124, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; *Perham v. Portland E. Co.*, 33 Or. 478, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730; *Fitzgerald v. Edison, et al.*, Co., 200 Pa. 543, 50 Atl. 161, 86 Am. St. Rep. 732; *Crosswell on Electricity*, § 234.

"The companies are not insurers of the safety of the public against all dangers arising from the lawful placing in the street of appliances pertaining to the business carried on by them, but they are bound to know the danger which may naturally be caused by such use of the streets, and to guard against them by the exercise of all the foresight and caution which can be reasonably expected of prudent men, under the circumstances." 1 *Joyce on Electricity*, § 438; *Denver v. Sherret*, 88 Fed. 233, 31 C. C. A. 499.

"The degree of care required of such companies, under the rule that they must exercise reasonable care, varies according to the facts and circumstances of the case, having in view the serious results which may ensue as a consequence of negligence." 1 *Joyce on Electricity*, § 438a.

The standard to be attained is that of ordinary and reasonable care, and this means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury. Where death may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it.

[2] There is some evidence to the effect that it is not a proper construction of such a power line to place the supporting poles 264 feet apart, and that aluminum wire is not as suitable for the purpose as copper wire. The span between the poles at the place of the accident was 264 feet and the wire was of aluminum. But the accident was not caused directly or indirectly by the length of the span, and there is no evidence that electricity escapes more readily from aluminum than from copper. Neither the length

of the span, nor the kind of metal composing the wires, had any causal relation to the accident. The wires were in plain sight, the plaintiff and those with him at the time saw them, guessed at their height above ground, and were endeavoring to bring the top of the derrick boom under the wires without coming in contact with them. "The sole cause of the accident, according to the undisputed evidence, was the fact that the derrick boom, with the cable attached and connected therewith, came in contact with, or in close proximity to, the wires. The lowest wire at that point was only 27 feet 8¼ inches above the surface of the ground; the derrick boom, in place as it was when the accident happened, being but 2¾ inches lower. The defendant cannot be charged with negligence, therefore, unless, under the circumstances, the placing or maintaining of its wires at that height was negligence.

The defendant's power line was completed in 1906. It carried electricity from its water power plant in the mountains, eight miles from Placerville, to Stockton and other places in the San Joaquin county for distribution to public use. As above stated, the duty of the defendant, with respect to the height of the wires, where the line ran along or over a roadway, was to suspend them high enough to permit safe and unobstructed passage under them of all persons and things which could reasonably be expected to pass. In determining this question, it was required to make careful inquiry into the conditions and customs of the country penetrated by its lines and ascertain the height of objects which it could reasonably be expected might be transported into, along, or across the road over which its lines ran. The height of existing wires throughout the country where the conditions were similar to the territory penetrated by its line was proper for its consideration.

The evidence shows that, both in the neighborhood of this power line and elsewhere throughout California, the country is webbed with telephone wires passing over the highways at heights varying from 20 to 25 feet. It was shown that a large number of other power companies, some 17 or more, were maintaining power lines in California, several of them in the neighborhood of this line, and that the usual height of the wires of such companies above the ground was practically the same as those of the defendant; many of them being lower. On the Folsom road, one mile north of the Jackson road, on which the accident occurred, a power line had been maintained for some years with wires lower than those of the defendant. In some instances wires were placed higher for special reasons, as to carry them above interfering lines, but there is no evidence that it was ever considered necessary to go above 27 feet and 8 inches to accommodate traffic below. It is apparent from all these facts that

the defendant had no reasonable cause to apprehend that the objects passing along, into, or across this road would be high enough to come into dangerous proximity to its wires placed at the height of 27 feet and 8 inches above the ground. No such object could get into many of the roads without difficulty, for the telephone wires, which were much lower than the defendant's wires, would prevent. We cannot perceive any lack of caution by defendant in fixing the altitude of its wires.

The boom of the derrick which the plaintiff was endeavoring to pass under the power wires extended 30 feet and 4 inches above the ground. It is contended by the plaintiff that in the country through which this power line extended there were many of these hay derricks which the owners might at any time have occasion to transport along or across the roads, and that the defendant should have ascertained this fact and have placed its wires high enough to avoid all dangerous proximity thereto. The evidence, however, does not support this contention. The accident happened in June, 1910. The owner of the derrick testified that he had lived on the land from which it was being taken ever since the year 1889, and that he had never known of any vehicle more than 20 feet high passing along the road in question, and that this derrick was the only one of the kind he had ever seen in Sacramento county. It was brought onto his farm in pieces and put up after arrival, and it had never been taken on or across any road. The manufacturer of these derricks testified that until 1909, some three years after the construction of defendant's line, he had never sold a derrick of that description in Sacramento county, and that he had, up to the date of the trial, sold but two such derricks for use in that county; that they had now gone out of use because the boom could not be lowered, and a different derrick was manufactured having what is called a "drop boom," which may be easily lowered. Homemade derricks were in use, but it is not shown that they were as high as these wires. There is no evidence upon which to predicate the conclusion that the defendant, by making inquiries at the time it erected its power line, could have ascertained or foreseen that some three or four years later persons would want to transport along the road derricks extending 30 feet above the surface of the ground. The failure to foresee such event cannot be held to establish negligence. On this ground, therefore, we think the verdict is contrary to the evidence.

The defendant also claims that the evidence shows contributory negligence by the plaintiff. It is admitted that plaintiff and those engaged with him knew that electricity from power wires was dangerous to human life and that the wires in question carried electricity to be used for power. The evidence shows that the derrick boom was by the

plaintiff allowed to swing around toward the wires with but slight care to prevent it from coming in close proximity to them. The claim, on the plaintiff's behalf, is that he and those with him did not know that electricity from a heavily charged wire would jump or arc across a short intervening space into an adjacent metal conductor, and that they believed there would be no danger unless the boom plate actually touched one of the wires. The evidence as to their knowledge on this point is not very clear. As we have concluded that defendant's alleged negligence was not proven, and as the evidence regarding plaintiff's knowledge may be clearer or different on a new trial, we deem it advisable not to consider the question of contributory negligence. It is also unnecessary to consider the rulings on evidence, and the instructions given and assigned as error.

The judgment and order are reversed.

We concur: SLOSS, J.; LAWLOR, J.

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PENNINGTON v. GEORGE W. PENNINGTON SONS et al. (S. F. 7213.)

(Supreme Court of California. April 28, 1915. Rehearing Denied May 27, 1915.)

CORPORATIONS $\Leftrightarrow$ 194—ANNUAL MEETINGS—BY-LAWS.

The by-laws of a corporation, which provide that the annual meeting of stockholders may be held in the first week of a month in each year, and shall be called as the directors may direct, or, by notice by the president, delivered or mailed to each stockholder, provides for alternative methods for the calling of an annual meeting, but both are mandatory; and, where the directors fail to call an annual meeting, the president must do so.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 734-743; Dec. Dig. $\Leftrightarrow$ 194.]

Department 2. Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by George W. Pennington against the George W. Pennington Sons and another, as president, and another, as secretary, of defendant named. From a judgment for plaintiff, defendants appeal. Affirmed.

Edwin L. Forster and Robert R. Moody, both of San Francisco, for appellants. Arthur H. Barendt, of San Francisco, for respondent.

HENSHAW, J. The complaint in this action charged, and the court found, that George W. Pennington Sons is a corporation; that the number of directors of this corporation is five; that by death there is a vacancy on the board, and this vacancy has never been filled; that Thomas Pennington is the president of the corporation, and, though requested so to do by a majority of the stockholders, he has refused to call any meeting of the board of directors for the purpose of filling this vacancy, and he has also refused to call any meeting of the stockholders,

though the written request of the holders of the majority of the issued and authorized capital stock has been made upon him, in conformity with the by-laws of the corporation. The by-laws in this respect provide:

"The annual meeting of the stockholders may be held in the first week of December in each year and shall be called as the directors may direct, or by a notice in writing by the president, delivered or mailed to each stockholder personally."

The judgment of the trial court directed the president to call a meeting of the stockholders as contemplated in this by-law.

Upon appeal it is argued that the by-laws do not enjoin the duty of calling such a meeting upon the president; that a mere permissive power so to do is vested with him; that the mandatory provision applies to the directors only. With this we cannot agree. Both the alternative methods provided are equally mandatory. It is in contemplation that there shall be an annual meeting of stockholders and that it shall be called. If the directors for any reason fail to do this, then it becomes the duty of the president so to do.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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BYINGTON et al. v. SACRAMENTO VALLEY WEST SIDE CANAL CO.
et al. (Sac. 2119.)

(Supreme Court of California. April 29, 1915.
Rehearing Denied May 27, 1915.)

1. WATERS AND WATER COURSES ⇨224—IRRIGATION DISTRICTS—DE FACTO DISTRICT—DISSOLUTION.

While a judgment in rem, declaring that an irrigation district is not legally organized, may be conclusive of the question and dissolve it as a de jure corporation, it does not preclude its subsequent existence as a de facto district assuming to exercise the same powers.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 315, 316; Dec. Dig. ⇨224.]

2. WATERS AND WATER COURSES ⇨253—PUBLIC WATER SUPPLY—DEDICATION.

Where a de facto irrigation district acquired water rights and dedicated them to the public, and subsequently leased its property with a right to sell water and collect rents therefor, the lessee's acts in improving the property and in selling water constituted a continuance of the original dedication for the benefit of the owners of property within the original district.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇨253.]

3. LANDLORD AND TENANT ⇨61—IRRIGATION DISTRICTS—LEASEHOLDS—LESSOR'S TITLE—ESTOPPEL.

A water and canal company, after taking a lease of the right to sell water from an irrigation district, is estopped to deny the validity of the title under which it took possession of the leased premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 151, 152, 187-196; Dec. Dig. ⇨61.]

4. WATERS AND WATER COURSES ⇨253—IRRIGATION DISTRICTS—POWERS—TRANSFER OF FRANCHISES.

While a quasi public corporation engaged in supplying water for a public use may not, without legislative sanction, transfer all of its property to another, under legislative authority such a corporation may transfer its property and its franchises, subject to the right of all persons to whose use the water is appropriated or dedicated to have the supply continued by the transferee or lessee.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇨253.]

5. CONSTITUTIONAL LAW ⇨64—WATERS AND WATER COURSES ⇨216—IRRIGATION DISTRICTS—POWERS—STATUTES.

Irrigation District Act 1901 (St. 1901, p. 815), permitting the board of directors of an irrigation district to lease the system, is not unconstitutional as being in conflict with Const. art. 11, § 13, since it does not purport to delegate to any private corporation any municipal function.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 91, 92; Dec. Dig. ⇨64; Waters and Water Courses, Cent. Dig. § 305; Dec. Dig. ⇨216.]

6. WATERS AND WATER COURSES ⇨247—IRRIGATION—QUIETING TITLE TO WATER RIGHTS.

A court of equity may entertain an action by property owners within an irrigation district to quiet title to water not immediately available and may grant appropriate relief therefor.

[Ed. Note.—For other cases, see Waters and W. Courses, Cent. Dig. § 314; Dec. Dig. ⇨247.]

7. WATERS AND WATER COURSES ⇨256—IRRIGATION DISTRICTS—PREFERENCES IN WATER RIGHTS.

A canal company, acting as a public service corporation in purveying water to property holders within an irrigation district, has no power to give preferential rights to purchasers of water rights directly from itself.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇨256.]

In Bank. Appeal from Superior Court, Colusa County; N. D. Arnot, Judge.

Suit by Lewis F. Byington and others against the Sacramento Valley West Side Canal Company and others. From a decree for plaintiffs, defendants appeal. Affirmed.

Frank Freeman, of Willows, and Morrison, Dunne & Brobeck, of San Francisco, for appellants. Stanley Moore, of San Francisco, and Ernest Weyand, of Colusa (A. A. Moore and Lewis F. Byington, both of San Francisco, of counsel), for respondents.

MELVIN, J. This is an appeal from the judgment by all of the defendants except those sued by fictitious names.

Plaintiffs are the owners of agricultural lands located within the boundaries of Central irrigation district, and, as they assert in their complaint, their property is susceptible of irrigation from the common source and system of irrigation controlled by certain of the defendants, particularly Sacramento Valley West Side Canal Company and Sacramento Valley Irrigation Company, although they admit that it will take more than a year to extend the canal of the former corporation from Maxwell, its pres-

ent terminus, to and beyond the town of Williams, so that the water will be brought into proximity to their lands. Williams is about 10 miles south of Maxwell.

After trial the court made elaborate findings and decreed that the waters taken by defendants from the Sacramento river were and are appropriated to a public use; that the area for the benefit of which said waters are appropriated is the land within Central irrigation district; that the farms of plaintiffs are within that area; that plaintiffs own an estate and interest in said appropriation, and their lands are entitled to water for irrigation either at a rate voluntarily agreed upon by the parties or fixed by the Board of Supervisors of Colusa county; that defendants are not entitled to convey water outside of the place of intended use and area for which said water was appropriated and (to quote from the decree itself):

"They are not entitled to irrigate lands outside said area, or furnish water for the irrigation thereof, until the requirements for the irrigation of the lands of plaintiffs have been fully met and provided for, and the defendants, and neither of them, are entitled to sell water rights upon lands inside or outside said area or place of intended use, until plaintiffs' requirements are fully met and provided for."

The findings contain a history of the attempt to furnish a system of irrigation for the west side of the Sacramento Valley beginning with the formation of the Central irrigation district in 1887. The district contains 156,000 acres of land. The towns of Williams and Maxwell and the surrounding territory, including the holdings of plaintiffs, are within this acreage. The purpose and plan of the district was to irrigate the lands therein by water to be taken from the Sacramento river and conveyed through a canal to be something more than 61 miles in length. In 1890 and the two following years the canal was dug for a distance of about 40 miles, the section excavated commencing near the point of intended diversion on the Sacramento river in Glenn county, about a quarter of a mile from the intersection of the river by the boundary line between Glenn and Tehama counties, and running thence southerly through the lands of the district to Maxwell. No further excavation was done until after January, 1903. In December, 1902, the board of directors of the Central irrigation district, claiming to be proceeding in accordance with the Irrigation District Act of 1901 (Stats. 1901, p. 815), amendatory of the act of 1897 (Stats. 1897, p. 254), decided to lease the properties of the district; and in the early part of 1903 a lease was executed between the Central irrigation district and Willard M. Sheldon, by the terms of which the lessee agreed to complete the canal for its entire length, together with all distributing canals, and to acquire all necessary water rights, and to sell and distribute water to the owners of all of the lands in

said district for the irrigation of said lands. The term of the lease was 50 years, and the rental was \$50 per year. Sheldon assigned this lease to Central Canal & Irrigation Company in February, 1903, and in the following years, to and including 1908, considerable work was done by that corporation, including the extension of the canal to the Sacramento river. In 1906, Central Canal & Irrigation Company obtained from Congress the right to divert and appropriate 900 cubic feet of water per second from the Sacramento river at the point of intake of the Central canal for the irrigation of all the lands of Central irrigation district. The court found also that the right to divert and appropriate this water from a navigable stream was obtained by the corporation "in pursuance with the covenants and conditions" of the lease "and for the purpose of enabling it to distribute, sell and supply water to all the lands within said district." There was also a finding that:

"Said right was granted by Congress for the public purpose and use of selling and distributing water for irrigating purposes to all the landowners and lands within the district."

In 1909, Sacramento Valley Irrigation Company obtained an assignment of the lease, and in July of that year transferred it to Sacramento Valley West Side Canal Company, a subsidiary corporation, a majority of the stock of which is owned by the irrigation company.

The lease is set out in the findings, and the court finds that under it the West Side Company is obligated to sell water for the lands of plaintiffs; that defendants are estopped from denying the de facto existence of the Central irrigation district; and that they are estopped also from denying the operative portions of the lease. It is also found that the two allied corporations are successors of the original appropriation of water for the Central irrigation district; that said original appropriation was for a public use; that the Central canal is dedicated to a public use; and that the lease was intended to carry out the public use of selling and distributing water for irrigation to the lands in Central irrigation district.

The findings further recite that Sacramento Valley Irrigation Company owns more than 80,000 acres of land in Central irrigation district; that the corporation entertains the purpose of buying substantially all of the land in the district and reselling it with "water rights" exclusively attached thereto. It is found that in pursuance of this plan the two companies have agreed and announced that the West Side Company will not sell water for irrigation of any lands within the district not now owned or hereafter acquired by the irrigation company, except that the West Side Company further states it will not irrigate any other lands whatsoever unless a water right is purchased for such tracts at a rate to be fixed by it at not less

than \$75 per acre; that the West Side Company also asserts that it intends to make use of all the water available from the Sacramento river for the irrigation of the land owned by the Sacramento Valley Irrigation Company, or to be acquired by that corporation within or outside of the Central irrigation district. And it is also found that:

"The Sacramento Valley West Side Canal Company is now delivering to the purchasers of lands from the Sacramento Valley Irrigation Company alleged water rights to the entire exclusion of the plaintiffs and which water rights purport to vest in the purchasers of said lands a right to the proportion of all of said water to be derived from said river measured and divided only by the rights of other purchasers of land from said Sacramento Valley Irrigation Company and purchasers of water rights, if any, from said Sacramento Valley West Side Canal Company, at not less than \$75 per acre."

Appellants insist that plaintiffs have no estate in the water by derangement through the lease, and that they are therefore entitled to no decree quieting their title or providing injunctive relief. In this behalf they assert that the irrigation district had no existence, either de jure or de facto, when the lease was executed in 1903. Respondents admit this claim to be correct so far as the formal organization of the district was concerned, because it was held by this court (In re Central Irrigation District, 117 Cal. 382, 49 Pac. 354) that the proceedings by which it was sought to organize the district were illegal and void; but respondents say that the district had a very substantial de facto existence. Appellants call our attention to the fact that, after the decision of this court cited above, the matter went back to the superior court for hearing, and that a judgment, in which the Central district and its officers acquiesced, was entered, pronouncing all proceedings in the formation of the said district void. This was in the year before the lease to Sheldon was executed, and it is argued that having acquiesced, by failure to appeal, in the judgment that its organization was a nullity, the district might not later assume any functions of an irrigation district, and that in the execution of the lease the district was acting without color of law. Consequently, say appellants, the lessor was not a corporation de facto. The appellants also are of the opinion that the alleged officers of the district being bound by a judgment in rem might not presume to act in an official capacity in making the lease, and that therefore all of their acts in the premises were void. In support of this view they cite *People v. Linda Vista Irrigation District*, 128 Cal. 482, 61 Pac. 86. That case did not determine so much as appellants attribute to it. This court there held that a decree under the proceeding prescribed by the confirmatory act would be conclusive evidence against an attempt by the state to relitigate the question of the regular formation of the district by a proceeding in quo warranto.

[1] A judgment in such a proceeding, declaring that the district was not legally organized, may be conclusive of that question and dissolve it as a de jure corporation; but it does not preclude the subsequent existence of a de facto district assuming to exercise the same powers. Persons may thereafter transact the ordinary business theretofore done by the supposed district, acting in the same manner and under the same name, even after a decree, final in its force, declaring the previous proceedings for the formation of a district to have been irregular and of no legal effect, and, if they do so, the organization so carried on may have the status of a de facto corporation. This was decided in *Haese v. Heitzeg*, 159 Cal. 574, 114 Pac. 816, where it was held that, notwithstanding a decree in confirmation proceedings under the irrigation act, declaring a district illegally organized and its bonds void, if persons assuming to be the officers of such district continue in good faith to close up its affairs, they would thereby constitute themselves a de facto irrigation district for that purpose. This de facto Central irrigation district, constituted in a similar manner, was sufficiently vital to transfer and deliver to Sheldon property worth many thousands of dollars, which had been acquired for the very public use of which the plaintiffs would have been beneficiaries if the district had been legally organized in the first place, and this property has since been used by the Sacramento West Side Canal Company, as Sheldon's successor, in the development of the irrigation system in the benefits of which the plaintiffs are here claiming the right to participate.

[2] Under these circumstances, we think the acts of said company should be held to be a continuance of the original dedication, that the water rights acquired in pursuance of the lease of the so-called district to Sheldon should be deemed a part of the system, that the lands within the bounds of the original Central irrigation district constitute the primary territory to which the original public use extends and continues, and, that, when demanded, such lands must be served with water from the system, before it can lawfully be taken for use upon outside lands.

[3] Occupying, as it does, the relation of tenant under the assigned lease, the Sacramento Valley West Side Canal Company is estopped from denying the validity of the title under which it took possession of the demised premises. *Jones on Landlord and Tenant*, § 682. While admitting the rule that ordinarily a tenant is estopped from denying the title of the lessor, the appellants insist that they are not bound by the contract of lease, and that plaintiffs may enjoy no rights thereunder because the act of the Legislature authorizing such leases was unconstitutional and the lease was ultra vires as against public policy and void.

[4] While it is true that a quasi public corporation—one, for example, engaged in sup-

plying water for a public use—may not, without legislative sanction, transfer all of its property to another (*Visalia Gas & Electric Light Co. v. Sims*, 104 Cal. 328, 37 Pac. 1042, 43 Am. St. Rep. 105; *Central Transportation Co. v. Pullman P. P. Co.*, 139 U. S. 59, 11 Sup. Ct. 478, 35 L. Ed. 55; *Anglo American Land Co. v. Lombard*, 132 Fed. 737, 68 C. C. A. 89), under legislative authority such a corporation may transfer its property and its franchises, subject to the right of all persons to whose use the water is appropriated or dedicated, to have the supply continued by the transferee or lessee (*South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 587, 93 Pac. 490).

[5] We see no reason why the enabling statute of 1901, permitting the board of directors of an irrigation district to lease the system of canals and works, should be held unconstitutional. The act provides that:

"Such lease shall in no way interfere with any rights that may have been established by law at the time such lease was made."

Manifestly any lease would carry that burden to the lessee, for the statute would be read into the lease. The enabling act does not conflict with section 13 of article 11 of the Constitution, because it does not purport to delegate to any private corporation any municipal function. The right to the use of water appropriated to the public may be enforced by one of the community or class entitled to its enjoyment, regardless of the title. The delivery of water dedicated to public use is not necessarily a municipal function. Such use may be administered by a natural person, or by a private corporation. Being therefore the successor of the irrigation district and being a public service corporation, the Sacramento Valley West Side Canal Company is bound by the terms of the original lease and may not question the power of the lessor to enter into that agreement. *Fellows v. Los Angeles*, 151 Cal. 64, 90 Pac. 137.

[6] Part of the consideration for the lease was the promise of the lessee to complete the canal. Plaintiffs assert that they are entitled to protect themselves by resort to a court of equity from the dissipation of their rights before the water shall be conducted to a place near their property; from the sale of water outside the district for which it was appropriated; and from the creation of preferential classes who will dispute with them their title to the water which they have as residents of the district. Appellants, on the contrary, take the position that the owners of land near Williams must wait until the extension of the canal and then enforce their rights, if any they have, by mandamus. They cite in support of that contention such cases as *Cozzens v. North Fork Ditch Co.*, 2 Cal. App. 405, 84 Pac. 342; *South Pasadena v. Pasadena Land & Water Co.*, supra; and *Orcutt v. Pasadena Land & Water Co.*, 152 Cal. 600, 93 Pac. 497. Unquestionably in those cases it was held that a right to take water may be exercised

only by one whose lands are within the flow of the ditches of the person or corporation bound to supply it, and that mandamus is the proper method of enforcing the demand of those who have been denied their rights. But a court of equity may entertain an action to quiet title to water not immediately available and may grant appropriate relief. Code Civ. Proc., § 738; *Wiel on Water Rights* (3d Ed.) § 654; *Katz v. Walkinshaw*, 141 Cal. 120, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35. In the case of *Inyo Consolidated Water Co. v. Jess*, 161 Cal. 520, 119 Pac. 934, it is declared that one may protect his "incipient right" to water against hostile invasions and claims of others. And the same doctrine is announced in the later case of *Merritt v. City of Los Angeles*, 162 Cal. 50, 120 Pac. 1064. So here the plaintiffs may safeguard their rights, although no water has, as yet, been brought into close proximity to their lands.

[7] Appellants try to bring themselves within the rules and principles declared in *Thayer v. California Development Co.*, 164 Cal. 125, 128 Pac. 21. In that case it was held that the water right which a person gains by diversion from a stream for a beneficial use is a private right and the water may not be demanded by the general public on payment of the legal fees until some act of dedication establishes the public use. Under the facts of that case, it was held that the California Development Company had not dedicated the water in its irrigating system to a public use and that it might select and sell water to a class of consumers to the exclusion of others not belonging to that class. The facts in this case are altogether different. The properties of the district leased to Sheldon had been held by a quasi public corporation for public use. Sheldon took them subject to that use. He assigned to the Central Canal & Irrigation Company, a public service corporation (admittedly such because it is so alleged in the complaint and not denied in the answer). The Sacramento Valley West Side Canal Company (bound by similar admission) is a public service corporation. Both companies by their articles of incorporation are permitted to engage in the business of purveying water. At the trial it was proven that the Sacramento Valley West Side Canal Company in developing the system of irrigation canals and ditches had prosecuted suits in eminent domain. This shows that it was a public service corporation. *Thayer v. California Development Co.*, 164 Cal. 138, 128 Pac. 21; *State ex rel. Wood v. Consumers Gas Trust Co.*, 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245; *Morawetz on Private Corporations* (2d Ed.) § 1129. Such a company may not confer such preferential rights as the Sacramento Valley West Side Canal Company and the Sacramento Valley Irrigation Company are seeking to bestow upon purchasers of land from the latter, because, as was said in *Leavitt v. Lassen Irrig-*

gation Co., 157 Cal. 89, 106 Pac. 404, 29 L. R. A. (N. S.) 213:

"The fundamental and all-important proposition, then, is this: That a public service water company which is appropriating water under the Constitution of 1879, for purposes of rental, distribution, and sale, cannot confer upon a consumer any preferential right to the use of any part of its water."

Appellants introduced in evidence several notices of appropriation. It is argued that any violation of the promised development outlined in these notices and any failure to comply with the rules of diligent construction merely entails upon the failing appropriators a forfeiture of their right as against a subsequent claimant (section 1419, Civil Code), and that the decree of the superior court imposing a much greater penalty was beyond its power. But the plaintiffs were not by their bill asking for relief because of a mere failure to extend the irrigation system in conformity with any notice of appropriation. They were trying to prevent the defendants from subverting water intended for a public use to private and extraterritorial purposes. It is evident that the West Side Canal Company was relying on the permission given by Congress to take water from the river and not upon the various notices introduced in evidence, because in its condemnation complaints it is alleged to be the owner of "the right to take and divert from the waters of said Sacramento river, nine hundred cubic feet per second at all seasons of the year."

Plaintiffs are not seeking to compel a spreading out of an insufficient supply of water over a large territory merely because it is mentioned in any notice of appropriation. Therefore the discussion in *Palmer v. Railroad Commission*, 167 Cal. 174, 138 Pac. 997, cited by appellants, is of no value here. The quantum of water available to the West Side Canal Company was not an issue in the case. The plaintiffs were seeking to prevent the creation of adverse claims to water which would embarrass and disadvantage them when the successors of Sheldon, under their contract and in accordance therewith should (as the court found they intended to do) extend their canal and laterals to a place convenient for serving water to the complaining farmers. This is all that the decree seeks to accomplish.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.; LAW-LOR, J.

26 Cal. App. 786

Ex parte CAPLES. (Cr. 379.)

(District Court of Appeal, Second District, California. March 18, 1915.)

ARREST $\S$ 29—CIVIL ACTION—SUFFICIENCY OF EVIDENCE—STATUTE.

Under Code Civ. Proc. $\S$ 479, authorizing an arrest on civil process where the defendant

is about to depart from the state with intent to defraud his creditors, and section 481, providing that the order for arrest may be made when it appears by affidavit that a sufficient cause of action exists, and that the affidavit must be either positive or upon information and belief, an affidavit, following the statute, alleging fraud in obtaining money on a note, that defendant had no fixed place of business in the state, and was about to leave with the intent to defraud his creditors, was sufficient.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. $\S\S$ 64-68; Dec. Dig. $\S$ 29.]

In the matter of the application of William J. Caples for a writ of habeas corpus. Writ discharged, and petitioner remanded to custody.

Earl Rogers, W. H. Dehm, and Milton M. Cohen, all of Los Angeles, for petitioner. Avery & French, of Los Angeles, for respondent.

PER CURIAM. Petitioner herein was arrested on civil process. One Gamage brought suit against him, based upon an alleged indebtedness in the sum of \$650, evidenced by a promissory note. Upon the commencement of that action the plaintiff filed in the superior court an affidavit setting forth facts upon which he claimed the right to have an order made for the arrest of the defendant, this petitioner. That affidavit first set out facts showing the cause of action existing in behalf of the affiant, and then contained this recitation:

"That said defendant obtained this sum of \$650 from this payee mentioned in said note upon the false and fraudulent representation that he had an interest in an estate in Texas and would send for and obtain said money to pay said note; that he has never done so, and has not paid said note, or any portion thereof, either principal or interest; that defendant has no fixed place of business in California, and is temporarily here, and is about to leave the state of California, and with the intent to defraud his creditors in this state, and to return to Texas."

The contention of petitioner is that, as arrests may be made on civil process only in cases of fraud, such fraud is not shown by the recitations in this affidavit. Section 479, Code of Civil Procedure, provides that an arrest may be made in such a case "when the defendant it about to depart from the state with intent to defraud his creditors." Section 481 of the same Code provides that the order may be made whenever it appears to the judge, by the affidavit of the plaintiff or some other person, that a sufficient cause of action exists, and that the case comes within the provisions of section 479, above cited. It is then provided that:

"The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded."

If it appears from the affidavit that the defendant is about to depart from the state with intent to defraud his creditors, a sufficient case is made out to warrant his arrest.

As to whether the facts constituting the evidence from which the conclusion is to be deduced as to the intent of the defendant in that regard need be stated, we think our Supreme Court has answered that question very plainly. A careful consideration of *Ex parte Fukumoto*, 120 Cal. 316, 52 Pac. 726, and *Fukumoto v. Marsh*, 130 Cal. 66, 62 Pac. 303, 509, 80 Am. St. Rep. 73, requires that the affidavit in this matter be held sufficient in substance. The effect of the decisions cited is to hold that the party making the affidavit upon which an order of arrest in a civil action is asked may follow the statute and declare in positive terms that the defendant is about to depart from the state with intent to defraud his creditors, or he may set up the facts which will warrant the judge in concluding such to be the intent of the defendant. In either case the affidavit will be held sufficient.

The writ is discharged, and petitioner remanded to the custody of the sheriff.

27 Cal. App. 46

LIST v. LA VERNE IRRIGATING CO.
(Civ. 1530.)

(District Court of Appeal, Second District, California. March 23, 1915.)

1. APPEAL AND ERROR ⇨1011—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ⇨1011.]

2. WATERS AND WATER COURSES ⇨157—INTEREST IN REAL ESTATE—ACQUISITION OF LICENSE.

One who does not obtain permission to construct an irrigation pipe line through the land of another, and who does not incur expenses in laying the pipe on the faith thereof, does not obtain any right to maintain the pipe line on the theory of license.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 185; Dec. Dig. ⇨157.]

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by R. D. List against the La Verne Irrigating Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. W. Fregean, of Los Angeles, for appellant. Lloyd, Hunt, Cheney & Geibel and Lloyd, Cheney & Geibel, all of Los Angeles, for respondent.

CONREY, P. J. Action to quiet title. The appeal is from a judgment in favor of the plaintiff and from an order denying defendant's motion for a new trial.

The defendant admits that plaintiff is the owner and entitled to possession of the real property described in the complaint, save and except as to a certain strip of land 20 feet in width extending across plaintiff's land. The defendant claims that it is, and ever since the month of May, 1906, has been, the owner of said strip of land for the purpose of maintaining thereon a pipe line connected with its system of irrigation. This claim of the defendant

is based upon the alleged fact that, with full knowledge and consent of the plaintiff and his then co-owner of said land, the defendant entered thereon under a license given by the owners for that purpose, and expended large sums of money or the equivalent thereof in labor in execution of its rights under said license.

[1,2] No written permission, license, or easement is claimed to have been given. Two witnesses for the defendant testified that in May, 1906, they had conversations with Mr. List and his co-owner, Mr. Gafford, in regard to obtaining a right of way across the land for this pipe line; that permission was given therefor; that after obtaining such permission they proceeded to expend upon the construction of the pipe line across plaintiff's land the sum of about \$300, and several thousand dollars more upon other and connected portions of the system. The witness Gafford in his deposition denies that he made any such statements as those attributed to him by defendant's witnesses, and the plaintiff in his testimony makes the same denial, and further testifies that he had no knowledge of the existence of this pipe line across his premises until some time after its construction, when certain leakages therein led to his discovery that the pipe line was there. The court having found with the plaintiff as to these controverted facts, we must take it as a fact in the case that no license was given, and that no expenditures were made in reliance thereon. This being so, the decisions relied upon in the brief of defendant's counsel have no application to this case, and the defendant is left without any foundation for its claim.

No other ground for reversal than that above stated has been argued in appellant's brief.

The judgment and the order denying motion for a new trial are affirmed.

We concur: JAMES, J.; SHAW, J.

27 Cal. App. 11

HENRY COWELL LIME & CEMENT CO.
v. FIGEL et al. (Civ. 1316.)

(District Court of Appeal, Third District, California. March 20, 1915.)

1. APPEAL AND ERROR ⇨71—ORDERS APPEALABLE—ORDER DENYING SALE OF ATTACHED PROPERTY.

An order denying a motion under Code Civ. Proc. § 548, by plaintiff in attachment for a sale of attached perishable property, is not appealable within section 939, enumerating appealable orders.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 386-401; Dec. Dig. ⇨71.]

2. ATTACHMENT ⇨198—SALE OF PERISHABLE PROPERTY ATTACHED—PROCEEDINGS TO OBTAIN SALE.

A party, desiring the sale of perishable property attached, may proceed under Code Civ. Proc. § 548, providing that when prop-

erty has been taken under an attachment, the court to subserve the interests of the parties, may order a sale, though section 547 requires the sheriff without order to sell perishable property so seized, and though, where the officer fails to sell, he may be compelled, by proper process, to sell.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 646, 647; Dec. Dig.  198.]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by the Henry Cowell Lime & Cement Company against Fred H. Figel and another. From an order denying an application of plaintiff for the sale of perishable attached property, he appeals. Dismissed.

Mastick & Partridge, of San Francisco, for appellant. Will M. Beggs, R. C. McComish, and Arthur M. Free, all of San Jose, for respondents.

HART, J. The court below denied the motion of the plaintiff for an order directing the sale, by virtue of the provisions of section 547 of the Code of Civil Procedure, of certain personal property, which the sheriff had levied upon and seized under a writ of attachment issued in this action. This appeal is from the order denying the application for the sale of the property.

The motion was made upon the affidavit by one of the attorneys for the plaintiff and upon the testimony of 11 witnesses taken and heard on behalf of the plaintiff. No part of the testimony so taken is presented in the record on this appeal.

The affidavit above mentioned states, however: That a writ of attachment was "duly and regularly issued in the above-entitled cause," and the same delivered to the sheriff of Santa Clara county. That thereupon said sheriff—

"duly and regularly levied said attachment upon certain goods situated in a certain warehouse. * * * That said goods, wares, and merchandise, among other things, consist of certain cement * * * and certain lime and plaster. That the said cement is in sacks in said warehouse, and that said cement is perishable in this: That when said cement is kept in sacks the cement absorbs moisture from the air and becomes hard and unfit for use. * * * That said lime is in sacks in said warehouse, and that when the same is kept in sacks for any considerable length of time, the same slakes and becomes unfit for use, and that therefore all of said cement, lime, and plaster is perishable property."

The following facts were admitted at the hearing: That the plaintiff commenced this action on the 31st day of March, 1911, and on the same day the sheriff levied a writ of attachment upon 1,616 sacks of Mt. Diablo cement, which were stored in the warehouse of the defendant, Figel; that said Figel was a dealer in lime and cement in the city of San Jose, and maintained said warehouse, to which his patrons had access and in which were stored, "at the time herein mentioned," various bags of cement belonging to other persons, the patrons of said Figel; that

previous to the issuance and levy of said writ of attachment, the county of Santa Clara had purchased from the said Figel 1,138 sacks of the said Mt. Diablo cement, "and at the time of the levy of said attachment the said last-named sacks of cement had been segregated from the remainder thereof, and that there had been placed thereon a placard bearing the words, 'Property of the county of Santa Clara.'"

It appears that one of the issues presented at the hearing of the motion was whether the purported sale of certain of the cement levied upon by the sheriff to the county of Santa Clara constituted an actual sale, or a sale that would stand as against the creditors of the vendor, it being made to appear that, although the county of Santa Clara claimed to have purchased said cement and had it segregated or set apart from other lots of cement contained in the warehouse of the defendant, Figel, said lot of cement so purchased remained in said warehouse and was never removed therefrom by the purchaser. Section 3440, Civ. Code. And this is the only question discussed in the opening brief of counsel for the plaintiff; their contention being that the admitted facts show that there was no actual and immediate delivery of the cement by the vendor to the vendee, followed by an actual and continued change of possession thereof.

[1, 2] Counsel for Figel, in their reply brief, besides urging the contention that the facts disclose an immediate delivery, followed by an actual and continued change of the possession of the cement, make the further point that the appellant is not a person entitled to challenge the transfer. But in their oral argument, which has been printed and filed herein in the form of a brief, they, for the first time, raise the point that the order from which this appeal is taken is not appealable. This proposition appears to be sound, and this court is therefore without jurisdiction to entertain this appeal. The proceeding in which the order appealed from was made is based upon section 548 of the Code of Civil Procedure, which, in part, provides:

"Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court or judge thereof that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court to abide the judgment in the action."

Although section 547 of the same Code makes it the duty of the sheriff, without an order from the court or judge, to sell property of a perishable character, which has been levied upon and seized by him under a writ of attachment, and that officer could, if he failed in that duty, be compelled by proper process to perform it, yet it is doubtless the correct practice for the parties to proceed,

if they so desire, under section 548 in a case where the property attached may be shown to be of a perishable nature, and upon such showing be entitled to an order directing its sale, since, obviously the sale of property of that character would certainly be to subserve the interest of the parties to the action. But in providing the mode sanctioned by section 548 for procuring the sale of attached property in cases where it may be shown that such sale will subserve the interest of the parties to the action, the Legislature seems to have conceived it to be proper to make the decision of the trial court or judge upon the question of the propriety of ordering such sale final and conclusive, for no appeal from such an order has been provided for.

The order appealed from here was made before final judgment, and, indeed, it is not one which it is contemplated should be made after final judgment, for, if the plaintiff should prevail in the action, the property attached, if not already sold by the sheriff, would necessarily have to be sold to satisfy the judgment; and, on the other hand, if the defendant should prevail in the action, then there would be no necessity and, indeed, no authority for the sale of the property. And the order is not among the appealable orders enumerated in section 939 of the Code of Civil Procedure. It certainly cannot be treated or regarded as a final judgment in the sense that an appeal will lie therefrom, for the proceeding in which it is applied for and made is merely ancillary to or in aid of the main relief sought to be enforced in an action for the recovery of a money judgment. It is merely a summary proceeding designed for the preservation of the efficacy of the attachment, and in authorizing it the Legislature proceeded upon the theory that the court or judge below will adopt such a course in such case as will make the lien of the attachment effective in the event that its enforcement becomes necessary.

It may be remarked that the manifest inutility of an appeal from such an order when made in a proceeding involving, as here (according to the allegations of the plaintiff's affidavit), property of a perishable nature would be a sufficient reason for the denial by the Legislature of an appeal from such order; for obviously in such case the questions involved would become moot long before the appeal could be heard and disposed of because of the destruction, practically, of the subject-matter of the controversy. However, the right of appeal is statutory, and where, as is plainly true here, no appeal is expressly authorized in any case, then obviously none will lie therein.

The appeal from the order is dismissed.

We concur: CHIPMAN, P. J.; BURNETT, J.

26 Cal. App. 793

SPINKS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 1701.)

(District Court of Appeal, Second District, California. March 18, 1915.)

COSTS ⇨48—DISMISSAL OF ACTION.

Code Civ. Proc. § 581, provides that an action may be dismissed by the plaintiff, by written request to the clerk at any time before trial, upon payment of his costs, provided no counterclaim has been set up. Section 1024 gives to a defendant the right to collect costs as a matter of course upon judgment in his favor. *Held*, that a defendant is entitled to costs where before trial plaintiff dismissed the action; the dismissal being a judgment in his favor.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 129, 192-210; Dec. Dig. ⇨48.]

Petition by M. E. Spinks for writ of mandate against the Superior Court in and for the County of Los Angeles, and Hon. J. P. Wood, Judge thereof. Petition granted.

G. Harold Janeway and Hunsaker & Britt, all of Los Angeles, for petitioner. Oliver O. Clark and George M. Pierson, both of Los Angeles, for respondents.

JAMES, J. Petition for mandate to compel the superior court to proceed with a hearing on contempt. The petition shows: That an action was commenced in November, 1913, by a corporation, against the plaintiff, wherein damages were claimed in the sum of \$1,600,000. That thereafter a second amended complaint was filed and petitioner made his verified answer thereto, and September 22, 1914, was set as the day for the trial of the issues thus made up. That on the day immediately preceding the day set for trial the plaintiff in that action filed with the clerk a direction that the suit be dismissed, and the clerk made an entry in the register of actions, noting that the action was dismissed and the order filed. That within five days thereafter petitioner, as the defendant in that action, filed his memorandum of costs, which amounted to \$69, and the court thereafter gave judgment in his favor for the amount of said costs. Execution for the collection of the amount of this judgment having been returned unsatisfied, the petitioner had proceedings instituted to have the matter of the ability of the corporation to pay investigated, and for that purpose obtained an order for the examination of the president and secretary thereof. That these persons appeared before the court and gave testimony, and thereupon the court made an order requiring said persons, as president and secretary of the judgment debtor corporation, to permit petitioner or his attorney or agent to examine the corporate books and records; that the president and secretary refused to comply with this order, and thereupon a citation was secured requiring them to appear in court and show cause why they

should not be held answerable as for a contempt. That upon the latter hearing being had, objection was made on the part of the corporation debtor that the judgment of the court was void upon its face, in that there was no authority in the court after dismissal made by the clerk to enter any judgment for costs. That this contention was sustained and the contempt proceedings dismissed. By the writ here sought petitioner asks that the superior court be required to proceed and consider the charge of contempt against the president and secretary of the corporation mentioned. A demurrer was interposed to the petition and the matter has been submitted upon the issue of law thus raised. The sole question involved is as to whether, where plaintiff in an action exercises his right to dismiss, in those cases where the Code provides that he may do so by filing a request with the clerk, the opposite party is entitled to recover the costs that he may have incurred. Section 581, Code of Civil Procedure, provides that an action may be dismissed:

"1. By the plaintiff himself, by written request to the clerk, filed with the papers in the case, at any time before the trial, upon payment of his costs; provided a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant. * * *

Section 1024 of the same Code gives to a defendant the right to collect costs incurred by him, as of course, "upon a judgment in his favor," in certain classes of actions of which that here involved was one. It has been held that the costs, referred to in section 581 as being required to be paid by the plaintiff when he files his dismissal with the clerk, are only the costs of entering the order of dismissal. *Kaufman v. Superior Court*, 115 Cal. 152, 46 Pac. 904; *Todhunter v. Klemmer*, 134 Cal. 60, 66 Pac. 75. This provision of the section so construed, respondent insists, furnishes the whole measure of its liability upon the dismissal of the action. On the other hand, the petitioner asserts that a dismissal so made does not interfere at all with his right to have a judgment following it entered, as he did, which would secure to him the expenses incurred in the action, and which were in their nature proper costs. We are in complete accord with this contention, and think that it proposes but a fair and reasonable construction for the statute. The dismissal as entered by the clerk upon the application of a plaintiff in such cases determines that action in favor of the opposite party; that suit is then forever ended. While the matter of the recovery of costs is one which rests wholly upon the authority of the statutes, it cannot be contemplated that the Legislature, having provided authority and means for the securing of costs to litigants, intended to leave a defendant remediless against

a plaintiff who chose to bring an action and put a defendant to great costs in preparing to meet the same and then dismiss the suit. This case is a typical illustration of the hardship which might result. Here the plaintiff filed several complaints, defendant made his verified answer, and proceedings were had to set the case for trial. Then, on the day before the trial was to take place, plaintiff appears at the clerk's office and dismisses its action. The defendant presumably prepared himself for the trial and subpoenaed his witnesses on the assumption that the plaintiff would proceed at the time regularly set. A construction of the statute which will allow the recovery of costs in such cases is one that will appeal to the sense of fairness and justice of every one, and is the one which we will assume the Legislature intended should be given to its declarations upon that subject. While the language may be taken as dictum, our Supreme Court, in the case of *Hopkins v. Superior Court*, 136 Cal. 552, 69 Pac. 299, has given an intimation in favor of a defendant's right to recover costs in this kind of a case. It is there said that the clerk in entering a dismissal cannot settle a cost bill, and this language follows:

"The utmost of a defendant's right under the circumstances is to present his cost bill in due time after dismissal to have it settled, and take judgment for his costs against plaintiff accordingly."

We are of the opinion that the writ should issue.

Peremptory writ of mandate is ordered to be issued in accordance with the prayer of the petition.

We concur: CONREY, P. J.; SHAW, J.

27 Cal. App. 1

NICHOLS v. WOLF et al. (Civ. 1533.)

(District Court of Appeal, Second District, California. March 19, 1915.)

1. ADVERSE POSSESSION §117 — FINDINGS OF ADVERSE POSSESSION.

A finding, in an action for the recovery of land and damages for use and detention thereof, that plaintiff had peaceable, adverse, and uninterrupted possession of the property from 1903 to 1911, paying taxes thereon during the eight years mentioned, is not a finding of title by adverse possession, within Code Civ. Proc. § 325, defining the elements of adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. §117.]

2. EJECTMENT §18 — INTERFERENCE WITH POSSESSION—ACTS CONSTITUTING.

That defendants commenced claiming a right and title to land in possession of plaintiff is not an interference with the possession.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 65-73; Dec. Dig. §18.]

3. TRIAL §395—FINDINGS OF FACT.

Where a finding is of the evidence and not of the fact in issue, it does not aid the judgment, unless the evidentiary facts carry with

them, by necessary implication, the ultimate fact which should be determined.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927-934, 939; Dec. Dig. ☞395.]

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by Mrs. W. A. Nichols, otherwise known as Luthera Nichols, against B. F. Wolf and others. From a judgment for plaintiff, defendants appeal. Reversed.

Hammack & Hammack, of Los Angeles, for appellants. R. F. Cook, of Ft. Worth, Tex., and Morton, Hollzer & Morton, of Los Angeles, for respondent.

CONREY, P. J. This is a controversy over the title to a strip of land on the southerly side of a larger tract described in the complaint. The complaint alleged that on March 1, 1912, while the plaintiff was seised and in possession and entitled to the possession of the entire parcel described, the defendants, without right or title, entered upon that portion thereof constituting the premises demanded herein and ousted and ejected plaintiff therefrom and now unlawfully withhold the possession from plaintiff, to her damage in the sum of \$150. By their answer defendants denied plaintiff's alleged title, possession, and right of possession, denied that, while plaintiff was seised of said land, the defendants without right or title entered into possession of the demanded premises, and denied that they ousted plaintiff therefrom, denied that they unlawfully withhold possession from plaintiff, and denied that plaintiff has been damaged thereby. In other words, by their answer defendants admit that they have taken and hold possession of the strip of land, and claim that they did so lawfully, and that plaintiff is without title or right of possession.

Defendants appeal from a judgment in favor of plaintiff awarding to plaintiff possession as demanded and damages for the use and detention thereof in the sum of \$75. The record on appeal consists of the judgment roll. It is claimed by appellants that the judgment should be reversed because the findings of fact do not show that plaintiff was ever seised of the property or had title thereto, and do not show that there was any ouster of the plaintiff; that the facts that were found are not such as entitled plaintiff to a judgment for possession or for damages.

[1-3] The findings of fact, exclusive of the formal recitals, are in the following words:

"(1) That the plaintiff had peaceful, adverse, and uninterrupted possession of the property described in plaintiff's second amended complaint from 1903 to 1911, paying taxes on same during the eight years above mentioned.

"(2) That about April 1, 1911, defendants commenced claiming right and title to a portion of said above-mentioned property, to wit, about 61.9 feet off the southern portion of said land, running the full length of said land."

The second of these two findings is of no effect whatever. The mere fact that defend-

ants commenced claiming right and title to the land was not an interference with plaintiff's possession. As to the first finding, it deals with material evidentiary facts which are not alone a sufficient equivalent to the ultimate fact of ownership, and does not find this ultimate fact. Where a finding is of the evidence and not of the fact in issue, it will not aid the judgment, unless the evidentiary facts thus determined carry with them, by necessary implication, the ultimate fact which should have been determined. It nowhere appears in the record that the adverse possession was under claim of title or that it was founded upon a written instrument. Even assuming that the adverse possession so found was under a claim of title, the facts as found do not meet the requirements of section 325, Code of Civil Procedure, by which the finding must be tested. It is not found that the property, while in the possession of plaintiff, was protected by a substantial inclosure, nor that it was usually cultivated or improved, nor that the plaintiff, while so occupying, has paid all the taxes which have been levied and assessed upon the land. The payment of some of those taxes would not alone meet the requirement. The court further neglected to find that the plaintiff was in possession of the property at the time of entry by the defendants.

These findings are not sufficient to warrant the conclusion that the plaintiff was seised or possessed of the strip of land in question at the time of entry by the defendants. They do not support a judgment for possession, and particularly they do not support the judgment against the defendants for damages.

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

27 Cal. App. 4

Ex parte KORDOULIS. (Cr. 576.)

(District Court of Appeal, First District, California. March 20, 1915.)

MUNICIPAL CORPORATIONS ☞626 — ORDINANCES—VALIDITY.

A municipal ordinance prohibiting any person from constructing or occupying any building to be used as a planing mill, etc., if planers, stickers, or jointers are used, and run by power, without obtaining a permit from the board of supervisors, is unconstitutional, because of discrimination between individuals similarly situated; that is, those already operating such mills and those desiring thereafter to operate them.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1380; Dec. Dig. ☞626.]

Application by one Kordoulis for release on habeas corpus. Writ issued.

Timothy Healy and Robert M. Reid, both of San Francisco, for petitioner. M. T. Dooling, Jr., Asst. City Atty., of San Francisco, for respondent.

PER CURIAM. This is an application of the petitioner for release on habeas corpus. The proceedings show that the petitioner was arrested and charged with the violation of the provisions of section 194 of Ordinance 2741 (New Series) of the ordinances of the board of supervisors of the city and county of San Francisco, which reads in part as follows:

"No person, firm or corporation shall construct or cause to be constructed, maintain or cause to be maintained, occupy or cause to be occupied, any structure or building hereafter used, or intended to be used as a planing mill, saw mill, sash or door factory, furniture or cabinet factory, or for any other woodworking purpose, if planers, stickers or jointers are used, and run by power, without first obtaining a permit so to do from the board of supervisors."

The sole question before the court is the legality of the foregoing section of the ordinance.

Practically the same question was before this court in *Ex parte Dondero*, 19 Cal. App. 66, 124 Pac. 884, wherein a similar section of the same general ordinance was held by this court to be invalid because of discrimination in its operation between individuals similarly situated, in that it permitted those already in possession or ownership of buildings or premises being used for stables to continue to put these structures to such use without a permit, while requiring all persons thereafter wishing to construct any building or premises to be used as a stable to first obtain a permit from the board of supervisors so to do. The reasoning and conclusion of this court in the *Dondero* Case apply to the case at bar, and impel us to hold the section of the ordinance in question here to be invalid.

Our attention has been called to the case of *In re Stoltenberg*, 165 Cal. 789, 134 Pac. 971, which, it is claimed by the respondent, announced a different rule than that declared, in *Ex parte Dondero*, and in *Los Angeles v. Hollywood Cem. Ass'n*, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75, and *Ex parte Bohen*, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618, upon the authority of which two latter cases the *Dondero* Case was decided. After a careful reading of the *Stoltenberg* Case we are of the opinion not only that its reasoning does not apply to an ordinance of the character of that under review in this case, but also that the *Stoltenberg* Case recognizes and refers to the distinction between the state tenement law upheld in that case and the section of the ordinance of the city and county of San Francisco declared invalid in the *Dondero* Case, and hence that the reasoning and conclusions of the *Stoltenberg* Case have no application to the case at bar.

As to the other question presented by the petitioner, the court deems it unnecessary to express an opinion.

It is ordered that the petitioner be discharged and his bail exonerated.

27 Cal. App. 48

PIERSON v. SMITH. (Civ. 1538.)

(District Court of Appeal, Second District, California. March 23, 1915.)

1. STIPULATIONS ⇐3—ISSUES—TRIAL.

Where the parties in open court stipulated that all the issues presented by the pleadings may be submitted for trial and determination, the court properly tried all the issues presented by the complaint and by the cross-complaint, though the cross-complaint was an improper pleading and could have been eliminated.

[Ed. Note.—For other cases, see *Stipulations*, Cent. Dig. § 2; Dec. Dig. ⇐3.]

2. APPEAL AND ERROR ⇐192 — QUESTIONS REVIEWABLE — QUESTIONS NOT RAISED IN TRIAL COURT

A party trying the case on the theory that the pleadings are sufficient cannot, for the first time on appeal, raise the question of sufficiency.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1221-1225, 1239; Dec. Dig. ⇐192.]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Maude E. Pierson against J. F. Smith. From a judgment for defendant, plaintiff appeals. Affirmed.

H. H. Appel and E. J. Dennison, both of Los Angeles, for appellant. Smith, Miller & Phelps, of Los Angeles, for respondent.

CONREY, P. J. Plaintiff appeals from the judgment upon the judgment roll alone.

The complaint stated a cause of action for quieting the title to a certain lot or parcel of land in the county of Los Angeles. It was alleged that the defendant claims an estate, interest, or lien thereon adverse to the plaintiff. By the answer, and also by a cross-complaint, the defendant admits plaintiff's ownership of the land; alleges that plaintiff and defendant entered into a verbal contract whereby defendant was to purchase the material and employ the labor and superintend the construction of a certain apartment building upon the premises described, according to plans to be furnished by the plaintiff from time to time; that the plaintiff was to pay to the defendant for said services the sum of \$5 per day, together with any money advanced by defendant for the reasonable value of the materials and labor used in the construction of the building; that pursuant to said contract defendant did superintend the construction of the building and purchase and furnish the materials and labor; that the total amount and value of the labor and materials so furnished was a certain sum in excess of \$8,000, which sum, including said sum of \$5 per day for the services of defendant, was the reasonable value of all materials furnished and labor performed upon said building; that the sum of \$8,000 and no more was paid to defendant by the plaintiff; that after completion of the building, and within 30 days after the filing by plaintiff of a notice of completion of the building, the defendant filed a notice of claim of lien in accord-

ance with the statute relating to mechanics' liens. Defendant and cross-complainant demanded judgment for the unpaid balance of his demand and for foreclosure of the lien claimed by him. The plaintiff filed her answer to the cross-complaint, yet made no objection to the sufficiency of the cross-complaint as a pleading in the action or to the right of defendant to file the same. The findings of fact and conclusions of law filed by the court contain a recital that the case was submitted upon said pleadings—

"and upon the stipulation made by counsel for plaintiff and defendant in open court that all of the issues presented by the pleadings might be submitted to the court for trial and decision herein."

The court determined that the plaintiff is the owner of the described premises; that the value of the labor and materials and the amount that had been paid by plaintiff were as alleged in the cross-complaint; that the defendant and cross-complainant was not entitled to any lien upon the premises of plaintiff. A decree was entered granting to defendant and cross-complainant a personal judgment against the plaintiff for the amount of his demand, and adjudging and decreeing that the lien claimed by the defendant was invalid and that the property described in the complaint be adjudged clear and free therefrom.

[1] Assuming without deciding that the cross-complaint was an improper pleading in the case and could have been eliminated from the case if the plaintiff had taken proper steps therefor, it does not follow that the judgment should be reversed. The stipulation made by the parties in the presence of the court at the commencement of the trial was properly accepted by the court as an agreement that the issues tendered by the cross-complaint, as well as those tendered by the complaint, were all to be determined in this action. Accordingly the court received evidence relating to these issues, found the facts, and entered its judgment thereon. The subject-matter of the cross-complaint included, not only a claim of lien, but also a money demand for an amount of which the superior court is authorized to entertain jurisdiction.

[2] As said by the Supreme Court in *McDougald v. Hulet*, 132 Cal. 154, 160, 64 Pac. 278, 280:

"The party, having tried the case in the court below upon the theory that the pleadings are sufficient, cannot for the first time raise the question here."

The decision in *Meyer v. Quiggle*, 140 Cal. 495, 74 Pac. 40, which is the principal case relied upon by appellant, is not applicable here. In that case the defendant had attempted to plead a counterclaim, as well as a cause of action stated in a cross-complaint. These pleadings were improper because the action was one to determine adverse claims to real property and the matters alleged by the defendant did not show that the defend-

ant had any interest in the land in question. The plaintiff objected to the evidence offered in support of this affirmative answer and cross-complaint. Held, that the objection was properly sustained. If in that case the parties had stipulated that the court might proceed to try and determine the claim of defendant as well as that of the plaintiff in the action, we think that it would not have been reversed merely for the reason that it was not a proper case for counterclaim or cross-complaint.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

27 Cal. App. 6

HUMBURG v. BOARD OF POLICE AND FIRE COMRS OF CITY OF SAN JOSE et al. (Civ. 1313.)

(District Court of Appeal, Third District, California. March 20, 1915. Rehearing Denied April 19, 1915. Denied by Supreme Court May 17, 1915.)

1. MUNICIPAL CORPORATIONS ⇐186 — POLICEMEN—PAY—POSSESSION OF OFFICE—ACTIONS.

A police patrol driver was suspended from duty without pay, following charges proved against him by the chief of police. Subsequently the board of police and fire commissioners made an order that thereafter the police department should consist of certain persons designated by name, but plaintiff was not included in the list. All the persons so designated continuously discharged their respective duties, and received salaries therefor. After this reorganization order, plaintiff gave up records belonging to the city and performed no further duty as a member of the police force, but sought a mandate to compel the board to pay his salary, and to restore him to office as policeman. *Held*, that he was out of possession of the office, and that it was occupied by another incumbent.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 510-517; Dec. Dig. ⇐186.]

2. MUNICIPAL CORPORATIONS ⇐186—POLICEMEN—DE FACTO OFFICERS—RIGHT TO RECOVER SALARY.

A police officer suspended from duty and out of possession of the office and performing no duties thereof cannot enforce the payment of his salary until his right to the office had been adjudicated in an appropriate action to which the person in possession is a party.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 510-517; Dec. Dig. ⇐186.]

Appeal from Superior Court, Santa Clara County; John E. Richards, Wm. A. Beasley, Judges.

Mandamus by John Humburg against the Board of Police and Fire Commissioners of the City of San Jose and others, to compel the payment of salary, and to restore petitioner to office of policeman. From a judgment for plaintiff, defendants appeal. Reversed.

John W. Sullivan; of San Jose, for appellants. J. C. Black, of San Jose, for respondents.

BURNETT, J. This is one of three cases which were tried together, as they involve practically the same facts and principles. Each was a special proceeding to obtain a writ of mandate to compel defendants to pay respondent a certain salary claimed to be due him as police officer of said city and also to restore him to office as said policeman. The three cases have been argued here together and will be treated in one opinion.

Humburg was employed as a member of the police department in 1891, De Carli in 1904, and Narvaez in 1905. They continued to discharge their duties as such until July 22, 1908, when charges were preferred against them by the chief of police for "interfering in politics," in violation of section 13 of article 10 of the city charter. They were thereupon suspended from duty without further pay. Thereafter they sought a writ of prohibition to restrain the board of police and fire commissioners from hearing or trying the charge so made against them. While this application was pending, said board, on August 26, 1908, made an order declaring that, in order to keep within the allowance made for the maintenance of the police and fire department, the police department should thereafter consist of a certain number of officers and men and designating the persons who should constitute the police force. None of the plaintiffs herein was among the list. Thereby the force was reduced from 24 to 19 men. This was set up in answer to said petition for writ of prohibition, and it was alleged that the petitioners therein had ceased to be members of the police force. Upon the issue so raised, the superior court directed the writ to issue, declaring in the judgment that, by reason of said order reorganizing said police department, said police and fire commissioners had estopped themselves from "trying plaintiffs on said charges and on that ground"; findings having been waived.

The proceedings herein were begun on December 24, 1909, for the payment of salaries from July 22, 1908, to December, 1909. Defendants in their answer set forth said suspension, the order of August 26th reorganizing the police department and discharging and removing petitioners therefrom, the incumbency of their successors, and the fact that they have held and enjoyed such offices and alleging estoppel of further litigation of plaintiffs' claim to said offices by reason of said decision as to the writ of prohibition. The findings were all against defendants, and a peremptory writ was issued by the court requiring the board of police and fire commissioners to pay the salaries of petitioners, as prayed for, and to restore them to office.

[1] Among the findings of the court was this:

"That it is not true that ever since the said 26th day of August, 1908, there is now or has been an incumbent in the offices claimed by the petitioner herein; that no one has been named

by any order or certificate issued by the board of police and fire commissioners nor by the city clerk of the city of San Jose to take the place and office of plaintiff, and no one holds any color of right to the office of this plaintiff, and that it is not true that any person holds as an incumbent or enjoys or performs or now performs the duties of said office, and no one asks for nor receives or claims from the public treasury of the said city of San Jose any salary of the petitioner."

This finding seems to be entirely contrary to the evidence. In fact, there is no conflict in that regard. The evidence is undisputed that in said order reorganizing the police department the officers were named who should fill all the places. Whether the order was legal or not, it certainly had the effect to put incumbents in the places formerly occupied by plaintiffs. Afterwards some additional places were created and filled, but plaintiffs were left out. Furthermore, the uncontradicted testimony of Mr. Lahan, the secretary of the board, is as follows:

"There has never been any order made restoring the petitioners to police duty. Immediately upon the making of the order of August 26th, I think the petitioner gave up property that belonged to the city that was there in his possession; I think he gave up records. Since the 22d day of July the plaintiff has not performed any services for the city of San Jose that I know of. Upon and immediately after the order of the 26th day of August, 1908, which designated the persons who should remain upon the police force, the persons named in that order, and each of them, immediately entered upon the discharge of their duties, as fixed in that order. They and each of them have continued, after that time, to discharge their respective duties, except I think that Patrolman Walthers resigned and his place was filled about December 1, 1909, by the appointment of Mr. Charles Hertel. * * * All the persons named in the order of the 26th day of August, 1908, and Mr. Hertel, and all the persons then or since then upon the police force, have regularly asked for and received their salary for the respective positions for which they claim to be appointed. From the 1st day of September, 1908, continuously and up to and including the 1st day of January, 1910, each and all of such persons have regularly performed their duties and regularly received their salaries as members of the police force. They each and all have claimed and now claim to hold their positions by virtue of a legal appointment by the board, claiming to hold upon a legal order. * * * I knew the petitioner, D. P. Narvaez, prior to the 22d day of July, 1908. He was a patrol driver. I am acquainted with Louis Sepulveda and Charles Pfau. Between the 22d day of July, the date of the suspension of the plaintiff, and August 26, 1908, the date of the order of removal, the petitioner did not perform any duties as patrol driver in the police department. Immediately upon the order of August 26, 1908, both Charles Pfau and Louis Sepulveda entered upon the duties of the position of patrol driver for the police department of the city of San Jose, and have ever since continued and are now discharging the duties."

And he furthermore stated that they had received the salaries for such services and claimed to occupy the positions by virtue of said order of August 26, 1908. We have quoted the evidence given in the Narvaez case, but it was substantially the same in the other two; Mr. Humburg having also been a patrol driver and Mr. De Carli a patrolman.

It is difficult to understand how it could be more clearly shown that there were incumbents in the positions formerly occupied by the plaintiffs herein; said incumbents claiming to be de jure officers, and who actually received the salaries attached to the positions.

[2] We have, then, exactly the condition presented by *Black v. Board of Police Commissioners*, 17 Cal. App. 310, 119 Pac. 674. Indeed, Mr. Black was removed from the same police force at the time petitioners were removed. Therein the court says:

"But in the case at bar petitioner was not in possession of the office, and performed no duties thereof during the time for which he claimed his salary, but another person was in possession of the office, under claim and color of right, and had performed, and was still performing, all the duties thereof, under such claim and color of right, and had claimed and been paid the salary therefor. Under such circumstances, the authorities cited in our former opinion expressly and pointedly hold that one out of possession of the office and performing no duties thereof cannot enforce the payment of his salary until he has had his right to the office adjudicated in an appropriate action, to which the person in possession must be a party. See, to the same effect, *Dillon on Municipal Corporations*, § 831."

Respondents herein claim that *Bannerman v. Boyle*, 160 Cal. 197, 116 Pac. 732, and some other cases following it, hold to the contrary. But a rehearing was granted in the *Black Case* for the purpose of considering the *Bannerman* decision, and, upon the rehearing, the appellate court for the first district said:

"Unlike the case at bar, in *Bannerman v. Boyle*, 160 Cal. 197, 116 Pac. 732, the petitioner for the writ of mandate was in exclusive possession of the office as a de facto officer, and performed all the duties of the office during the time for which he claimed his salary. At the very outset of the opinion it is stated that this was conceded."

The Supreme Court denied a petition for hearing of the *Black Case* in that court, and the decision therein would seem to be authoritative and binding here. The other cases cited by respondents to this point are *Barendt v. McCarthy*, 160 Cal. 685, 118 Pac. 223; *Welch v. Ware*, 161 Cal. 646, 119 Pac. 1080; *Ross v. Board of Education*, 18 Cal. App. 223, 122 Pac. 967.

The *Barendt Case*, supra, was an injunction to restrain defendants "from removing or attempting to remove plaintiff from actual possession of his office as a member of the board of health of the city and county of San Francisco," and the vital point determined was that, "pending a litigation in the nature of a quo warranto to determine the title to the office," plaintiff was not entitled to an injunction "restoring him to and protecting him in the actual possession of the office."

In the *Welch Case*, supra, the "petitioner continued to perform and discharge the duties of fire, fish, and game warden for said county," and in the *Ross Case* an office was not involved, nor does it appear that another

incumbent was occupying the position from which the plaintiff was ousted.

Other points are discussed by counsel, but it seems hardly necessary to consider them.

It may be said in conclusion that after the decision in the *Black Case*, supra, Mr. Black brought an action in quo warranto to try the title to the office, and that action is now on appeal in the Supreme Court. It involves the merits of these proceedings, and, no doubt, if the decision should be favorable to Black, defendants will no longer refuse to allow petitioners' claims for the salaries that may be due them.

For the reason stated, the judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

27 Cal. App. 791

NARVAEZ v. BOARD OF POLICE AND FIRE COM'RS OF CITY OF SAN JOSE et al. (Civ. 1314.)

(District Court of Appeal, Third District, California. March 20, 1915. Rehearing Denied April 19, 1915. Denied by Supreme Court May 17, 1915.)

Appeal from Superior Court, Santa Clara County; John E. Richards, Wm. A. Beasley, Judges.

Mandamus by D. P. Narvaez against the Board of Police and Fire Commissioners of San Jose and others, to compel payment of salary, and to restore him to the office of policeman. From a judgment for plaintiff, defendants appeal. Reversed.

J. W. Sullivan, of San Jose, for appellants. J. C. Black, of San Jose, for respondent.

BURNETT, J. For the reason stated in the decision filed this day in *John Humburg v. Board of Police and Fire Commissioners of the City of San Jose et al.*, 148 Pac. 802, the judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

27 Cal. App. 792

DE CARLI v. BOARD OF POLICE AND FIRE COM'RS OF CITY OF SAN JOSE et al. (Civ. 1315.)

(District Court of Appeal, Third District, California. March 20, 1915. Rehearing Denied April 19, 1915. Denied by Supreme Court May 17, 1915.)

Appeal from Superior Court, Santa Clara County; John E. Richards, Wm. A. Beasley, Judges.

Mandamus by L. C. De Carli against the Board of Police and Fire Commissioners of San Jose and others, to compel payment of salary, and to restore him to the office of policeman. From a judgment for plaintiff, defendants appeal. Reversed.

John W. Sullivan, of San Jose, for appellants. J. C. Black, of San Jose, for respondent.

BURNETT, J. On the authority of *John Humburg v. Board of Police and Fire Commissioners of San Jose et al.*, 148 Pac. 802, this day decided, the judgment herein is reversed.

We concur: CHIPMAN, P. J.; HART, J.

26 Cal. App. 788

PEOPLE v. FLESHMAN. (Cr. 369.)

(District Court of Appeal, Second District, California. March 18, 1915.)

1. FALSE PRETENSES 6—WRITTEN TOKEN—WHAT CONSTITUTES.

Pen. Code, § 1110, declares that defendant cannot be convicted of false pretenses for having obtained from any person any labor, money, property, or valuable thing, if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense or some note or memorandum thereof is proven by the testimony of two witnesses. Accused presented a purported copy of a fictitious advertising medium and a forged contract bearing the genuine signature of a bank cashier, and claimed payment. *Held*, that the contract and bill constituted a false token or writing sufficient to justify a conviction, when accompanied by a false pretense implied from the language or conduct of accused.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 4; Dec. Dig. 6.]

2. FALSE PRETENSES 38—PROOF — VARIANCE.

In such case, testimony by the bank cashier that he was induced to pay the money by reason of the demand based upon the false contract was not a variance between the averments of the information that accused, with intent to cheat and defraud, presented to the bank a contract which he represented it had made with a publishing concern, and demanded payment.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 50-53; Dec. Dig. 38.]

3. CRIMINAL LAW 814—TRIAL—INSTRUCTIONS.

The refusal of an instruction that accused is presumed to have a reasonably good moral character unless the contrary is shown was proper, where there was no evidence on the question of accused's character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1835, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. 814.]

4. CRIMINAL LAW 734—TRIAL—JURY QUESTIONS.

It is improper to submit to the jury the question: What are the material averments of the information with which the proof must correspond to sustain a conviction?

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1697-1699; Dec. Dig. 734.]

5. CRIMINAL LAW 1172—APPEAL—HARMLESS ERROR.

A charge that the proof must correspond with the material allegations of the information, while erroneous in submitting to the jury the question, What are the material allegations? is harmless because permitting the jury to find that all allegations of the complaint are material.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. 1172.]

6. FALSE PRETENSES 49—PROSECUTION—EVIDENCE—SUFFICIENCY.

In a prosecution for obtaining money under false pretenses, evidence *held* to establish accused's guilty knowledge.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. 49.]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

M. H. Fleshman was convicted of obtain-

ing money under false pretenses, and from the judgment and an order denying new trial, he appeals. Affirmed.

A. J. Morganstern and Morganstern, McGee, Henning & Hendee, all of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty.-Gen., for the People.

SHAW, J. Defendant was convicted upon an information charging him with the crime of obtaining money by false pretenses. He appeals from the judgment and an order denying his motion for a new trial.

The material allegations of the information are that defendant, with intent to cheat and defraud it, represented to the American National Bank that it had theretofore made and executed a certain contract with the Parker Company, which he represented to be a corporation engaged in publishing a directory, designated as the Western States Business Gazetteer, which contract was in words and figures as follows:

"Publishers' Regular Authorized Advertising Contract. Our advertisement and display classification being inserted by the publishers in this publication, and appearing in the manner and form as hereby authorized by us, it is understood that our obligations cease with the payment of this amount, the same being the sum of \$250, two hundred and fifty dollars. Copy of book not included in this charge. City of San Diego Canv. for 1914. Firm name, American National Bank. Ordered by L. J. Rice, Assistant Cashier"

—and that by reason of said contract said bank was indebted to the Parker Company in the sum of \$250; that defendant represented himself to be an agent of said Parker Company authorized to collect and receive said \$250 so due from said bank, all of which representations were false and untrue, and by defendant known to be false and untrue; that said bank believed said representations to be true, and, relying upon the same, and deceived thereby, delivered to defendant said sum of \$250.

The evidence tended to prove that the alleged contract to which was attached the genuine signature of L. J. Rice, assistant cashier of the bank, was nevertheless forged over his signature, or otherwise wrongfully obtained, in that neither Rice nor the bank ever at any time signed or executed such contract, and that there was, in truth and in fact, no such publication as the Western States Business Gazetteer, or firm of "Parker Company" engaged in the publication thereof. Nevertheless appellant insists that, conceding a public offense committed in so wrongfully obtaining such contract, the evidence fails to connect him therewith or show his participation in any crime based thereon; and, further, that his acts as established by the evidence cannot be construed as the public offense of obtaining money under false pretenses.

It appears from the evidence of Mr. Rice, the assistant cashier of the bank, that defendant called upon him at the bank on June 25, 1914, and, taking from a leather case which he carried a purported copy of the Western States Business Gazetteer, exhibited the same to him as containing a full-page advertisement of the bank, and presented a bill for \$250, made out against the bank, to which was attached the alleged contract over his signature as such assistant cashier, and stated to Mr. Rice that he had come to collect the bill. Mr. Rice, who says he was very busy at the time, examined the papers, remarking that he did not see how anybody ever hypnotized him into signing a contract for an advertisement of that kind, and asked defendant if he was Mr. Parker, in reply to which defendant said: "No; but a relative of his." The bill presented was as follows:

Make Checks Payable to Herbert Parker.	
Publishers	City San Diego, Cal. 6/ 1914
Printers	M American National Bank
Booksellers	To the Parker Company, Dr.
Lithographers	Publisher of
Importers	Western States Business
Blank Book Manufacturers	Gazetteer
	Branch Head Office Branch
	New Orleans New York St. Louis
To Insertion in "The Western States Business Gazetteer," \$250. Received Payment for the Publisher.	

Rice indorsed upon the bill, "O. K. L. J. R.," handed it back to defendant, telling him to present it to the bank teller, whom he directed to pay it. Defendant, before presenting the bill to the teller for payment, detached therefrom the contract, which he retained, and, upon receipting the bill as follows: "H. F. Coll, 6/26/14,"—the teller gave him the sum of \$250. Mr. Rice, after testifying to the substance of the contract so retained by defendant, was asked why he paid the money to defendant, to which he replied:

"The reason I paid it was that he presented this bill to me and said he had come to collect the money, and showed me this advertisement in the book, and presented the bill for the \$250, with the contract pasted on the back of it which had my signature on it."

And again, in reply to a similar question, he stated:

"First, because he asked me for it; second, because he showed me a copy of this advertise-

ment; third, because I had a bill for it, and had my name signed to a piece of paper [the contract] there that I knew was my signature."

[1] The false statements made by defendant to Rice, though meager, taken in connection with his conduct in presenting the purported copy of the gazetteer and advertisement therein, together with the forged contract pursuant to and in accordance with which he, as agent of the Parker Company, presented the bill for \$250, which, in reliance upon the representations so made and implied from such conduct, the bank paid, were sufficient to constitute the offense with which he was charged. It was the false contract to which the genuine signature of Rice was attached that induced him to pay the bill. This contract constituted a "false token or writing" within the meaning of section 1110, Penal Code, which, in order to justify a conviction, must accompany the false pretense when expressed or implied from the language and conduct of one charged with the offense.

[2] Another alleged ground for reversal is that there was a fatal variance between the allegations of the information and the evidence given by Rice. In support of this contention defendant cites the case of *People v. Lapique*, 10 Cal. App. 669, 103 Pac. 164. It clearly appeared in that case, as stated in the opinion of the late Mr. Justice Taggart, that the representations made and upon which the prosecuting witness relied were not those alleged in the information. The facts in the case at bar bear no analogy to those in the case cited. The evidence of Rice shows that he was induced to pay the money by reason of the demand based upon the false and forged obligation of the bank to pay for the fictitious advertisement in the purported directory. There was no variance between his evidence and the allegations of the information.

[3] Defendant complains that the court modified instruction No. 3 by striking out the words "he [the defendant] is presumed to have a reasonably good moral character unless the contrary be shown to your satisfaction by testimony in that regard," citing *People v. Gleason*, 122 Cal. 370, 55 Pac. 123. There was no testimony given touching the subject of defendant's character; and, as said in the case cited, "instructions upon abstract rules of law which have no application to the evidence in a case tend to confuse rather than enlighten a jury, and ought not to be given." To the same effect is *People v. Griffith*, 146 Cal. 339, 80 Pac. 68.

[4, 5] Defendant requested the court to instruct the jury that "in every criminal case the proof must correspond with the allegations of the information, and, unless the proof does substantially correspond with the allegations of the information, it will be your duty to acquit the defendant," which instruction the court, after inserting the word "material" before the word "allegations," gave. While it was error to submit

to the jury the question as to what constituted "the material allegations of the information," since as to what is a material allegation of a pleading is a question of law for the court to decide, nevertheless such instruction was in favor of, rather than against, defendant. If the jury considered all the allegations material, then, under the instruction, a greater burden would be imposed upon the prosecution than if they deemed only a portion of such allegations material. Obviously the substantial rights of defendant could not have been prejudiced by the giving of such instruction.

[6] There is no merit in appellant's contention that the evidence fails to show that he had guilty knowledge of the fraud being perpetrated by him as a means of procuring the money. Much evidence was offered tending to prove a number of other like offenses perpetrated by him, the purpose of which was to establish guilty intent and knowledge. The evidence taken as a whole, together with his acts in connection with those of an associate who was apparently an accomplice, both before and after the commission of the offense charged, as well as acts of defendant occurring on the train after departure from San Diego, is wholly inconsistent with any theory other than knowledge on the part of defendant that he was perpetrating the fraud of which he was accused and obtaining the money by presenting the purported contract to the prosecuting witness, knowing at the time it was a forgery.

Judgment and order affirmed.

We concur: CONREY, P. J.; JAMES, J.

26 Cal. App. 796

PEOPLE v. SELBY. (Cr. 272.)

(District Court of Appeal, Third District, California. March 18, 1915.)

HUSBAND AND WIFE $\hookrightarrow$ 304—ABANDONMENT—DESTITUTE CONDITION—EVIDENCE.

Pen. Code, § 270a, provides that every husband having sufficient ability to provide for his wife's support who willfully abandons and leaves her in a destitute condition, unless by her misconduct he was justified in abandoning her, is punishable by imprisonment, etc. A husband whose wife confessed her improper relations with other men, and then recanted, induced her to enter into an agreement to separate, requiring him to pay \$15 per month for the support of herself and two children, which agreement she entered into without coercion, and with knowledge of his impecunious condition, herself declaring that she would not live with him. After the separation she was received into the family of a relative and cared for, and had her own credit at a general merchandise store, and was not at any time deprived of the necessities of life. *Held*, that the statute was intended to cover cases where the husband without just cause abandons his wife, leaving her in a condition of absolute want, and that defendant was not guilty, because there was neither an abandonment nor a leaving in a destitute condition.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1102; Dec. Dig. $\hookrightarrow$ 304.]

Appeal from Superior Court, Modoc County; C. A. Raker, Judge.

J. C. Selby was convicted of unlawfully abandoning his wife in a destitute condition and failing to provide for her support, and he appeals. Reversed.

Grover C. Julian and A. F. Shartel, both of Alturas, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. By information filed in the superior court of Modoc county the defendant was accused of the crime of unlawfully abandoning and leaving his wife in a destitute condition and failing to provide for her support, as defined by section 270a of the Penal Code. Upon being tried for said offense before a jury, he was convicted thereof, and thereafter, and within legal time, the court sentenced him to imprisonment in the state prison at Folsom for the term of two years. This appeal is prosecuted by the defendant from the judgment, and is supported by a transcript of the testimony.

Section 270a of the Penal Code reads:

"Every husband having sufficient ability to provide for his wife's support, or who is able to earn the means of such wife's support, who willfully abandons and leaves his wife in a destitute condition, or who refuses or neglects to provide such wife with necessary food, clothing, shelter or medical attendance, unless by her misconduct he was justified in abandoning her, is punishable by imprisonment in the state prison, or in the county jail, not exceeding two years, or by fine not exceeding one thousand dollars, or * * * both."

The important facts are undisputed, and may thus be briefly stated:

The defendant and his wife had been married for a period of nearly four years at the time of the trial of this case. To them, during that time, were born two children, the younger still nursing at its mother's breast when the trial took place. It appears that a short time before his arrest, the defendant conceived a suspicion that his wife was unfaithful to him; that she was holding clandestine meetings with other men and sustaining immoral relations with them. He finally revealed to his wife his suspicions, and directly accused her of misconduct with other men. She admitted to him the truth of the accusation, confessing that two different men had, on divers occasions, had sexual relations with her. This occurred on the night of the 27th day of March, 1914. On the following morning the wife contradicted her story of wrongdoing, declaring to her husband that there was no truth in it, and explaining that, he having been so persistent in his asseverations of her guilt, she merely told him the story to pacify him for the time. He, however, insisted that she had done wrong, and persisted in expressing the belief that her confession of the night before was founded upon the truth. He then persuaded her to accompany him to the office of the justice of

the peace of the town of Alturas, where they then, and had during the major part of their married life, resided, and, upon appearing before that officer, related to the latter their domestic differences, and stated that his wife was in need of medical treatment, and that she ought to be committed to a hospital. The justice attempted to effect a reconciliation between the parties, but without avail. Both positively stated in the presence of that officer that they would not live together in the future. The couple then departed together from the office of the justice of the peace, and immediately repaired to the office of the district attorney of Modoc county. There they met the district attorney, and to him related the story of their domestic difficulties. The testimony of that officer was not contradicted in any important particular, and therefore in his language may best be told what transpired between the parties at his office.

"Mr. Selby was relating quite a good deal of their difficulties to me, and Mrs. Selby was also adding words of explanation here and there, and they were giving me quite a detailed account of the troubles they had been having, and one thing and another, and it appeared to me that their affairs had reached a state where they could no longer live together with any satisfaction to each other; and I made a remark to that effect to them. My remembrance is that Mrs. Selby was the first to speak, and she said, in substance, that she did not expect to ever live with Mr. Selby again, and Mr. Selby, as I remember it, acquiesced to this statement, that their affairs had reached a state where they could be no longer together with any satisfaction to each other as husband and wife, and that they might as well separate. This was merely the substance of it. I would not attempt to repeat a verbatim account of it. I then made the remark to Mr. Selby that he would have to make some provision for Mrs. Selby and the children. First I asked if they had any property. They said, 'No.' I then remarked to Mr. Selby that he would have to make some provision for Mrs. Selby and the children; and then there was some considerable discussion followed, and it was finally agreed that Mr. Selby should pay Mrs. Selby \$15 a month, and my remembrance is that I turned to Mrs. Selby and asked her if that was satisfactory to her. She expressed herself as being satisfied; and Mr. Selby then attempted to interpose a condition that Mrs. Selby should keep away from the Ed. Dorris home. I told him that as long as they agreed to separate, and he was going his way without restrictions, he had no right to interpose any conditions upon her, that the Dorrises were relatives of hers, and it was but natural that she should want to go to those interested in her, and it was a restriction he had no right to interpose, and he urged the point no further."

The defendant and his wife, after having made the agreement above mentioned, departed from the district attorney's office, the latter going to her mother's home, and later to the home of her uncle, a Mr. Dorris, with whose family she lived up to the time of the trial. It appears, however, that before she left her mother's home, the defendant called on her and stated that he intended to sell their household goods. He then went to their former home, and she followed a short time thereafter; her purpose in doing so being to secure possession of certain articles of cloth-

ing belonging to her and the children. Upon her arrival at their home a quarrel between her and the defendant ensued. There is some conflict between the defendant and his wife with respect to what transpired between them at that time. She testified that after placing certain articles of her own in a trunk he ejected her from the house and locked the doors thereto, and thus prevented her from again entering the house and obtaining what belonged to her. The defendant testified that the reason he did not desire that she should remain in the house was because he had often heard her threaten self-destruction; that he knew that there were several different kinds of poison in the house; and that, although he believed she was merely "bluffing" when threatening to take her own life, he nevertheless felt some apprehension that she might do so if she found the poison. He further testified that after he had put her out of the house she broke a window, and through it re-entered, after which he again ejected her, and again locked the doors. He said that he did not prevent her from obtaining possession of her own wearing apparel.

Nothing further occurred between the parties until the 30th day of March, 1914—two days after the agreement of separation was entered into between them—when the defendant was arrested upon the charge of which he was convicted in this case and placed in the county jail, and thus in the custody of the sheriff of the county, and there remained up to the time of the trial, and, so far as we are advised to the contrary, is still in said jail. His wife and children during that time lived at the home of her uncle, the Mr. Dorris heretofore referred to.

At the time of his arrest the defendant was without means. Mrs. Selby testified that, in her opinion, he could not have had in his possession an amount of money exceeding \$1. The defendant testified that all the money he had at that time was the sum of 25 cents. Both the defendant and his wife testified that he owned no property of any kind. It appears, however, that prior to his arrest and incarceration in the county jail on the present charge his credit was good at a general merchandising store owned and conducted by a Mr. Thomas, who testified that the defendant had maintained an account with him, and that Mrs. Selby often came to the store and bought various articles of merchandise on his account. He further said that the arrangement whereby the defendant's wife was enabled to purchase goods at his store on her husband's credit had never been revoked, although (he continued to say) he would not let her have merchandise on her husband's account so long as he remained in jail and was thus deprived of the opportunity to earn money with which to pay his debts. He declared, however, that Mrs. Selby could, notwithstanding that her husband was in jail, se-

cure merchandise at his store on her own account.

The defendant testified that at the time Mrs. Selby left their home there was "a good supply of provisions in that house," and "is at present, if they have not been removed," and that she could have gone to the house if she had desired to. Mrs. Selby, although giving testimony in rebuttal, did not contradict this statement.

It may be added that the testimony shows without contradiction that the defendant, who was a common laborer, had always been a hard-working, industrious man, and had, prior to his arrest, provided well for his family.

The foregoing embraces an accurate statement of the facts which were established at the trial and upon which the jury founded their verdict of conviction in this case.

Our conclusion is that the verdict is wholly without justification under the proofs, and that to sustain and execute it would result in manifest injustice.

The statute upon which the information is based was obviously intended to cover those cases where the husband, without just cause, has willfully abandoned his wife and left her without means or resources and in a condition of absolute want—a condition in which she is unable to procure for herself the ordinary or common necessities essential to the sustenance of life. This is, indeed, the natural meaning of the word "destitute" or "destitution," and the sense in which it is undoubtedly used in the statute. The uncontradicted evidence clearly shows that the wife in this case was not left in a "destitute condition" by the defendant. Immediately upon the separation between herself and husband taking place, she was received into the family of a relative, and there taken care of. Moreover, she had credit at a general merchandising store, where, according to the owner of the store, she was privileged to obtain merchandise on her own credit. She did not, nor did any other witness, testify that after the separation she was at any time deprived of the necessities of life. The only proof upon that matter was that the defendant did not provide those necessities. While it was, of course, his duty to furnish her with such necessities, it was no crime for him not to do so if she was not actually in want of them, even though he might have abandoned her within the meaning of the statute. See *State v. Thornton*, 232 Mo. Sup. 298, 134 S. W. 519, 32 L. R. A. (N. S.) 841, 844.

But the above is not the only important consideration which stamps the verdict as an unjustifiable and erroneous conclusion from the evidence. We fail to see wherein the act of the defendant constituted an abandonment of his wife within the meaning of section 270a of the Penal Code. The uncontradicted evidence shows that the separation was the

result of the mutual agreement of the parties. So far as the record discloses, there was no duress or coercion practiced by the defendant to bring about the separation. He evidently believed his wife's confession that she had sustained immoral relations with other men, notwithstanding that she subsequently asseverated that the story was a pure invention. Because of that confession, he insisted upon a separation, and, if he still honestly believed, after her recantation of her confession, that she had been unfaithful in her marital obligations, he had the legal, even if not the moral, right to insist upon a separation, and such insistence would not of itself involve duress or coercion. But she, too, declared that she could and would no longer live with the defendant, and was, equally with the latter, not only agreeable to the fact and act of separation, but also to the terms of the agreement. In brief, the agreement to separate was the culmination of the mutual, free, and voluntary acts of both parties. Under these circumstances, there could be no abandonment of the wife by the defendant.

There can be no claim that the wife was in any manner or degree misled as to the defendant's financial condition before and at the time the agreement to separate was made. She knew, and, indeed, testified that she knew, when the agreement was entered into, that the defendant had neither money nor property of any other character. She therefore knew, when she made the agreement to separate upon the terms indicated, that the defendant, in order to carry out his part of the agreement, would be required to secure employment whereby he would be enabled to earn money. It was doubtless for this reason that no particular time for the payment of the initial and other monthly installments which he was to make to her was specified or agreed upon in the agreement. Thus it clearly appears that she entered into the agreement freely and voluntarily and with full and complete knowledge of the defendant's impecunious condition. And, so far as anything to the contrary is shown by this record, the defendant entered into the agreement in good faith and with the intention of carrying it out, if given a reasonable opportunity to do so. This was denied him; for, as has been shown, on the third day after the agreement was made, he was placed under arrest upon the charge of which he here stands convicted.

At all events, we are firmly of the conviction that, under the conceded facts, the defendant neither abandoned his wife nor left her in a destitute condition within the true meaning or contemplation of section 270a of the Penal Code.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

27 Cal. App. 23

PEOPLE v. CASSOU. (Cr. 503.)

(District Court of Appeal, First District, California. March 22, 1915.)

1. FALSE PRETENSES $\Leftrightarrow$ 13—OFFENSE—"EVIDENCE OF DEBT"—"PERSONAL PROPERTY."

Under Pen. Code, § 532, declaring that every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds another of real or personal property, shall be punishable as for larceny, and section 7, subd. 12, declaring that an evidence of debt is "personal property," the making of a note and the procuring of its indorsement by false pretenses was not an offense, since the indorsement was not an "evidence of debt" while the note remained in the hands of defendant; though a note in the hands of the payee or any other person than the maker is an evidence of debt, and, as such, is "personal property" which may be the subject-matter of the offense of obtaining property by false pretenses.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 17; Dec. Dig. $\Leftrightarrow$ 13.]

For other definitions, see Words and Phrases, First Series, Evidence of Debt; also First and Second Series, Personal Property.]

2. BILLS AND NOTES $\Leftrightarrow$ 63 — INDORSEMENT—EFFECT.

Neither a note nor the indorsement thereof has any legal existence until delivered to and accepted by the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 95-103; Dec. Dig. $\Leftrightarrow$ 63.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Basile Cassou was charged with the felonious obtaining of personal property by false pretenses. Demurrer to information sustained, and the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen. (Halsey Rixford, of San Francisco, of counsel), for the People. E. L. Webber and Fitzpatrick & Greeley, all of San Francisco, for respondent.

LENNON, P. J. The defendant in this case, in an information filed in the superior court of the city and county of San Francisco, was charged with the felonious obtaining of personal property by false pretenses. The defendant's demurrer was allowed upon the ground that the information did not state facts sufficient to constitute a public offense. A judgment of dismissal was thereupon entered, from which the people have appealed.

The information charged the defendant with having induced one G. F. Vella, by means of false pretenses, to make and deliver to the defendant the following promissory note:

"\$600. San Francisco, Cal., May 4, 1912.

"One day after date, 1912, at 3 o'clock p. m. of that date (no grace), for value received in gold coin of the government of the United States, I promise to pay to the order of Bank of Italy in this city six hundred dollars, with interest from date at the rate of 7 per cent. per annum until paid, payable monthly, both principal and interest payable in like gold coin.

"[Signed] Basile Cassou."

This note was indorsed by Vella, and following his signature as indorser appears the following:

"For value received * * * hereby waive presentation, due protest, notice of protest, and notice of nonpayment.

"[Signed] G. F. Vella."

[1, 2] The information alleged that the note was of the value of \$600 in gold coin of the United States, and that it was the personal property of Vella.

Section 532 of the Penal Code defines the offense of obtaining money, property, etc., by false pretenses, and that section, in so far as it is pertinent to the facts of the present case, reads as follows:

"Every person who knowingly and designedly, by any false or fraudulent representations or pretense, defrauds any other person of * * * property, whether real or personal, * * * is punishable in the same manner and to the same extent as for the larceny of the * * * property so obtained."

An evidence of debt is personal property. Pen. Code, § 7, subd. 12.

Admittedly a promissory note in the hands of the payee or any other person than the maker is an evidence of debt, and, as such, is personal property which may be the subject-matter of the offense of obtaining property by false pretenses. People v. Summers, 115 Mich. 537, 73 N. W. 819; People v. Skidmore, 123 Cal. 267, 55 Pac. 934; People v. Reed, 70 Cal. 529, 11 Pac. 676. While the information in the present case avers that Vella, the complaining witness, was induced by certain false pretenses to make and deliver to the defendant the promissory note set out in the information, nevertheless it is apparent from an inspection of the note itself that the defendant alone was the maker, and that Vella was merely an indorser. Therefore, in so far as ownership was concerned, Vella, had no interest in the note, and, when read and construed in its entirety, it is apparent that the information charges the defendant with nothing more than procuring Vella's indorsement of the note by false pretenses. That this was the purpose and intent of the information was admitted by the Attorney General upon the oral argument of the case here. Neither the note nor the indorsement thereon had any legal existence until delivered to and accepted by the payee. Randolph on Commercial Paper, § 216, p. 397; Clark v. Sigourney, 17 Conn. 511; Dann v. Norris, 24 Conn. 332; Mott v. Smith, 2 Cranch, C. C. 33, Fed. Cas. No. 9,882; Cook v. Litchfield, 9 N. Y. 279. Consequently, Vella's indorsement of the note was not an evidence of debt while the note remained in the hands of the defendant. This being so, it is apparent upon the face of the information that the subject-matter of the alleged false pretenses, viz., Vella's indorsement, was not property within the meaning of section 532 of the Penal Code.

The case of *People v. Nesbitt*, 102 Cal. 327, 36 Pac. 654, neither holds nor hints that a promissory note which has not passed from the hands of the maker may be the basis of a charge of obtaining property by false pretenses. In that case the information charged that the complaining witness was induced by the false pretenses of the defendant to execute and deliver jointly with the defendant to the Bank of Chico, as payee, a promissory note, and thereupon the bank paid to the defendant the sum called for in the same. The Supreme Court, in commenting upon the sufficiency of the indictment, stated, in effect, that in view of the complicated nature of the facts of the transaction out of which the charge of obtaining property by false pretenses arose, the alleged ambiguities and uncertainties of the information would have been avoided by "a direct allegation in the information charging the defendant with having defrauded Merry [the complainant] of his note, and then the statute defining the offense here charged would have been literally followed." Nothing that the court said in the case last cited was inconsistent with the conclusion reached here. There the court evidently was dealing only with alleged uncertainties of the information, and not with the sufficiency of the facts, and therefore it cannot be said that the case is authority for the proposition that the information would have been sufficient without an allegation that the note involved in the transaction had been delivered to and accepted by the payee.

The case of *People v. Stone*, 9 Wend. (N. Y.) 183, is strongly relied upon to support the people's contention that it was not necessary for the information in the present case to allege that the note in question with Vella's indorsement thereon had been actually negotiated. That case, in so far as the principal point there decided is concerned, has no application to the facts of the present case. There, under a statute which made it a crime "to obtain the signature of any person to any written instrument," the defendant was charged in an indictment containing three counts with obtaining the promissory note of one Filley, and his indorsement to three other promissory notes. The court, in discussing objections to the indictment, said:

"The first and second counts of the indictment expressly aver that Filley was charged as indorser upon the notes mentioned therein, and which it is alleged he was induced to indorse by the false pretenses of the defendant, and that he had been obliged to pay, and had actually paid, the same. Filley could not have been charged as indorser, *unless the notes had been negotiated* [italics are ours], and their payment by him, whoever was the holder at the time, must have been for the use and benefit of the defendant, for whose accommodation they were indorsed. The third count does not show that Filley ever paid the notes mentioned therein, or that Stone [the defendant] ever parted with them or put them in circulation, or that Filley ever suffered inconvenience or loss in consequence of having signed them. For aught that appears, they may have been immediately destroyed by Stone, or restored to Filley, or may now be in the

hands of Stone, where they are incapable of being used to the prejudice of any of the parties to them. Our Revised Statutes * * * make it an offense in express terms to obtain the signature of any person to any written instrument by any false pretense, with intent to cheat or defraud another. Under this statute, the offense is complete when the signature is obtained, if it were obtained by false pretenses and with a fraudulent intent, although it may never be used to the prejudice of any person. But whether a note, where no use of it has been made, * * * can be considered either money, or goods or chattels, or a valuable thing, may be questionable. It is not, however, important in this case, as the objection has been shown not to exist in relation to the other two counts; and, if any one count is good, it is sufficient. That a note obtained by false pretenses and with a fraudulent intent, and which a party has actually used for his own benefit, is embraced within the spirit of the act as it stood before the Revised Statutes, I have no doubt."

It will thus be seen that in the case last cited the court doubted that a promissory note not used could be considered as within the category of money, goods, chattels, or valuable things, and inferentially held that an indorser of a promissory note could not be charged as such unless the note had been actually negotiated. To this extent at least the case under discussion frustrates, rather than fortifies, the contention of the people here. That the point upon which the indictment in the case last cited was held to be good can have no application to the statute of this state under which the information in the present case was drawn is made manifest by the recital in the opinion that the indictment was founded upon a statute making "it an offense in express terms to obtain the signature of any person to any written instrument by any false pretense with intent to cheat or defraud another." If there be any doubt as to the scope and effect of the opinion in the case last referred to, that doubt is relieved by a consideration of the case of *People v. Genung*, 11 Wend. (N. Y.) 19, 25 Am. Dec. 594, where the same court, in an opinion by the same justice, said:

"It was suggested upon the argument that the indictment was bad in not charging loss or prejudice to have been sustained by Conly [the signer of the note]. This was not necessary. This is a new offense, created by the Revised Statutes. * * * They have added to the statute, as it stood before, * * * the obtaining by false pretenses the signature of any person to any written instrument. The offense is complete when the signature is obtained by false pretenses, with intent to cheat or defraud another. It is not essential to the offense that actual loss or injury should be sustained. This was held in the case of *People v. Stone*, 9 Wend. [N. Y.] 190. That case arose before the Revised Statutes. * * * The offense charged was the obtaining the indorsement of one Filley upon several notes by false pretenses. It was held that such indorsement, where the note was actually passed and made productive, was to be considered as money, goods, or chattels, or other effects, within the meaning of the act. But I expressed a doubt whether a note thus obtained, where no use had been made of it, would be considered either money, goods, or chattels, or a valuable thing; but I also observed that under the Revised Statutes the offense was complete when the signature was obtained."

The case of *Bargie v. U. S.*, Fed. Cas. No. 18,229, cannot be considered as an authority to support the sufficiency of the information in the present case. There the offense charged was founded upon an act of Congress which penalized the procurement by false pretenses of any instrument in writing for the payment of money or other valuable thing. In that case the second count of the indictment charged that the defendant by false pretenses procured the indorsement of the complainant of a sight draft drawn by the defendant upon a third party, and the court held that such an indorsement was an instrument in writing within the meaning of the statute under which the indictment was drawn, and that therefore it was immaterial to the completion of the offense charged whether or not the indorser was ever called upon to meet the obligation of the indorsement. This conclusion and the reasoning upon which it is based cannot, in our opinion, be applied to section 532 of the Penal Code, which limits the subject-matters of the offense charged against the defendant to "money, labor or property."

Our examination of the remaining cases cited in support of the information discloses the fact that the decision in each instance was based upon the interpretation and application of statutes which, in defining the offense of fraud by false pretenses, cover and control the procurement of a signature to an instrument in writing or a valuable thing.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

27 Cal. App. 29

PEOPLE v. KILFOIL. (Cr. 356.)

(District Court of Appeal, Second District, California. March 22, 1915. Rehearing Denied April 20, 1915; Denied by Supreme Court May 20, 1915.)

1. CRIMINAL LAW — 1162 — APPEAL — REVIEW — VERDICT — CONFLICTING EVIDENCE.

Where there is evidence which, though contradicted by other evidence, is sufficient to establish every essential element of the offense, a conviction cannot be disturbed except for errors which prevented the defendant from having a fair trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3085; Dec. Dig. — 1162.]

2. GRAND JURY — 2 — CHALLENGES — STATUTES — CONSTITUTIONALITY.

Pen. Code, § 895, as amended by St. 1911, p. 434, providing that no challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand juror unless when made by the court for want of qualification, as prescribed in the next preceding section, is not unconstitutional.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 1, 17; Dec. Dig. — 2.]

3. CRIMINAL LAW — 603 — CONTINUANCE — ABSENT WITNESSES.

It was not an abuse of the court's discretion to refuse a continuance to the accused to procure evidence, where the affidavits were based on anonymous communications indicating that unnamed persons, while passing the home of

prosecutrix, had heard her exclaim that it wasn't the defendant, where the affidavits gave no assurances that the witnesses could or would be produced if the continuance were granted, and did not establish sufficient diligence in searching for the witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. — 603.]

4. CRIMINAL LAW — 1170½ — APPEAL — HARMLESS ERROR — EXCLUSION OF EVIDENCE.

Error in refusing to permit the cross-examination of prosecutrix as to inconsistent statements was cured, where later in the cross-examination she was permitted to answer other questions whereby she virtually admitted making the inconsistent statements.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. — 1170½.]

5. CRIMINAL LAW — 404 — EVIDENCE — DEMONSTRATIVE EVIDENCE — IDENTIFICATION.

Where the prosecutrix identified capsules shown her by the district attorney as being the ones given her by defendant, and testified that defendant had given them to her in an envelope, that she had taken some, and that those shown her in court had been given by her to the district attorney, the capsules were sufficiently identified to be admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. — 404.]

6. CRIMINAL LAW — 730 — APPEAL — HARMLESS ERROR — MISCONDUCT OF PROSECUTOR.

The district attorney in cross-examining the defendant after securing an admission from him that he had urged prosecutrix to tell her mother of her condition, stated, "but you were too cowardly to tell her yourself." On defendant assigning the question as misconduct, the prosecutor withdrew the statement and the court cautioned him not to make any more remarks of that kind, and instructed the jury to disregard it or any similar remarks. Later the district attorney, after reading to the defendant his testimony before the grand jury, stated "Now that is all the nastiness you repeated in the grand jury, isn't it?" but on objection substituted "That is all the corruption you could think of," and on the court sustaining an objection to that, asked, "That is all the unlawful doing or immoral acts that you could think of at the time you were before the grand jury?" to which objection was again sustained by the court on the ground that the question was an improper and prejudicial characterization of the subject-matter that had been read to the jury. *Held*, that the conduct of the prosecutor, while improper, does not require a reversal where the evidence was such that in view of the court's action in regard thereto, it cannot be reasonably held that a different verdict might have been reached except for such misconduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. — 730.]

7. RAPE — 40 — EVIDENCE — OTHER OFFENSES.

In a prosecution for rape where the fact that prosecutrix had borne a child was first brought out by defendant on cross-examination of her, he could not thereafter introduce evidence of another intercourse between her, and as he could have done if her pregnancy had been proved by the prosecution as a circumstance corroborating her story.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 55-59; Dec. Dig. — 40.]

8. CRIMINAL LAW — 785 — REQUESTED INSTRUCTIONS — CREDIBILITY OF WITNESSES — POLICE OFFICERS AND DETECTIVES.

It was not error to refuse a requested instruction separately designating the testimony

of police officers and detectives, who testified on behalf of the state, and stating a rule of greater strictness in weighing their testimony than in weighing the testimony of other witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776-1781, 1889-1894; Dec. Dig. ☞785.]

9. CRIMINAL LAW ☞829—REQUESTED INSTRUCTIONS—REPETITION OF GIVEN INSTRUCTIONS.

It was not error to refuse a requested instruction on defendant's theory that the prosecution was a trumped-up charge, which instruction stated no rule of law, other than that the evidence concerning his claim should be considered as part of the evidence in the case, and that the burden of proof as to defendant's guilt remains with the prosecution through the case, where that law was entirely covered by the court's instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ☞829.]

10. CRIMINAL LAW ☞939—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—EVIDENCE DISCOVERED AT TRIAL.

Newly discovered evidence consisting of a statement made by prosecutrix to the district attorney inconsistent with portions of her testimony, which became known to the defendant's attorney after the prosecution had rested, does not require a new trial where no request was made for leave to recall the prosecutrix for further cross-examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. ☞939.]

11. CRIMINAL LAW ☞911, 1156—APPEAL—DISCRETION OF COURT—NEW TRIAL.

Motions for a new trial in a criminal case are addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless the record shows an abuse of the discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2134, 3067-3071; Dec. Dig. ☞911, 1156.]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Philip A. Kilfoil was convicted of a rape, and he appeals. Affirmed.

Jennings & Horton and Walter V. Dysert, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was convicted of the crime of rape and sentenced to serve a term in the state prison at San Quentin. From the judgment, and from an order denying his motion for a new trial, he prosecutes this appeal.

[1] The indictment charged that the crime was committed by the defendant on an unmarried female person, whom we shall call the prosecutrix, and whose age was under 16 years. The story as contained in the record is a long one, covering three years' acquaintance between these two persons. The prosecutrix testified to facts which, if truly related, are sufficient, together with the abundant corroborating evidence, to sustain the verdict rendered by the jury. The testimony of the defendant and much other evidence was in strong conflict with that relied on by

the prosecution. Every fact implied in the verdict and essential to the crime is supported by evidence which the jury might reasonably have believed to be true. Therefore, the verdict must not be disturbed unless the record shows errors which have prevented the defendant from having a fair trial and have thus produced an unjust conviction. The errors assigned and discussed in the principal brief of appellant's counsel and the main points involved therein are hereinafter set forth.

[2] The court did not err in refusing to set aside the indictment. Whatever merits the motion for that purpose might have had, in view of Penal Code rules formerly in force, were eliminated by the legislation of 1911 (St. 1911, pp. 435, 434) amending sections 995 and 895, and repealing sections, 164, 896, 897, 898, 899, 900 and 901 of that Code. We do not find in the decision in *People v. Anthony*, 20 Cal. App. 586, 129 Pac. 968, anything to support appellant's claim that section 895 of the Penal Code as amended in 1911 should be held to be unconstitutional.

[3] The defendant moved for a continuance of the trial for the purpose of procuring evidence, and the motion was denied. The affidavits on which the motion was based referred to anonymous communications intimating that sundry unnamed persons, while passing the home of the prosecutrix, had heard her crying and declaring that "it wasn't Phil," etc. One of the affidavits is by one Leila Jones, who, five days before the trial, informed defendant's attorney that a similar hearsay statement had been made to her by a girl whose name she did not remember. The affidavits did not state facts which furnished any definite and satisfactory assurance that such witnesses could or would be produced at a later time if the continuance were granted. There was no abuse of discretion in denying this motion. The court was authorized, on the showing made, to find that defendant had not shown sufficient diligence in searching for these witnesses.

[4] The prosecutrix, on her cross-examination, admitted that she had told another girl that she, the prosecutrix, had had improper relations with one Albert Hall, but with no one else. Thereupon a series of questions followed designed to compel admissions that on certain specified occasions the witness had been questioned about her alleged illicit relations with defendant, and that on those occasions she had made statements inconsistent with her testimony on the direct examination at this trial as to the time when she first had any illicit relations with the defendant. It is earnestly contended in the brief for appellant that the defendant was entitled to a cross-examination of the witness on her testimony concerning the time or times when such relations existed, and that such cross-examination was excluded. The record shows, however, that although the objections

to the questions as first put to the witness by defendant's counsel were sustained, the witness was later permitted to answer other questions whereby virtually she admitted that she had made the statements referred to in the questions which had first been excluded. Taking the cross-examination in its entirety, it does not seem that any prejudicial error occurred.

[5] On cross-examination of prosecutrix the fact was brought into the record that in March, 1914, she gave birth to a child. The fact of the girl's pregnancy did not become known to her mother until the mother's return in January from a visit in the Eastern states. On redirect examination, being asked about things done by defendant to assist in concealing her condition from the mother, prosecutrix said that he gave her medicine and told her that it would keep her from having a baby. The district attorney exhibited to the witness certain pellets or capsules and asked her whether they were the things called medicine to which she had referred. She said they were; that the defendant had given them to her in an envelope to take home, and she had taken some of them; and that those which were produced in court had been given by her to the district attorney. It is contended that the court erred in admitting these capsules as exhibits, over defendant's objection that no foundation had been laid to authorize their reception as evidence. We think that the identification was sufficient.

[6] During the course of defendant's testimony in his own behalf, he denied that he had given any capsules or pellets to the prosecutrix, or any medicine for the purposes mentioned, and denied that he had ever had any improper relations with her. Also, he testified that at the time when he learned from prosecutrix the fact of her pregnant condition, shortly before her mother's return from the East, she told him that one Ed Hall had given her some medicine and had told her not to worry; that that would bring her out of her trouble all right. On cross-examination of defendant, the district attorney questioned the defendant about the testimony that had been given by him as a voluntary statement before the grand jury, and obtained from him the admission that in that statement before the grand jury defendant had not mentioned the fact now testified to by him concerning the medicine which he said that the prosecutrix claimed to have received from Ed Hall. Defendant said that he did not know why he did not mention this matter to the grand jury, other than that it did not occur to him to tell them. It is complained by his counsel that the mode of cross-examination and statements of the district attorney in conducting this cross-examination were improper. The cross-examination was a long one and at times, was tinged with bitterness of language used by counsel on both sides, as well as by the witness. Appellant's counsel in their brief have directed our

attention to 47 pages selected from the transcript, wherein they claim that improper questions and remarks by the district attorney are shown, and we have examined those pages with these criticisms particularly in view. For the most part the charges of misconduct are not sustained, but in some instances they are established. Perhaps the most flagrant example is found at page 299. There, having first obtained an admission from defendant that he had urged the prosecutrix to tell her mother the truth about her condition and had refused to go and help break the news to her mother, the district attorney inquired, "But you were too cowardly to tell her yourself?" Defendant's counsel at once assigned this as misconduct, whereupon the district attorney said, "I withdraw the statement;" and the judge said, "Don't make any more remarks of that kind; the jury are instructed to disregard that remark or any other similar remark of counsel."

Again the district attorney propounded to the defendant a question designed to draw from him the admission that he had given certain testimony before the grand jury. After reading the testimony, of which there were several pages, the district attorney said "Now, that is all the nastiness you repeated in the grand jury, isn't it?" On objection made, the district attorney substituted the words, "That is all the corruption you could think of." The court having sustained an objection, the district attorney modified his question again by saying, "That is all of the unlawful doing or immoral acts that you could think of at the time you were before the grand jury, to tell the grand jury?" The objection was renewed on the same ground, that the question was improper and a prejudicial characterization of the subject-matter that had been read to the witness, and the objection was sustained.

There is no doubt that in these instances, and in some others less pronounced, the district attorney gave examples of conduct very different from that which should characterize the conduct of a prosecuting officer toward the defendant in trying an action of this kind, or in any criminal case. The correct rule of conduct has been insisted upon many times by the Supreme Court and by the district courts of appeal and some verdicts have been set aside on account of flagrant violations of duty in this respect. *People v. Tufts*, 167 Cal. 266, 139 Pac. 78; *People v. Fleming*, 166 Cal. 357, 136 Pac. 291. In the *Fleming* case, 166 Cal. 381, 136 Pac. 301, the court said:

"In view of the very grave doubt as to the guilt of the defendant of the crime charged against him, and in view of the nature of the acts charged against defendant as shown by the testimony of the witnesses for the prosecution, we are of the opinion that, despite the general instructions of the court to the jury to the effect that they must base their verdict exclusively on the evidence, the conduct of the special prosecutor in the matters we have been discussing, which clearly constitute misconduct on his

part, contributed materially to the verdict that was rendered. See *People v. Derwae*, 155 Cal. 592 [102 Pac. 266]. So believing, under the circumstances we have heretofore stated, we consider the case one in which section 4½ of article 6 of the Constitution contemplates a reversal on account of an error or erroneous procedure resulting in a 'miscarriage of justice.'"

The principle set forth in the foregoing statement is applicable here and the question presented is whether or not there is, upon the whole record including the evidence, such a doubt of the guilt of the defendant, and whether the misconduct complained of bears such an important relation to the entire case that it contributed materially to the verdict that was rendered. Can we say from our examination of the entire case that the errors complained of resulted in a miscarriage of justice? Our opinion is that in this case the effect of the misconduct that we have referred to was materially reduced by the rulings of the court, and the instructions then and thereafter given to the jury; and that it cannot reasonably be held that without these actions of the district attorney the verdict would have been different from that which was returned by the jury. It is to be regretted, however, that prosecuting officers should ever so conduct themselves toward a defendant as to give an excuse for raising these questions.

[7] As already noted, the fact that prosecutrix gave birth to a child was first shown by evidence brought out at the instance of the defendant. This was followed by an offer to prove by testimony of the witness Mrs. Frasier that in May or June, 1913, she saw the prosecutrix have intercourse with Albert Hall in a hammock. This testimony was excluded. The ruling was correct. If the fact of pregnancy occurring at the period of time in question had been shown by evidence introduced into the record at the instance of the prosecution, this testimony offered by defendant would have been admissible. The rule is stated in *People v. Currie*, 14 Cal. App. 67, 111 Pac. 108, as follows:

"It is well settled that in cases of this character, where the prosecutrix is under the age of consent, her relations with other men as tending to show want of chastity are immaterial. Here, however, the district attorney had brought out the fact in chief that she was found to be pregnant after defendant's intercourse with her as she testified, the object being to corroborate her testimony by that important fact. * * * Defendant had a clear right to discredit her testimony by showing on cross-examination whether her pregnancy was due to her relations with defendant, or might not have been caused by some other person."

The defendant could have no better right to show that the prosecutrix became pregnant, and that some other person than defendant was responsible for such pregnancy, than to have shown the mere fact of her intercourse with other men if there had been no subsequent pregnancy.

It is contended that the court erred in refusing to give to the jury certain instructions

requested by the defendant. Several of these instructions, though not in the precise words requested, were included in other instructions given by the court. When, under these circumstances, counsel impose upon this court the duty of considering alleged error in the refusal of an instruction, the argument should not be urged without reference to the instructions given on the same proposition, nor as if no such instructions had been given. This is a difficulty that we have to meet in our consideration of many of the appeals presented here in criminal cases, where a little more industry and candor would aid in the proper disposition of cases, and many of the objections that we have to consider as to the refusal of instructions would not be presented at all. For example, it was stipulated that the defendant's reputation for truth, honesty, and integrity in the community where he resides, is good. Defendant's counsel complain because the court refused a certain proposed instruction that this fact stipulated must be found as true. After considering this point, and the authority cited, we at last discover among the many instructions given, one wherein the court instructed the jury directly with respect to that stipulation, and did so in language more strongly favorable to the defendant than was asked for by him.

[8] The court did not err in refusing to give an instruction separately designating the testimony of police officers and detectives who testified "on behalf of the state," and stating a rule of greater strictness in weighing their testimony than in weighing the testimony of other witnesses.

[9] The court did not err in refusing a proffered instruction setting forth defendant's theory that the prosecution was a trumped-up charge, the outgrowth of a conspiracy against him. The proposed instruction stated no rule of law other than that the evidence concerning this claim should be considered as part of the evidence in the case, and that the burden of proof as to defendant's guilt remains with the prosecution all through the case. The law on this question was entirely covered by the instructions given by the court to the jury.

[10] It is contended that the court should have granted defendant's motion for a new trial on the ground of newly discovered evidence. This newly discovered evidence is set forth in an affidavit of the defendant, and has reference to a statement made by the prosecutrix to the district attorney about one month before the case was tried. Affiant says that this typewritten statement came to his hands on May 27, 1914, which was nine days after rendition of the verdict. He says that "not until after the trial of said cause had been concluded did affiant ever see said statement or know its contents, nor did affiant have access thereto during said trial or before said trial." So far as this shows,

defendant may have known that a written statement had been made by the prosecutrix at the time mentioned. If he or his counsel had that knowledge during or before the trial, they had the same right then to have it produced for use in court as they would have for the purposes of a second trial. In their reply brief, counsel for defendant admit that they procured this statement after the prosecution had rested its case. This implies that they had it during the remainder of the trial; yet they did not ask permission to recall the prosecutrix for further cross-examination. Looking at the contents of the statement, we find that the principal use that could have been made of it would have been to show thereby that prosecutrix said that her first act of sexual intercourse with defendant was after the death of his sister Lucy, which death occurred in February, 1913, and that this was inconsistent with her testimony at the trial wherein she said that her illicit relations with the defendant first occurred nearly two years before that time.

[11] Motions for new trial are addressed to the sound discretion of the trial court, and its action will not be disturbed unless the record shows an abuse of this discretion, the presumption being that the discretion was properly exercised. "The question as to whether the evidence produced on the motion is such as to render a different result probable is one peculiarly addressed to the discretion of the trial judge, who, in the light of the knowledge afforded by presiding at the trial, is especially qualified to determine as to the probable effect of such evidence." *People v. Feld*, 149 Cal. 464, 474, 86 Pac. 1100, 1103. In the trial of this case it was shown that there were some inconsistencies between the testimony given by the prosecutrix at the trial and some statements previously made by her. Connected with these same matters, the court might well have been of the opinion that the additional circumstance referred to in this affidavit on motion for new trial would not be sufficient to materially affect the weight that would be given to her testimony by the jury; in other words, that the jury was authorized to believe the essential facts to have been as she stated them to be, and that the inconsistent statement made by her in her statement to Mr. Ford was not likely to throw any new light upon her character and reliability as a witness. However this may be, the failure of appellant to avail himself of his opportunity to use the statement when he discovered it, while the case was still open for evidence, is alone a sufficient reason for denying a new trial, so far as that ground of the motion (and no other was presented) is concerned.

The judgment and order denying motion for a new trial are affirmed.

We concur: JAMES, J.; SHAW, J.

27 Cal. App. 15

MINGES v. BOARD OF TRUSTEES OF CITY OF MERCED et al.
(Civ. 1374.)

(District Court of Appeal, Third District, California. March 20, 1915. Rehearing Denied by Supreme Court May 17, 1915.)

1. ELECTIONS — 97 — QUALIFICATIONS — REGISTRATION — "ELECTOR."

Under Const. art. 2, § 1, defining "electors" as persons entitled to vote at all elections which are now or may hereafter be authorized by law, registration is not a qualification of an elector, and cannot be added to the qualifications fixed by the Constitution, but is to be regarded as a reasonable regulation to ascertain who are qualified electors in order to prevent illegal voting.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 92; Dec. Dig. 97.

For other definitions, see *Words and Phrases*, First and Second Series, *Elector*.]

2. MUNICIPAL CORPORATIONS — 108 — ELECTIONS — "ELECTOR" — "QUALIFIED ELECTOR" — "REGISTERED QUALIFIED ELECTOR."

Const. art. 2, § 1, defines electors as persons entitled to vote at all elections authorized by law. Initiative Act 1911 (St. 1911, Ex. Sess. p. 131) § 1, provides that the petition by which any proposed ordinance may be submitted to the legislative body of a city shall be signed by a certain percentage of the qualified electors, and that within ten days from the filing of such petition the clerk shall ascertain from the records of registration whether the petition is signed by the requisite number of qualified electors, and attach a certificate of examination. Pol. Code, § 1083a, as added by St. 1913, p. 225, provides that wherever, by the Constitution or laws, any initiative petition is required to be signed by qualified electors, only a registered qualified elector shall be entitled to sign it. On a petition submitting a proposed ordinance, the city clerk certified, that he had examined the records of registration, and had ascertained that it was signed by the requisite number of qualified electors. *Held*, that a "qualified elector" was one whose qualifications measured up to the constitutional standard; that a "registered qualified elector" was one possessing the constitutional qualifications, and registered under the registration statute; and that the additional qualification that the signers be registered qualified electors, when ascertained and duly certified, complied with the law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. 108.

For other definitions, see *Words and Phrases*, First and Second Series, *Qualified Elector*.]

3. MUNICIPAL CORPORATIONS — 108 — ORDINANCES — INITIATIVE — TIME WHEN EFFECTIVE — CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 4, § 1, provides that in the submission of any question to the electors the general laws of the state shall apply, but makes no provision as to when initiative measures proposed by the electors of a city shall take effect. Pol. Code, § 323, declares that every statute, unless a different time is prescribed therein, takes effect on the sixtieth day after its passage. Initiative Act 1911 (St. 1911, Ex. Sess. p. 131) provides that, if a petition accompanying a proposed ordinance be signed by the requisite number of electors, and contains a request that, if such ordinance be not adopted, it be submitted at a special election, the legislative body shall pass such ordinance within 10 days after it is presented, or call a special election, that on a majority vote it shall go into effect 10 days thereafter, and by section 1 that

an election shall be called not less than 30 nor more than 60 days after the presentation of the proposed ordinance. *Held*, that the fact that the time fixed for a proposed ordinance to take effect was April 1, 1915, and that the result of an election thereon could not be known until after that date, would not prevent its submission to an election, and, if they adopted the ordinance the Initiative Act would determine when the ordinance should be effective.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. ¶108.]

Mandamus by G. W. Minges against the Board of Trustees of the City of Merced and E. L. Alvord and others, constituting the Board of Trustees of the City of Merced. Peremptory writ to issue.

A. R. Schottky, of Merced, for petitioner.
F. W. Henderson, of Merced, for respondents.

CHIPMAN, P. J. It is sought by plaintiff to compel defendants by writ of mandamus either to adopt and pass a certain ordinance, or to call a special election at which said ordinance should be submitted to a vote of the electors of said city. No question arises as to the sufficiency of the petition in respect of its form or the number of petitioners, or that they had the right, under the initiative and referendum statute approved January 2, 1912 (Stats. 1911, Ex. Sess. p. 131), to propose the said ordinance as an initiative measure.

The objections arise on a general demurrer and are: First, that it nowhere appears that the signers of the petition submitting the proposed ordinance were registered qualified electors of the city of Merced at the time they signed said petition; second, that section 10 of the proposed ordinance is in conflict with the initiative and referendum act of 1911, *supra*.

1. Section 1083a of the Political Code (Stats. 1913, p. 225) provides:

"Wherever, by the Constitution or laws of this state, any initiative, referendum, recall or nominating petition is required to be signed by qualified electors, only an elector who is a registered qualified elector at the time he signs such petition, shall be entitled to sign the same."

In the petition to the board of trustees it is declared that:

"The undersigned, each of whom is a resident and qualified elector of and in the city of Merced, respectfully propose," etc.

The certificate of the city clerk reads as follows:

"State of California, County of Merced, City of Merced—ss.:

"I, J. D. Wood, city clerk of the city of Merced, do hereby certify that the foregoing petition was presented to me on the 19th day of December, 1914; that I have examined the same and from the records of registration, to wit, the great register of said county of Merced, have ascertained that said petition is signed by the requisite number of qualified electors.

"I do further certify that the entire vote cast within said city of Merced for all candidates for Governor of said state at the last preceding general election at which such Governor was voted for was 1,373; that said petition is

signed by more than 280 electors, the number of which is not less than 20 per cent. of said entire vote.

"In witness whereof I have hereunto set my hand and affixed the seal of said city this 28th day of December, 1914.

"[Seal of Said City.]

"[Signed] J. D. Wood,

"City Clerk of Said City of Merced."

[1] Except certain persons especially mentioned, the Constitution (article 2, § 1) prescribes who are electors; i. e., persons "entitled to vote at all elections which are now or may hereafter be authorized by law." The Constitution thus determines the qualifications of an elector, and it was held, in *Bergevin v. Curtz*, 127 Cal. 86, 59 Pac. 312, that registration is not a qualification of an elector, and cannot add to the qualifications fixed by the Constitution; but it is to be regarded as a reasonable regulation by the Legislature for the purpose of ascertaining who are qualified electors in order to prevent illegal voting.

[2] A qualified elector, then, is a person whose qualifications measure up to the constitutional standard. A registered qualified elector, we take it, is a person who possesses the constitutional qualifications and is registered in accordance with the registration statute.

If the signers of the petition, when they signed the petition, were, in fact, qualified electors as above defined, and if that fact appears by the certificate of the city clerk showing that they are registered, it seems to us the requirements of the statute are fully met. The registered qualified elector entitled to sign the petition and to vote in the city of Merced is a qualified elector whose name appears upon the records of registration, to wit, upon the great register of the county of Merced, at the time he signed the petition. Now, this is precisely what the clerk certified to be the fact, and we cannot see what more should be required to show that the persons signing the petition were at the time "registered qualified electors." It is true the certificate of the clerk might have stated, and perhaps it would have been better if he had so stated, that the great register examined by him was the then and only existing great register of the county. But the petition shows that all the signatures were attached thereto on or subsequent to November 17, 1914, and prior to December 19, 1914, when the petition was presented to the clerk. We must assume that in the discharge of official duty he examined the great register on which the petitioners' names appeared, and that it was the great register then in force.

The initiative act of 1911, *supra*, in section 1, provides that the petition by which "any proposed ordinance may be submitted to the legislative body of such city or town" shall be "signed by qualified electors of the city or town not less in number than the percentages hereinafter required." The affida-

vit which the statute provides shall be made respecting each signer must show that he is "a qualified elector of the city or town." The act then provides:

"That within ten days from the date of filing such petition the clerk shall examine, and from the records of registration, ascertain whether or not said petition is signed by the requisite number of qualified electors and he shall attach to said petition his certificate showing the result of said examination."

It will be observed that the act deals with qualified electors, and says nothing about registered qualified electors. It is only in section 1083a of the Political Code that mention is made of registered qualified electors. This section was added to the Political Code in 1913 (Stats. 1913, p. 225). It adds nothing to the procedure prescribed by the act of 1911, and only requires that it appear by the certificate of the clerk that the signers to the petition are registered qualified electors. This additional qualification can only be ascertained from the records of registration, to wit, the great register, and, when thus ascertained and duly certified to, the law is, in our opinion, fully complied with. There is nothing in *Davenport v. City of Los Angeles*, 146 Cal. 508, 80 Pac. 684, casting any doubt upon our conclusion. In that case (which was one of recall of an officer) the law required the clerk to ascertain the number of electors by an inspection of the great register. His certificate failed to show that he ascertained the requisite facts from the great register.

In the view we have taken of the question we are but following the injunction found in the initiative act that:

"All the provisions of this statute are to be liberally construed for the purpose of ascertaining and enforcing the will of the electors."

[3] 2. The proposed ordinance had for its object the regulation, sale, and distribution of alcoholic liquors within the city of Merced and to provide penalties for its violation. Section 10 provides as follows:

"This ordinance shall take effect and be in force on the first day of April, 1915, and any money that shall have been paid to the city of Merced before said date as license money for the sale of alcoholic liquors in said city of Merced after said first day of April, 1915, shall be refunded and repaid to the person or persons who have paid the same."

The initiative act provides that, if the petition accompanying the proposed ordinance be signed by the requisite number of electors, and contains a request that if such ordinance be not adopted it be submitted forthwith to a vote of the people at a special election (the petition made such request), "then the legislative body shall either: (a) Pass such ordinance without alteration at the regular session at which it is presented and within ten days after it is presented; or (b) forthwith the legislative body shall proceed to call a special election at which such ordinance, without alteration, shall be submitted to a vote of the electors of the city or town."

The alleged conflict between section 10 of the proposed ordinance and the initiative act is claimed to exist in this: That, should the ordinance be submitted to a vote of the people, the initiative act provides, among other things, that:

"If a majority of the qualified electors voting on said proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city or town, and be considered adopted upon the date that the vote is canvassed and declared by the canvassing board, and go into effect ten days thereafter."

Section 1 of the act provides that:

"When a special election is to be called under the terms of this section, it shall be held not less than thirty nor more than sixty days after the date of the presentation of the proposed ordinance to the legislative body, and shall be held as nearly as may be in accordance with the election laws of the state."

Respondent points out that, if the election had been called within the shortest time possible, the election would have been called on February 4, 1915; that, "under section 1278 of the Political Code, the canvassing board would have met on the 8th day of February, 1915, and the ordinance would have gone into effect on the 18th day of February, 1915; such a result," continues the brief, "would be in direct conflict with the provisions of the ordinance, which are to the effect that the ordinance shall not take effect until the 1st day of April, 1915." Hence the invalidity of the ordinance, for the reason that neither the municipality has power, nor have the people by initiative, to pass an ordinance in conflict with the general law. The conclusion reached by respondents is that in all cases where ordinances are proposed under the powers reserved to the electors through the initiative by section 1, art. 4, of the Constitution, the proposed ordinance should be silent as to when it is to take effect, leaving the initiative act to fix the date; in short, that the electors have no power to say when the proposed ordinance shall take effect, and in doing so the ordinance would be invalid.

The Constitution makes no provision as to the time when acts of the Legislature shall go into effect. Undoubtedly the Legislature may designate the time. When it fails to do so, the Political Code (section 323) declares:

"Every statute, unless a different time is prescribed therein, takes effect on the sixtieth day after its passage."

The Constitution (section 1, art. 4) reads:

"The legislative power of this state shall be vested in a Senate and Assembly which shall be designated 'the Legislature of the state of California,' but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their * * * option, to * * * adopt or reject any act, or section or part of any act, passed by the Legislature. 'The enacting clause of every law shall be 'the people of the state of California do enact as follows.' The first power

reserved to the people shall be known as the initiative."

Then follow provisions prescribing the mode of exercising this power, reserved to the people generally, in respect of enacting general laws to be voted upon by the qualified electors of the state. The Constitution then reads:

"The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the state, to be exercised under such procedure as may be provided by law. * * * In the submission to the electors of any measure under this section, all officers shall be guided by the general laws of this state, except as is herein otherwise provided. This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved."

The Legislature, by the act of 1911, *supra*, provided for the procedure for the exercise of the power to initiate measures by counties, cities, and towns, but nothing in the act was intended to limit or restrict the power given by the Constitution, and the Constitution expressly forbids any limitation or restriction on the power by the enactment of legislation. The power to initiate legislative measures reserved to the electors of counties, cities, and towns (except in cities or cities and counties having charters adopted under the provisions of section 8 of article 11 of the Constitution) is as comprehensive as the power residing in the Legislature. The Constitution makes no provision as to when initiative measures proposed by the people of the state or by the electors of a county, city, or town, shall take effect.

The power to initiate a measure for the government of the people of a county, city, or town carries with it the power to prescribe when it shall go into effect, the same as the power to enact a law by the Legislature implies the power to fix the time when it shall take effect. The statute, as we have seen (Pol. Code, § 323), fixes the time when the Legislature has failed to do so. The initiative act of 1911, *supra*, in our opinion, was intended to accomplish a like object in cases where an ordinance proposed by the electors of a county, city, or town fails to prescribe the time when it is to take effect. The act does not, in words, as does the Political Code, provide that the ordinance shall go into effect at a specified time "unless a different time is prescribed therein," but, fairly construed, we think this is its meaning. The suggestion of respondent that, if the time can be fixed by the proposed ordinance for it to take effect, the date might be postponed to some remote period a decade hence, presupposes that the electors may incorporate an unreasonable or absurd provision on this subject. The power is not to be measured by the possibility of its being abused. We must assume a reasonable exercise of it by the electors.

The power residing in the Legislature to declare when its acts shall take effect is open to the same objection now urged respecting the power to initiate measures, but no one could question its exercise by the Legislature. As the power to initiate legislative measures is as comprehensive as the power residing in the Legislature, the power to say when an act shall take effect resides alike in both the Legislature and in the electors when proceeding by the initiative.

In the present case the time fixed for the ordinance to take effect is April 1, 1915. Obviously, should respondents refuse to adopt the proposed ordinance and resort to the alternative of submitting it "forthwith" to the electors, the result cannot be known until after April 1, 1915. But this, we think, should not prevent its submission to a vote at the polls. The provision as to its taking effect would be inoperative, and the statute would fix the time. The main object to be achieved by the electors in proposing the ordinance was to bring about the regulation of the liquor traffic, and that object may not be thwarted by obstructions which it is within the power of the board of trustees or by the electors resorting to the referendum or otherwise to interpose, and thus making inoperative the provision fixing the time when the ordinance shall take effect. The reasonable view to take of such a situation, and one warranted, we think, by canons of construction, is that resort must be had to the initiative act itself to determine when, if adopted by the board of trustees or by the electors at the polls, the ordinance shall take effect. Any other construction would make easy the defeat of every measure proposed by the initiative in which the time is fixed for it to take effect.

Our conclusion is that the peremptory writ should issue as prayed for, and that respondents should either adopt the ordinance or forthwith submit it to a vote of the electors of the city of Merced in accordance with the requirements of the initiative act; and it is so ordered.

We concur: BURNETT, J.; HART, J.

27 Cal. App. 39

AGNEW et al. v. NELSON et al. (Civ. 1480.)

(District Court of Appeal, First District, California. March 23, 1915. Rehearing Denied April 22, 1915; Denied by Supreme Court May 20, 1915.)

1. VENDOR AND PURCHASER ⇨317—REMEDIES OF VENDOR—FINDING—"MERCHANTABLE"—"MARKETABLE"—"MARKETABLE TITLE"—"GOOD AND PERFECT TITLE."

In an action to recover a deposit by the purchaser on a land contract which the vendor's agent had returned to the purchaser, a finding that the objections of the purchaser to the title were not good or valid, and that the title to the property was good and merchantable, was equivalent to a finding that the objections,

even if sufficient on their face to warrant the refusal of the property, were not true in fact, since the word "merchantable," though ordinarily used in connection with mercantile contracts to signify the salability of goods, was used in such finding as synonymous with "marketable," and a "marketable title" to real property is one in which there is no doubt involved, either as a matter of law or fact, a good and perfect title, and a "good and perfect title" has been defined to be one which is apparently and in fact free from any reasonable objections.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 934-937; Dec. Dig. ☞317.]

For other definitions, see Words and Phrases, Second Series, Marketable; also First and Second Series, Merchantable; Merchantable Title; Good and Perfect Title.]

2. APPEAL AND ERROR ☞907 — QUESTIONS PRESENTED FOR REVIEW—FINDINGS OF FACT—ABSENCE OF EVIDENCE.

Where the evidence is not before the appellate court, the findings of fact must be taken to be true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. ☞907.]

3. VENDOR AND PURCHASER ☞315 — REMEDIES OF VENDOR — BURDEN OF PROOF — DEFECTS IN TITLE.

In an action by the vendor against the purchasers and the vendor's agent to recover the deposit which the agent had returned to the purchaser, where the answer alleged that there were defects in the vendor's title, some of which were still in existence, the burden was on defendant to prove, not only that the defects were valid, but that they were subsisting.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 928-931; Dec. Dig. ☞315.]

4. APPEAL AND ERROR ☞931—REVIEW—PRESUMPTIONS—FAILURE TO FIND.

On appeal in such action on the judgment roll, it must be assumed that, if a finding as to the continued existence of the defects was necessary, the court failed to so find because of the absence of any evidence in the case on that issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3723, 3762-3771; Dec. Dig. ☞931.]

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Jessie B. Agnew and another against J. M. Nelson and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Robert R. Syer, C. L. Witten, and Owen D. Richardson, all of San Jose, and P. A. Bergerot, of San Francisco, for appellants. Fry & Jenkins, of San Jose, for respondents.

PER CURIAM. This action was instituted by the plaintiffs against the defendant Nelson to recover the sum of \$1,000. The plaintiffs' cause of action rested upon a common count for moneys had and received. The defendant Nelson by his answer denied having received any money for the use and benefit of the plaintiffs, and pleaded as a further defense the execution of a contract by himself, as the agent of the plaintiffs, with one B. Cassou for the purchase and sale of certain

real estate for an agreed price, under the terms of which the defendant received from Cassou the sum of \$1,000 as a deposit and as part payment on the purchase price of the property. The defendant's answer further alleged that the contract of purchase and sale provided that, if the plaintiffs' title to the property which was the subject-matter of the contract did not prove good, the deposit and part payment of \$1,000 was to be returned to Cassou, that the plaintiffs' title to the property was found to be defective, and that therefore Cassou demanded of the said defendant the return of the \$1,000. Because of these facts the answer of the defendant Nelson averred that the rights of all of the parties to the transaction in suit could not be fully and rightfully determined without the presence of Cassou as a party to the action. Accordingly Cassou was made a party defendant.

The defendant Nelson counterclaimed against Cassou in the sum of \$1,000 for services alleged to have been rendered the latter. Cassou, answering the plaintiffs' complaint and the cross-complaint of the defendant Nelson, averred that under the terms and conditions of the contract of purchase and sale he was entitled to a return of the \$1,000 paid by him to the defendant Nelson, because of certain defects in the plaintiffs' title to the property, which defects, it was alleged, had been in writing specifically called to the attention of the plaintiffs. Incidentally Cassou counterclaimed against the defendant Nelson; but, inasmuch as the issues raised as between these defendants by their respective pleadings are not involved upon this appeal, they need not be narrated. It will be noted that, of the several objections alleged to have been originally made to the plaintiffs' title to the property by Cassou, only two were alleged in his answer to be in actual existence and not removed at the time of the commencement of the action.

The trial court found that these two objections were not "good or valid" and that the said title to said property was good and merchantable." Judgment was entered for the plaintiffs and against the defendant Nelson for the sum of \$1,000. The judgment declared that:

"The claim of the defendant Cassou was without right, and that he had forfeited to the plaintiffs the \$1,000 deposited with and paid to the defendant Nelson under the terms of the contract."

Both defendants have appealed from the judgment upon the judgment roll alone.

[1, 2] The only point made in support of the appeals is that the findings are insufficient to support the judgment because the court failed in so many words to find whether or not the two alleged unremoved and existing objections finally interposed by the defendant Cassou to the plaintiffs' title to the real property involved in the transaction

were true and well founded at the time the plaintiffs tendered and the defendant Cassou refused to accept a deed to the property. The evidence upon which the findings are based not being before us, we are unable to say whether or not the objections made to plaintiffs' title were good or valid, and in the absence of the evidence the finding that such objections were not good or valid will be deemed to be correct. But, conceding that the objections to plaintiffs' title finally interposed and relied upon by the defendant Cassou would have been, if true in fact, sufficient to have warranted him in refusing to conclude the purchase of the property, still we are of the opinion that the findings as a whole are to the effect that such objections had no foundation in fact.

The finding that those objections were not "good or valid" must be considered and construed in connection with the further finding that "the said title to said property was good and merchantable." The word "merchantable" is usually, if not exclusively, employed in mercantile contracts, and, strictly speaking, signifies the salability of merchandise with regard to "quality or medium quality of goodness." *Pacific Elevator Co. v. Bravinder*, 14 Wash. 315, 44 Pac. 544; *Riggs v. Armstrong*, 23 W. Va. 760. We have no doubt, however, that the word "merchantable," as used in the findings of the trial court, was, under the circumstances of the present case, intended to be, and may fairly be said to be, synonymous with the word "marketable" as usually applied and ordinarily understood when used with reference to the title to real property. A "marketable title" to real property is one in which there is no doubt involved, either as a matter of law or of fact. *Herman v. Somers*, 158 Pa. 424, 27 Atl. 1050, 38 Am. St. Rep. 851. In other words, a "marketable title" is a "good and perfect title"; and a good and perfect title has been defined to be one which is apparently and in fact free from any reasonable objection. *Peckham v. Stewart*, 97 Cal. 147, 31 Pac. 928. The nonexistence in point of fact of the two objections interposed to the plaintiffs' title would be not only consistent with, but follow as a necessary inference from, the findings as made. This being so, we may construe the findings as a whole to mean that the plaintiffs' title was in fact free from valid existing objections. *Emmal v. Webb*, 36 Cal. 197.

[3] The issue as to the actual existence of valid objections to plaintiffs' title was made by the answer of the defendant Cassou, which among other things alleged "that some of the said defects were still in existence on or about May 27, 1912"; and the burden was upon the defendant Cassou to show, not only valid, but subsisting, objections to plaintiffs' title. *Maupin's Marketable Title*, 784.

[4] The appeals having been taken upon the judgment roll, we must assume that, if

an express finding as to the existence of the alleged defects in plaintiffs' title was necessary, the trial court failed to so find because of the absence of any evidence upon that issue of the case. *Shirey's Estate*, 167 Cal. 193, 138 Pac. 994; *Schoonover v. Birnbaum*, 150 Cal. 734, 89 Pac. 1108.

The judgment appealed from is affirmed.

170 Cal. 134

In re McCAUSLAND'S ESTATE.
(S. F. 6987.)

(Supreme Court of California. April 30, 1915.)

EXECUTORS AND ADMINISTRATORS 17—PERSONS ENTITLED TO LETTERS—DISQUALIFICATION—ADVERSE INTEREST.

The fact that a sister of an intestate decedent who had, under Code Civ. Proc. § 1365, a preferential right, over the niece, to letters of administration was not seeking the appointment in good faith to preserve the assets, which consisted principally of a claim against the sister's daughter, does not show a want of integrity on her part, which, under Code Civ. Proc. § 1369, would disqualify her, especially where no direct issue was raised by opposition to her petition, and the court cannot add to the disqualifications prescribed by that section, but must grant the letters to her.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. 17.]

In Bank. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Separate applications by Anna W. Grayson and another for appointment as administratrix of the estate of William McCausland, deceased. From an order denying the petition of Anna W. Grayson and appointing the other, the petitioner appeals. Reversed.

Elmer W. Kilgore, of Santa Rosa, and Heller, Powers & Ehrman, of San Francisco, amici curiæ, for appellant. Phil Ware and W. F. Cowan, both of Santa Rosa, for respondent.

HENSHAW, J. William McCausland died intestate in Sonoma county in May, 1912. On January 15, 1914, his niece filed a petition for letters of administration upon the estate of her uncle. She declared the character and value of this estate to be a claim against Rebecca M. Caughey for \$6,500. About 10 days thereafter a sister of the deceased, Anna W. Grayson, who was also the mother of Rebecca M. Caughey, filed her written opposition to the petition. She denied that the deceased had left any estate whatever, "except a few practically worthless effects," and she also filed her petition to be appointed administratrix. The petitions were heard at the same time, and the court made its order appointing the niece administratrix, dismissing the opposition of Anna W. Grayson and denying her petition.

Under section 1365 of the Code of Civil Procedure the sister of the deceased had a preferential statutory right to this appointment (subdivision 5) over the niece (subdivision 7). No formal opposition to the petition of the sister was filed. No finding is made by the court upon which its order denying the petition of the sister is based. This court, reading the evidence, reached the conclusion and expressed it in its former opinion upon this appeal, that the application of the sister was not made in good faith and for the best interest of the estate, the showing in this regard being partly evidentiary and partly argumentative. In brief, the niece's testimony was to the effect that shortly before his death her uncle had \$6,500 in the Cloverdale bank; that he drew \$3,000 of this money and loaned it to one Pinschower—

"and the result of the transaction was that Rebecca M. Caughey got the mortgage from Pinschower executed to her in her own name for the amount of \$3,000, which was loaned by my uncle to Pinschower. Rebecca M. Caughey never turned this money over to my uncle. My uncle was old and feeble and a man of very frugal habits, and spent very little money. He was unable to attend to business and had great trust in my cousin Rebecca M. Caughey, and in her mother, Anna W. Grayson, and they always claimed that they would care for him and advise him."

Upon this evidence the contention and argument of the niece's attorney was as follows:

"We claim that Rebecca Caughey and her mother, Mrs. Grayson, conspired to get William McCausland's money, and that Mrs. Grayson is now seeking to be appointed administratrix solely for the purpose of denying the petitioner, Amy McCausland Bower, an adequate remedy against Rebecca Caughey and Anna W. Grayson, and that Mrs. Grayson is lacking in integrity, and is not competent for that reason to serve as administratrix in this estate."

The view of this court first expressed was to the effect that the judge in probate was justified, under the facts and circumstances shown, in denying the petition of the sister, upon the ground that she was not seeking in good faith to preserve and administer the estate of her deceased brother. The petition for rehearing was granted for the consideration of the argument advanced that the Code of Civil Procedure itself, in section 1369, has specifically defined all of the acts and facts justifying a refusal to issue letters to one otherwise entitled to receive them under section 1365; that it was not permissible for the court in probate, nor yet for this court, to add any grounds of incompetency or disqualification other than those expressed in

the statute; that this had repeatedly been declared, and specifically in *Estate of Brundage*, 141 Cal. 538, 75 Pac. 175, where it is said, "Our statute prescribes the grounds of disqualification, and the courts have no right to add to the disqualifications prescribed by statute;" that to the same effect are the decisions of this court in *Re Bauquier*, 88 Cal. 302, 26 Pac. 178, 532, and in *Re Carmody*, 88 Cal. 616, 26 Pac. 373; that in the last-mentioned case the specific finding of the court was to the effect that the husband, seeking letters upon the estate of his wife, was incompetent because "the said application of said John Carmody is made, not in good faith, but for the purpose of obtaining possession of the estate of deceased for his own, and to deprive the heirs and creditors of said estate from any participation therein, and that said John Carmody is wanting in integrity in that regard"; that notwithstanding this finding, this court declared that the fact that the court in probate found that the application was not made in good faith, in that the husband claimed all the estate for his own, did not show such a lack of integrity as to disqualify the petitioner under section 1365, Code of Civil Procedure. And, finally, it is argued, that under the *Estate of Gordon*, 142 Cal. 125, 75 Pac. 672, neither the trial court nor this court, in the absence of a direct issue raised upon the question of incompetency, is entitled to find and pass upon the matter merely because of the appearance in the record of such evidence as is here presented, tending to reflect upon the bona fides of petitioner's application.

We are of the opinion that this reasoning, under our statutes and decisions, is unanswerable; that the court in probate therefore erroneously granted letters to the niece, and erroneously denied the petition of the sister. In conclusion it may be added that the law affords ample remedies to all parties interested in the estate against the acts of any administrator who may be found not to have the best interests of the estate at heart. In the first instance, they will be protected by an adequate bond exacted of the administrator, and in the next, he is subject to prompt removal for any unwarranted failure to recover and preserve the estate's assets.

The decree appealed from is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.

170 Cal. 122

SPARKS v. MAUK et al. (S. F. 6476.)

(Supreme Court of California. April 29, 1915.)

1. APPEAL AND ERROR ¶1039 — ISSUES, PROOF, AND VARIANCE—HARMLESS ERROR.

A variance between allegation and proof in no way affecting any of the substantial matters in controversy and susceptible of correction by amendment is immaterial, and not fatal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. ¶1039.]

2. CONTRACTS ¶34 — REQUISITES — SIGNATURE.

Where a contract contemplates its execution by signing, either party has the right to insist upon the condition, and mere acts of performance on the part of one who has not signed it will not validate it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 162-166; Dec. Dig. ¶34.]

3. SPECIFIC PERFORMANCE ¶101 — CONTRACTS ENFORCEABLE—CONTRACT NOT SIGNED—ESTOPPEL BY PART PERFORMANCE.

Plaintiff sold his fuel and feed business to defendants for a note for \$1,000, and repurchased the business for \$1,085, and the value of the stock on hand, the note to be received to the extent of \$1,027, and tendered the note and the difference, and dismissed an attachment previously made in a suit on the note, and took possession and conducted the business. *Held*, there was a part performance and an agreement to its terms by both parties, and, in plaintiff's action for specific performance, defendants were estopped from setting up that he had not signed the contract for repurchase as agreed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 290, 295, 311-317; Dec. Dig. ¶101.]

Department 2. Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by S. G. Sparks against M. V. Mauk and another, and M. V. Mauk and another, jointly and severally, doing business under the name and style of the Santa Clara Grain & Fuel Company. Judgment for plaintiff, and defendant M. V. Mauk appeals. Affirmed.

Louis Oneal and Wm. F. James, both of San Jose, for appellant. H. C. Jones, of San Jose, for respondent.

HENSHAW, J. Plaintiff, who had been the owner of a fuel and feed business in the town of Santa Clara, sold that business to F. P. Mauk and son. Mauk and son, in turn, sold it to Mrs. M. V. Mauk. Plaintiff held the note of defendant F. P. Mauk and F. V. Foster for the sum of \$1,000, and began suit upon this note, attaching the business of appellant. Negotiations followed this suit, and the parties entered into an agreement, by the terms of which plaintiff was to repurchase the business, paying therefor \$1,085, and the value of the stock on hand. The note in suit was to be received as payment upon this \$1,085 to the extent of \$1,027.50. M. V. Mauk and F. P. Mauk both agreed to refrain from engaging in like business for the period of

five years. The plaintiff tendered the note and the small sum of money sufficient to make the \$1,085. He dismissed the attachment, and would have dismissed the suit, saving that it was allowed to linger at the instance of Mauk while the matter of the costs of the suit were being adjusted with Foster, comaker of the note with Mauk. Plaintiff took possession of and conducted the business, had a valuation put upon the stock on hand, grain, fuel, etc., and tendered this amount, which was rejected. He then began this action to enforce the contract, and was awarded a temporary injunction. From this judgment M. V. Mauk appeals.

[1] It is asserted that there is a variance between the allegations and the proofs. The variance is immaterial, in no way affecting any of the substantial matters in controversy, and is susceptible of correction by an amendment to the complaint.

[2] It is next asserted that the contract contemplated a signing by both parties; that plaintiff did not sign; that the contract is not complete, and therefore unenforceable. It is the undoubted rule that, where the contract contemplates the execution of it by signing, either party has the right to insist upon the condition, and mere acts of performance upon the part of one who has not signed will not validate the contract. *Tewsbury v. O'Connell*, 21 Cal. 60; *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797.

[3] But in this case plaintiff had changed his condition by the abandonment of his action, and by the dismissal of the attachment, and by the surrender of the promissory note, and appellant had accepted these benefits. Plaintiff, moreover, had taken possession of the property, and was conducting the business; and this case, therefore, is brought within the exception to the rule above mentioned. There is here shown not a mere voluntary compliance with the conditions of the contract by one who has not previously assented to it. There is distinctly shown part performance under it by both parties, and an accession to its terms by both parties. *Spinney v. Downing*, 108 Cal. 670, 41 Pac. 797; *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515; *Lowber v. Connit*, 36 Wis. 183. Such an accession to the terms of the contract and such a performance under it as is here shown would make it inequitable to permit appellant to avail herself of this defense, and she is estopped from doing so under familiar principles. *Borel v. Rollins*, 30 Cal. 408; *White v. Stevenson*, 144 Cal. 104, 77 Pac. 828; *Fidelity, etc., Co. v. Fresno Flume Co.*, 161 Cal. 466, 119 Pac. 646, 37 L. R. A. (N. S.) 322.

Appellant's apparent reason for refusing to proceed with the contract was that the amount tendered for the stock of grain, fuel, etc., on hand was not sufficient. Plaintiff produced evidence, however, establishing that

the amount which he tendered was not alone the full market value, but in excess of the market value of the stock.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

170 Cal. 112

LYNN v. GOODWIN. (S. F. 7213.)

(Supreme Court of California. April 28, 1915.)

1. APPEAL AND ERROR ⇐1050 — HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.

Where the driver of an automobile was intoxicated at the time plaintiff was riding with him and injured in a collision with defendant's automobile, and plaintiff knew of the driver's intoxication, error in admitting evidence of the driver's intemperate habits, and of his having frequently driven in an intoxicated condition, unable to control the machine, was not prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. ⇐1050.]

2. HIGHWAYS ⇐175 — COLLISION BETWEEN AUTOMOBILES—NEGLIGENCE.

One continuing to ride in an automobile with the knowledge that the driver thereof is intoxicated is guilty of independent negligence apart from the negligence of the driver, and may not recover for injuries in a collision with another automobile.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 461-464; Dec. Dig. ⇐175.]

Department 2. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Thomas Lynn against J. W. Goodwin. From a judgment for defendant, plaintiff appeals. Affirmed.

Rogers, Bloomingdale & Free, of San Jose, for appellant. Wright & Wright & Stetson, of San Francisco, and Louis Oneal and James P. Sex, both of San Jose, for respondent.

HENSHAW, J. Plaintiff sought damages for personal injuries to himself arising out of an automobile collision. The case was tried before the court without a jury, and the findings of the court were that P. W. Metcalf was driving the car in which plaintiff was seated; that Metcalf approached a wagon with a large load of brush; that the load of brush was nine feet or more in width and obstructed the view of Metcalf and plaintiff and prevented them from seeing the roadway in front; that they turned to the left to pass this load of brush and collided with defendant's automobile. This automobile was in all respects being carefully and prudently han-

dled, saving that it was being driven at a speed of about 25 miles an hour. Metcalf was driving his automobile at about 20 miles an hour. The collision would probably have taken place if defendant's automobile had been traveling at a rate of speed of 20 miles an hour. The collision would not have taken place if Metcalf had not driven his automobile to the extreme westerly side of the road and across the pathway which was being followed by the automobile of defendant. The automobile of defendant was at the extreme right-hand part of the road, where it should have been. Metcalf's recklessness in driving was the direct, proximate, and primary cause of the collision, and Metcalf, when so driving, and when the accident occurred, was under the influence of liquor and was drunk. Plaintiff, his companion, knew this, and a reasonably prudent person would not have ridden in the automobile with Metcalf in his condition of inebriety.

[1] Evidence of Metcalf's intemperate habits was admitted, and also evidence that in times past he had frequently driven in an intoxicated condition and had been subject to seizures when at the wheel which temporarily made him helpless and unable to control his machine. It is argued that the admission of this evidence was incompetent. Without passing upon this question, suffice it to say that it was not injurious, for the evidence was abundant that, at the time of the accident, Metcalf was under the influence of liquor, and plaintiff must have known it.

[2] While it is true that in general the negligence of the driver of a vehicle is not imputable to a passenger so as to bar that passenger's right of recovery (*Bresee v. Los Angeles Traction*, 149 Cal. 131, 85 Pac. 152, 5 L. R. A. [N. S.] 1059), yet the conduct of the plaintiff in riding and in continuing to ride in an automobile when he must have known that the driver was intoxicated established independent negligence upon the plaintiff's part, apart from the driver's negligence, barring the right of recovery (*Bresee v. Los Angeles Traction*, supra, 149 Cal. 137, 85 Pac. 152, 5 L. R. A. [N. S.] 1059; *Meenagh v. Buckmaster*, 26 App. Div. 451, 50 N. Y. Supp. 85; *Read v. N. Y. Cent. R. R. Co.*, 123 App. Div. 228, 107 N. Y. Supp. 1068; *Brommer v. Penn. R. Co.*, 179 Fed. 581, 103 C. C. A. 135, 29 L. R. A. [N. S.] 924).

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(170 Cal. 104)

PEOPLE v. WITT. (Cr. 1922.)

(Supreme Court of California. April 27, 1915.)

1. HOMICIDE — 18—“MURDER IN FIRST DEGREE.”

Under Pen. Code, § 189, providing that any murder committed in the perpetration or attempt to perpetrate robbery, burglary, etc., is murder in the first degree, defendant, whose own confession showed that he and another burglariously entered the house of deceased in the nighttime to commit larceny therein, that, when discovered, defendant himself had no revolver, and that in an ensuing struggle his companion shot and killed deceased, was guilty of “murder in the first degree.”

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 24-31; Dec. Dig. —18.]

For other definitions, see Words and Phrases, First and Second Series, Murder in First Degree.]

2. INDICTMENT AND INFORMATION — 110 — LANGUAGE OF STATUTE — MURDER IN FIRST DEGREE.

An information in the language of Pen. Code, § 187, charging that defendant and another, on a certain day and in a certain county and state, feloniously and with malice aforethought, killed and murdered a certain named person, contrary to the form and effect of the statutes, sufficiently charged the offense of murder specified in section 189, declaring murder committed in the perpetration or attempt to perpetrate robbery, burglary, etc., to be murder in the first degree; it being sufficient to charge the offense in the language of the statute defining it, whatever the circumstances of the particular case.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. —110.]

3. CRIMINAL LAW — 854—TRIAL—“SEPARATION OF JURY.”

Under Pen. Code, § 1121, permitting the jury to separate at adjournments and recesses until the case is submitted to them, unless the court in its discretion orders them kept together in charge of an officer during trial, the court's excusal of a juror who went to an ante-room and returned in two or three minutes, where no adjournment was taken and no proceedings were had during his absence, and where the jury had not been placed in charge of an officer, was not a “separation of the jury.”

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. —854.]

For other definitions, see Words and Phrases, First and Second Series, Separation of Jury.]

4. CRIMINAL LAW — 1186—APPEAL—HARMLESS ERROR—SEPARATION OF JURY.

Error, if any, in failing to admonish the jury in the manner prescribed for each adjournment by Pen. Code, § 1122, as to not talking about the case or allowing any one else to talk to them about it, was too technical to require a reversal of the judgment and a new trial, especially in view of Const. art. 6, § 4½, declaring that no judgment shall be set aside or new trial granted for error in procedure, unless the court, upon examination of the entire case, shall determine that the error complained of resulted in a miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. —1186.]

5. CRIMINAL LAW — 636—JUDGMENT—FIXING TIME FOR EXECUTION—PRESENCE OF DEFENDANT.

A judgment imposing the death penalty, and directing that defendant be delivered to the

warden of the state prison, and that sentence be executed on a day to be thereafter fixed by the court, was valid without any appointment of such time; and hence defendant had no right to be present when the judge, as required by Pen. Code, § 1217, subsequently signed a warrant appointing a day on which the judgment was to be executed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1465-1482, 2120; Dec. Dig. —636.]

6. HOMICIDE — 163—EVIDENCE—RELEVANCY.

Pen. Code, § 190, giving the jury the right to assess punishment in the event of conviction of murder at either death or life imprisonment, does not contemplate the admission of evidence as to matters not otherwise relevant, but is based solely on such evidence as is admissible on the issues made by the indictment and plea, so that evidence as to the defendant's character and previous habits, his condition at the time of the crime, and as to his parents, home surroundings, and education, were inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 310-317; Dec. Dig. —163.]

In Bank. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Glenn Witt was convicted of murder in the first degree, and from the judgment and denial of his motion for a new trial, he appeals. Judgment and order affirmed.

Clyde E. Cate and Hocker, Morris & Austin, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clark, Deputy Atty. Gen., for the People.

ANGELLOTTI, C. J. Appellant, Glenn Witt, and one Oxnam were jointly informed against for the crime of murder, alleged to have been committed December 22, 1914. They were tried separately, and appellant, having been convicted of murder in the first degree, was, on January 21, 1915, adjudged to suffer death. This is an appeal from such judgment, and from an order denying his motion for a new trial.

[1] It is not claimed that appellant is not guilty of the offense of which he has been convicted. In view of the record, such a claim would be without warrant. According to his own admissions made shortly after his arrest, and his own testimony given on the trial, appellant and Oxnam burglariously entered the house of deceased, William M. Alexander, in Los Angeles, at about 2 o'clock on the morning of December 22, 1914, for the purpose of committing larceny therein. They obtained access to the house through a window on the ground floor, and, having gone upstairs, went into the room occupied by deceased and his wife. The attention of Mrs. Alexander was attracted by some noise made by them, and she awakened her husband. Upon the flashing on of the electric light by the latter, appellant and Oxnam were discovered. Even then the two men persisted in their efforts to take and carry away the valuables of deceased; Oxnam attempting to hold Alexander at bay with a revolver

which he had brought with him, while appellant was searching for articles of value. In the struggle which ensued between Alexander and members of his family, on the one hand, and appellant and Oxnam, on the other, Oxnam shot and killed the deceased. The appellant himself did not have a pistol. Both men escaped from the house, but were shortly after apprehended in a room where they had taken refuge. They were identified beyond question as the two burglars, and the case is one where guilt is shown beyond the question of a doubt, even without the admissions and testimony of appellant. But, as we have said, the testimony of appellant himself convicts him of murder in the first degree. Although he did not himself fire the fatal shot, he was at the time engaged with Oxnam in the perpetration or attempt to perpetrate the burglary, was a principal therein, and was equally guilty with Oxnam in the eyes of the law of any act committed by the latter in and about the prosecution of the burglarious scheme of himself and Oxnam. Our statute expressly providing that any murder "which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary or mayhem, is murder of the first degree" (section 189, Pen. Code) makes this a case where no other verdict than that of guilty of murder of the first degree could properly have been rendered. As said by this court in *People v. Milton*, 145 Cal. 169, 78 Pac. 549, the law in such cases as this has declared to the malefactor:

"If in your perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem you shall take the life of a fellow being, intentionally or unintentionally, your crime is murder of the first degree. The killing may be willful, deliberate, and premeditated, or it may be absolutely accidental. In either case, you are equally guilty. The elements of willfulness, deliberation, and premeditation are not indispensable to your crime. The murder, under section 187 of the Penal Code, is established, in that the killing is unlawful, it having been perpetrated in the performance or attempt to perform one of these felonies, and the malice of the abandoned and malignant heart is shown from the very nature of the crime you are attempting to commit."

A review of the record shows that there was in the proceedings no error affecting any substantial right of the appellant. In the light of the admitted facts, the various points made by counsel for appellant appear trivial and inconsequential.

[2] The information charged the defendants with the crime of murder, committed as follows:

"That the said Glenn Witt and Charles E. T. Oxnam, on the 22d day of December, 1914, at and in the county of Los Angeles, State of California, did willfully, unlawfully, feloniously, and with malice aforethought kill and murder one William M. Alexander, a human being," contrary to the form, force, and effect of the statute, etc.

Concededly, this describes the offense of murder in the language of our statute, and

is in accord with a form approved over and over again by this court. It is claimed, however, that it does not sufficiently allege the kind of murder proved in this case, viz., one committed in the perpetration, or attempt to perpetrate, one of the felonies specified in section 189, Penal Code. Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165:

"The information is in the language of the statute defining murder, which is: 'Murder is the unlawful killing of a human being with malice aforethought.' Pen. Code, § 187. Murder, thus defined, includes murder in the first degree and murder in the second degree. It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

Under our decisions there is no ground for distinction in this regard between the class of murder in the first degree here involved and any other class. *People v. Hyndmann*, 99 Cal. 1, 33 Pac. 782, does not decide otherwise. Our simplified system of pleading in criminal cases has been in use for many years, and we think it may safely be said that it has not been found that defendants have, in fact, been without sufficient notice of the nature of the charge against them to enable them to make such defense as they had. It is certain that in the case at bar no such claim could be made, in view of the fact that the facts proved against appellant were precisely those which he had admitted before the trial and to which he testified on the trial. Of course, if it should appear in any case that a defendant was, in fact, surprised by the theory of the prosecution as developed on the trial, a trial court would undoubtedly grant him such time as was reasonably necessary to make his defense.

In view of what has already been said, it is clear that the trial court did not err in instructing the jury substantially that, where the killing is done in the perpetration or attempt to perpetrate one of the felonies specified in section 189, Penal Code, the jury has no option but to find the killing to be murder in the first degree. We find no substantial error in any of the other instructions.

[3] The record shows that during the examination of one of the witnesses a juror asked to be excused for a minute, and the court answered, "Yes," whereupon the juror went "into the anteroom, and returned in two or three minutes," whereupon the court directed the trial to proceed. Apparently, while no adjournment was taken, no proceedings were had during the absence of the juror. It is admitted that, when the juror was thus allowed to absent himself, no admonition was given to him or to the other

jurors, and that no officer accompanied said juror. There is no pretense that any objection was made by defendant at the time. It is urged on these facts that the jury was allowed to separate during the trial of the case, and that such separation must be held to have been prejudicial to appellant. It is not claimed that the trial court had placed the jury in charge of an officer, and under our statute (section 1121, Pen. Code) the jury are permitted to separate at adjournments and recesses until the case is submitted to them for decision, unless the court, in its discretion, orders them kept together in charge of an officer during the progress of the trial. Of course, a separation would be improper after the jury has been placed in charge of an officer or after submission of the cause to the jury, or at any time while evidence was actually being received, and the cases cited by appellant from this state are all cases of this character. There was no forbidden separation here. See *People v. Coyne*, 116 Cal. 297, 48 Pac. 218.

[4] The only possible error here was the failure of the court to admonish the jurors when one was allowed to retire for a moment, in the manner prescribed for each adjournment by section 1122, Penal Code, as to not talking about the case or allowing any one else to talk to them about it, etc. Under the circumstances, no one probably thought of the necessity of such an admonition for this brief retirement of one of the jurors into another room. If error was committed here, it must be said of it, as was said in *People v. Coyne*, supra, of the failure of the court to so admonish the jury upon an adjournment, that the error is technical, and not of the importance to demand a reversal of the judgment and a new trial. Especially is this true in view of the provisions of section 4½ of article 6 of the Constitution. It would be most unreasonable to assume that any prejudice was suffered by appellant by reason thereof.

[5] Appellant was personally present when judgment of death was pronounced on January 21, 1915, the judgment decreeing substantially that he suffer the penalty of death; that he be delivered into the custody of the warden of the state prison at Folsom; and that the sentence be executed by said warden on a date to be thereafter fixed by the court. Subsequently, the judge, as required by section 1217, Penal Code, signed a warrant, appointing a day on which the judgment was to be executed, and directing the sheriff to deliver the defendant to the warden of the state prison for execution. Appellant was not present at the time the judge so appointed the day for execution. It is now claimed that appellant was entitled to be present when the day of execution was fixed. Under our statute, the fixing of the time for the execution of the judgment is no part of the judgment. That is to be done in the

warrant signed by the judge and attested by the clerk after the judgment is given. The judgment here was complete and valid without any appointment of such time, and, of course, could not be reversed for the reasons urged, even if appellant's contention that he was entitled to be present, at the fixing of the time be well based. But we think there is no force in the contention. It has been substantially held that under our statutes his presence at the signing and attesting of the warrant is not contemplated or required (*People v. Flannelly*, 128 Cal. 94, 60 Pac. 670), and we see no reason to doubt the correctness of this view. The question here is probably, however, of no practical importance, for the reason that the time fixed has passed without the execution of the judgment by reason of this appeal. An order for the execution of the judgment at a specified time must be made by the court under section 1227, Penal Code, before it can now be executed, and by express provision of that section appellant is entitled to be present at the time of the making of any such order. See *People v. Chew Lan Ong*, 141 Cal. 553, 75 Pac. 186, 99 Am. St. Rep. 88.

[6] Finally it is urged that the trial court erred in refusing to permit testimony to be given by appellant and his mother with reference to his character and previous habits. It is not claimed that the offered testimony was relevant or material on the issue of either guilt or degree of crime, but simply that, inasmuch as the jury had the right to assess the punishment in the event of conviction at either death or life imprisonment, appellant was entitled to have admitted for their consideration evidence as to matters not otherwise relevant or material. We are of the opinion that our law does not contemplate any such independent inquiry on a trial for murder, and that the determination of the jury, under the provisions of section 190, Penal Code, as to death or life imprisonment, is necessarily to be based solely on such evidence as is admissible on the issues made by the indictment or information and the plea of the defendant. But, if we assume otherwise, we are nevertheless satisfied from an examination of the record that it cannot be held that defendant was denied the opportunity by any ruling of the trial court of showing any extenuating fact or circumstance that could have properly affected the verdict. So far as he himself was concerned, he fully testified as to his condition the evening of the homicide, said that he had no place to sleep, was "broke," out of work, had no supper that evening. His answers to the remaining two or three questions to which objections were sustained could not have added to the effect of this. The only other witness on this branch was appellant's mother, who testified as to her age, that of the appellant, and her own occupation. Objections were sustained to questions asking her

how long has it been since appellant resided with her and his father, whether the father was still living, what occupation appellant has followed during the last year, what his education had been, when she herself came to Los Angeles. No statement was made as to the object of these questions, or what it was expected to show thereby. We cannot perceive that they had any legitimate bearing on any question to be determined by the jury, and can see no reason to assume that answers to the same could have affected the verdict in any way.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; MELVIN, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

170 Cal. 101

In re WASSERMAN'S ESTATE.

WASSERMAN v. JONES.

(S. F. 7172.)

(Supreme Court of California. April 27, 1915.)

1. WILLS $\hookrightarrow$ 34—TESTAMENTARY CAPACITY—UN SOUNDNESS OF MIND.

The rule of law is not that no person who is insane may make a valid will, but that the will of no person who, by reason of insanity, is incapable of making a valid testamentary disposition shall be upheld.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 71-73; Dec. Dig. $\hookrightarrow$ 34.]

2. WILLS $\hookrightarrow$ 55—TESTAMENTARY CAPACITY—JUDICIAL DUTY.

Whether a testator's unsoundness of mind amounts to incapacity to make a will must be determined by the court upon its own responsibility, though his whole neighborhood believes him to be of unsound mind.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-158, 161; Dec. Dig. $\hookrightarrow$ 55.]

3. WILLS $\hookrightarrow$ 55—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.

On the trial of a will contest, where it appeared that there was insanity in the testator's family, and the testimony of witnesses and entries by the testator in his diary showed that he entertained strange beliefs, delusions, and hallucinations; that he thought waiters and saloon keepers were trying to poison him; that wireless electricity was shooting violet rays through him, instigated by his enemies; that a former employer, a railroad company, sought to destroy him, and had detectives pursuing him, who entered his house and stole articles; that the company instructed its engineer to blow steam as they passed the neighborhood where his property was situated; that the steam would be carried by electric waves and give him a shock; that a lemon given him by a neighbor was poisoned; and that he was visibly nervous, wild-eyed, distressed, and irrational—a verdict against the validity of the will was warranted.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-158, 161; Dec. Dig. $\hookrightarrow$ 55.]

4. WILLS $\hookrightarrow$ 54—TESTAMENTARY CAPACITY—EVIDENCE.

On the issue of testamentary capacity, the jury might properly consider the facts that the testator, who was unmarried, committed suicide, and that he left his little property away

from his aged mother and his brothers, from whom he had not been estranged.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 131-134, 136; Dec. Dig. $\hookrightarrow$ 54.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Proceeding to prove the will of Victor H. Wasserman, deceased, contested by Sophia F. Wasserman. From a decree on a verdict against the validity of the will, and from an order denying a new trial, the proponent, Horace C. Jones, appeals. Affirmed.

Nowlin, Fassett & Little, of San Francisco, for appellant. Joseph P. Lucey, of San Francisco, for respondent.

HENSHAW, J. This is a contest over the admission to probate of the will of Victor H. Wasserman, deceased. At the time of his death he was 45 years of age. He had never married and left surviving him his mother, two brothers, and one sister. He had been employed as a railway freight clerk in the offices of the Southern Pacific Company, but some time prior to his death was obliged to cease his employment on account of ill health. He invested his savings in a six-acre tract of land in Santa Clara county, and devoted his time to planting this land to orchard trees. Before his death he was despondent over his lack of money. In March, 1914, he committed suicide by hanging. His body was found in a barren spot near the reservoir on Twin Peaks in the city and county of San Francisco. While his death was caused by the strangulation of hanging, he had also stabbed himself. In his hat, found alongside his body, was an olographic will in language as follows:

"San Francisco, Cal. Mar. 9 '14.

"Being of sound mind, I will my (6 1-5) six and one fifth acres in Santa Clara county to Horace C. Jones of Berkeley.

"Victor H. Wasserman."

Its date was the day preceding the testator's self-destruction. The beneficiary under his will and the proponent thereof, Horace C. Jones, was a friend of the deceased of several years' standing and had been engaged with him in the same general employment in the Southern Pacific Company, had interested himself in the deceased's affairs and made many week-end visits to the deceased's property in Santa Clara county. The deceased was not an infrequent guest at the home and at the table of the proponent. The contest of this will instituted by the mother of the deceased was based upon the mental incapacity of the deceased to execute a will by reason of his insanity. The issue was tried before a jury, which returned its verdict against the validity of the will upon the ground indicated. Form the decree which followed and from the order denying his mo-

tion for a new trial, Horace C. Jones, the proponent, appeals.

[1,2] In the consideration of this appeal we have in mind the principles of law and the decisions upon them governing the question of the mental capacity requisite to the making of a valid testamentary disposition of property, such principles as that declared in *Estate of Chevallier*, 159 Cal. 168, 113 Pac. 133, where it is said:

"The rule of law is not that no person who is insane may make a valid will, but that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition shall be upheld"

—and the language of *In re Redfield*, 116 Cal. 655, 48 Pac. 799, where this court say:

"A man may be of unsound mind, and his whole neighborhood may declare him so. But whether that unsoundness amounts to incapacity for a discharge of the important duty of making a final disposal of his property is a question which the court must determine upon its own responsibility."

[3] The contention of the appellant is that while the deceased labored under certain delusions or hallucinations, they were not such, nor of such character, as to impair his capacity to make a will; that the evidence did not establish a general mental unsoundness (as distinguished from the mere indulgence in one or another form of delusion) which was sufficient to justify the jury in its conclusion that there was such a complete breakdown and destruction of the mental faculties as to preclude the idea that the will was the product of a disposing mind. The following was shown: There was insanity in the family. A sister had been confined in the state asylum for the insane at Agnews and had died there. From the year 1912 the deceased entertained strange beliefs, delusions, and hallucinations; the waiters in the restaurant were endeavoring to poison his coffee, the saloon keepers to poison his beer, wireless electricity was shooting violet rays through him, instigated by his enemies; the Southern Pacific Company, his former employer, sought to destroy him; it had detectives pursuing him; the detectives entered his house and stole a

can of condensed milk and a can of corn; the Southern Pacific also instructed its engineers to blow off steam as they passed Cupertino (in the neighborhood of which his little property was situated) and "the steam would be carried by electric waves in the atmosphere and give him a shock"; a neighbor gave him a lemon, and he discovered that the skin was pierced and poison had been injected into it; he was visibly nervous, wild-eyed, distressed, and irrational. This, and much more, does not rest merely upon the oral evidence of witnesses, but is confirmed by a curious diary which the deceased kept in his own handwriting. Extracts from that diary are as follows:

"Mr. Redmond received two electric needles in his foot (ball). I got one while staking out." "Sunday night placed 2 rose bushes in the ground and the next morning one was gone and a piece of paper in its place." "About 15 years ago, a box of dynamite slid off a wagon on Larimer St. for no apparent reason whatever." "About 1 years ago I was walking across a field and stepped on an iron scraper and fell over unconscious. I felt a sharp pain back of my ear." "A half loaf of bread fell off the bar overhead in the old cabin on the 1 acre piece." "When the papers rain out of the windows in the City Hall when no wind was blowing. I got an awful shaking up in bed one night sometime before I went to the springs." "Detected a small hole in cheese. When I ate the cheese it cleaned my head out." "The Violet Rays in the Mirror." "The Violet Rays in the Pillow." "The electric needle pricks at Wilber Springs." "A flash of hot air passed between Mother and me."

[4] In addition to this the circumstance that he left his little property away from his aged mother and from his brothers from whom he had not been estranged was proper for the consideration of the jury (*Field v. Shorb*, 99 Cal. 671, 34 Pac. 504), as was also the fact that he met his death at his own hands (*Estate of Dolbeer*, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795). The evidence was amply sufficient to support the verdict of the jury.

The decree and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

170 Cal. 98

OTIS v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 6498.)

(Supreme Court of California. April 27, 1915.)

TAXATION — 543 — **RECOVERY OF TAXES** — **MANDAMUS.**

Under Pol. Code, § 3804, relieving taxpayers of the necessity of a protest at the time of payment, and declaring that moneys irregularly collected may, by order of the board of supervisors, be refunded by the county treasurer, six months' delay of the board of supervisors to take action on a claim for taxes illegally collected is tantamount to a denial, and will warrant a suit on the claim without any proceeding by mandamus to compel the board to consider and dispose of it.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1006-1016; Dec. Dig. 543.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by James Otis as surviving trustee under a trust created by the last will of A. C. Whitcomb, deceased, against the City and County of San Francisco. From a judgment for plaintiff, defendant appeals. Affirmed.

Percy V. Long, City Atty., and Jesse H. Steinhart, Asst. City Atty., both of San Francisco, for appellant. J. R. Pringle and Rufus Hatch Kimball, both of San Francisco (Edwin H. Williams, of San Francisco, of counsel), for respondent.

HENSHAW, J. This is an action to recover moneys paid on account of certain taxes assessed by the city and county of San Francisco, which taxes, it is alleged, were illegal. The taxes are the same as those whose validity was considered in *Josselyn v. City and County of San Francisco*, 143 Pac. 705, where they were decreed to be illegal.

There is left for consideration in this case the sole remaining question of the remedy pursued by plaintiff. He brought his action against the city and county of San Francisco, basing it upon the provisions of section 3804 of the Political Code. That section in the case of the taxes therein described relieves from the necessity of a protest at the time of payment, and declares that moneys so irregularly collected on account of such taxes "may by order of the board of supervisors be refunded by the county treasurer."

The complaint here shows that seasonably after payment plaintiff made demand upon the board of supervisors by verified claim for an order for refund of the moneys so paid. Plaintiff followed this demand by many letters, repeating the same request, and appeared personally before the board and argued the merits of his demand. The result of all this was simply nonaction upon the part of the board. Formally, it neither allowed nor rejected the demand. Appellant contends, under the authority of such cases as *Reed v. Omnibus Railroad Co.*, 33 Cal. 212, *Smith v.*

Omnibus Railroad Co., 32 Cal. 212, Id., 36 Cal. 281, *Keller v. City of Corpus Christi*, 50 Tex. 614, 32 Am. St. Rep. 613, and *Heiser v. Mayor of New York*, 104 N. Y. 72, 9 N. E. 866, that, as this is a remedy created by statute, the precise steps of the statute must be followed to obtain relief, that the treasurer is not entitled to act except on the order of the board of supervisors, and that the proper procedure for plaintiff to have adopted was that by mandate directed to the board of supervisors to compel them to make the proper order. Appellant recognizes that actions against counties upon claims such as this have frequently been sustained, as in *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766, *Pacific Coast Co. v. Wells*, 134 Cal. 471, 66 Pac. 657, and *Stewart, etc., Co. v. County of Alameda*, 142 Cal. 660, 76 Pac. 481, but distinguishes these from the case at bar by pointing out that in each one of those, and in the other similar cases, the action was brought after the rejection by the board of the disputed claim. We have no disposition to criticize any of the cases cited by appellant. The principles enunciated in each and all of them are perfectly sound. Where a right is thus created by statute and the method of securing that right pointed out, in all essentials the legislative directions must be followed. But here, after repeated requests, demands, and arguments we have inaction upon the part of the board of supervisors for a period exceeding six months. This is certainly a reasonable time within which action should have been taken by the supervisors. If they may delay matters of this kind for this period, where would the line be drawn that demarks reasonable from unreasonable delay? We hold the delay in this case to be so unreasonable as to amount to a rejection by the supervisors of the claim, and thus to authorize the prosecution of this action in its present form.

The judgment appealed from is therefore affirmed.

We concur: **LORIGAN, J.; MELVIN, J.**

170 Cal. 803

CREDIT CLEARANCE BUREAU v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 6758.)

(Supreme Court of California. April 27, 1915.)

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Credit Clearance Bureau against the City and County of San Francisco. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

Edwin H. Williams and L. S. Melsted, both of San Francisco, for appellant. Percy V. Long, City Atty., and Jesse H. Steinhart, Asst. City Atty., both of San Francisco, for respondent.

PER CURIAM. In this action the court sustained a general demurrer to plaintiff's complaint, which complaint is, in all essentials, the same as that considered in *Otis v. City and County of San Francisco*, S. F. No. 6498, 148 Pac. 933.

For the reasons therein given, the court erred, and the judgment is reversed, and the cause remanded with directions to the trial court to overrule the defendant's demurrer.

170 Cal. 148

EHRHART et al. v. MAHONY et al.
(Sac. Dig. 2183.)

(Supreme Court of California. May 8, 1915.)

1. TRIAL $\hookrightarrow$ 396 — FINDINGS—APPLICABILITY TO COMPLAINT.

In a suit for the specific performance of a contract to buy mining claims, it appeared that the names of the claims contained in the contract, complaint, and findings were not precisely the same, but the complaint embodied a copy of the contract and alleged that the property agreed to be sold by the contract was described as set forth in the complaint. *Held*, that this allegation, which was not denied, established the identity of the apparently differing descriptions, and judgment could not be attacked on the ground that there was a difference between the descriptions in the findings and the complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935-938; Dec. Dig. $\hookrightarrow$ 396.]

2. VENDOR AND PURCHASER $\hookrightarrow$ 266 — REMEDIES OF VENDOR—ACTION FOR PRICE—WAIVER OF LIEN.

Where a vendor, who retains the legal title, proceeds at law for the purchase price, he does not waive his right to proceed against the property to subject it to a lien for sums paid after the contract to preserve the property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 687, 713-750; Dec. Dig. $\hookrightarrow$ 266.]

3. VENDOR AND PURCHASER $\hookrightarrow$ 273 — CONTRACTS—PERFORMANCE—WAIVER.

A vendor need not tender title, where the purchasers refused to perform; Civ. Code, § 1440, excusing a party from tendering performance, where the other party has announced he will not perform.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 767; Dec. Dig. $\hookrightarrow$ 273.]

4. SPECIFIC PERFORMANCE $\hookrightarrow$ 119 — CONTRACTS ENFORCEABLE.

Specific performance cannot be granted, in the absence of a showing that there was an adequate consideration for the obligation sought to be enforced, and that the contract was just and reasonable as to defendant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 382, 383; Dec. Dig. $\hookrightarrow$ 119.]

Department 1. Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action by Thomas J. Ehrhart and another against D. R. Mahony and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Benj. F. Geis and Duard F. Geis, both of Willow, and Will A. Dower, of San Andreas, for appellants. Snyder & Snyder, of San Andreas, for respondents.

SLOSS, J. On September 27, 1910, the plaintiffs entered into a written contract with all of the defendants, except Clifton, whereby plaintiffs agreed to sell, and said defendants agreed to buy, three mining claims in Calaveras county for the sum of \$3,000, of which \$50 was paid on the execution of the writing, and the balance was payable in installments. The vendees agreed to do all assessment work.

The complaint set up the contract, alleged an assignment by the vendees to Clifton, alleged further, nonpayment of any part of the purchase price, except the \$50, the failure to do the assessment work, for which plaintiffs had been compelled to pay \$300, demand for the sums due, and a tender and continuous willingness and ability to convey a good title. The prayer was for judgment for the balance due and for the \$300 paid by plaintiffs, for a decree that plaintiffs hold the legal title as security for the payment of the sums due, that they have a lien on said property to secure payment of such sums, that said liens be foreclosed, and that the property, or so much as might be necessary, be sold to satisfy the demand. The defendants denied some of the allegations of the complaint, and set up various affirmative defenses, based on alleged frauds and misrepresentations on the part of plaintiffs. On all these issues the court found for the plaintiffs, and judgment followed in their favor as prayed. Defendants appeal on the judgment roll.

The appellants present a number of points, but only one of them is, in our judgment, entitled to favorable consideration.

[1] Much stress is laid upon the fact that the descriptions of the mining claims in the contract vary from the descriptions found in the complaint and the findings. In each case the description is by name only, and the names, as given in the various papers, are not precisely the same. But the complaint embodies a copy of the contract, and alleges that the property agreed to be sold by said contract is described as set forth in the complaint. This allegation is not denied, and it establishes the identity of the apparently differing descriptions.

The argument based upon the claim of fraud is futile, in view of the fact that the evidence is not brought up, and the findings negative fraud.

[2] One of the defenses was that plaintiffs had waived their lien by commencing an action at law for the recovery of the purchase price. The court found that such action had been brought (and subsequently dismissed), but that there was no waiver. The conclusion was correct. Where the vendor retains the legal title, a proceeding at law for the purchase price is not a waiver of his right to proceed against the property. *Longmaid v. Coulter*, 123 Cal. 208, 55 Pac. 791.

[3] The appellants criticize the allegation

of tender, but, since their answer showed that a conveyance would have been refused in any event, technical defects in the tender, or even a want of any tender, would be of no importance. Civ. Code, § 1440.

[4] But the appellants make a final contention which must, under the decisions of this court, be upheld. The complaint does not allege, nor does the court find, facts showing that there was an adequate consideration for the obligation sought to be enforced, or that the contract was just and reasonable as to the defendants. It is thoroughly established in this state that such facts must be alleged and proven in a suit for specific performance. *Agard v. Valencia*, 39 Cal. 302; *White v. Sage*, 149 Cal. 613, 87 Pac. 193; *Herzog v. A. T., etc., R. R. Co.*, 153 Cal. 496, 501, 95 Pac. 898, 17 L. R. A. (N. S.) 428, and cases cited. That the present action is one for specific performance cannot be questioned, in view of the decisions in *White v. Sage*, supra, and *Sparks v. Hess*, 15 Cal. 186.

For the reason stated, the judgment will have to be reversed. With nothing before us but the judgment roll, we have no basis for saying that the error was harmless. Nor would we be justified in modifying the judgment by striking out everything but the provision for recovery of the purchase price. An action for such purchase price is one at law, in which the parties are entitled to a jury trial, and it would hardly be fair for the appellate court to convert the character of the case after judgment, where no such change had been suggested below.

The judgment is reversed.

We concur: SHAW, J.; LAWLOR, J.

170 Cal. 137

CECIL v. GRAY et al. (BOGGS et al., Interveners). (Sac. 2162.)

(Supreme Court of California. May 1, 1915.)

1. DEEDS $\hookrightarrow$ 116—PROPERTY CONVEYED—AFTER-ACQUIRED PROPERTY.

Under the express provision of Civ. Code, § 1106, the subsequently acquired title of a grantor in a section, the whole of which he had purported to sell and convey, inured to the benefit of his grantees.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 330; Dec. Dig. $\hookrightarrow$ 116.]

2. DEEDS $\hookrightarrow$ 114—CONSTRUCTION—QUANTITY CONVEYED—RECITALS.

Where deeds purported to convey "all of section 30" or "an undivided half of section 30," such words of description were not to be cut down or modified by a recital of the number of acres contained therein.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316-322, 326-329, 388; Dec. Dig. $\hookrightarrow$ 114.]

3. BOUNDARIES $\hookrightarrow$ 37—EVIDENCE—DESCRIPTION OF LAND.

In an action involving the title to land, evidence held to show that lots 1 to 4 of section 30-19-2 included all the land up to the west boundary of the section, as shown by the original government survey, and that there was

no land to the west of such lots which could form lots 7 to 10 of the section as shown by a subsequent survey relied on by interveners.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-194; Dec. Dig. $\hookrightarrow$ 37.]

Department 1. Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by Logan Cecil against Harry J. Gray and others, in which Louisa E. Boggs and others intervened. Judgment for plaintiff, and from the judgment and the denial of their motion for a new trial, the interveners appeal. Judgment and order affirmed.

Frank Freeman, of Willows, for appellants. Arthur C. Huston, of Woodland, for respondent.

SLOSS, J. The plaintiff, claiming to be the owner of a tract of land in Glenn county, brought this action to enjoin the defendants from entering the land and constructing an irrigating canal thereon. The defendant Gray was about to proceed under authority derived from Louisa E. Boggs, Frank S. Boggs, Fred H. Boggs, and Alice J. Dutton, who, asserting title to the parcel which was to be occupied by the proposed canal, intervened, and asked that their title to the land claimed by them be quieted. Pending the action, the right to construct the canal was acquired by condemnation, and the present litigation has resolved itself into a contest between the plaintiff and the interveners over the title to the land claimed by the latter. Judgment went in favor of the plaintiff, quieting his title, subject to a right of way for the canal. The interveners appeal from the judgment and from an order denying their motion for a new trial.

The appellants describe the land which they claim to own as lots 7, 8, 9, and 10 of section 30 in township 19 north, range 2 west, M. D. B. & M., the said four lots containing 73.28 acres. The plaintiff asserts ownership to the whole of section 30. A government survey of township 19 was made, and the plat thereof approved on November 12, 1867. This plat was offered in evidence. It showed the easterly half of section 30, divided into two full quarter sections of 160 acres each, and the east half of the westerly quarter sections, each containing 80 acres. The west end of the section, bounded by the range line and by the two 80-acre subdivisions just mentioned, was divided into four lots, numbered 1, 2, 3, and 4, and containing, respectively, 46.40, 46.20, 46, and 45.80 acres. The area of the entire section was 664.40 acres. A plat of a second survey, made by one Shackelford, was approved April 2, 1879. This plat shows lots 7, 8, 9, and 10, running along the westerly line of lots 1, 2, 3, and 4, and containing in the aggregate 73.28 acres. The land lying east of these lots is shown just as it was in the delineation of section 30 on the earlier plat. By the inclu-

sion of lots 7, 8, 9, and 10 in section 30, on the face of the Shackelford plat, that section is made to contain 737.68 acres. Prior to the making of the second survey, the different subdivisions of section 30 (as delineated on the original survey) were patented to various persons. All of these parcels finally became vested in John Boggs, the last conveyance to him being dated August 10, 1875, on which date he was the owner of the record title to the whole of section 30. On August 16, 1879, John Boggs executed to John E. Crooks, Robert Balfour, and Robert Brodie Forman a grant, bargain, and sale deed conveying to them "all of section 30, township 19 N., R. 2 W., M. D. B. & M." This, it will be observed, was subsequent to the approval of the Shackelford survey and plat. The plaintiff has succeeded to the interest of the grantees under this deed. On July 23, 1880, the United States issued its patent to one Morris, conveying to him lots 7, 8, 9, and 10 of section 30. Morris conveyed such lots to John Boggs in December, 1885, and upon the death of Boggs the said lots were distributed to the interveners as successors to Boggs' title.

The plaintiff advances two distinct grounds for supporting the finding that he is the owner of the land in controversy. Either would suffice to justify an affirmation of the judgment and order. Both, we think, are sustained by the law and the evidence.

[1] In the first place, the plaintiff, as well as the interveners, claim under John Boggs. Under any view of the effect of the Shackelford survey, lots 7, 8, 9, and 10, as shown by that survey, were a part of section 30. Boggs made a grant, bargain, and sale deed of the whole of section 30 to plaintiff's predecessors in August, 1879. If he did not then own that part of the section included in lots 7, 8, 9, and 10, his title, subsequently acquired, inured to the benefit of his grantees. "Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors." Civil Code, § 1106; *Green v. Green*, 103 Cal. 108, 37 Pac. 188; *Merrill v. Clark*, 103 Cal. 307, 37 Pac. 238. It makes no difference that Boggs, at the date of his deed to Crooks and others, may not have owned the whole of section 30. He purported to grant the entire section, and the effect of his deed was to estop him, as against the grantees, from asserting an after-acquired title to any part of the property which he had thus assumed to convey to them. *Clark v. Baker*, 14 Cal. 612, 629, 76 Am. Dec. 449.

[2] Some of the deeds in the chain of title from Crooks and his associates to the plain-

tiff contain statements of the number of acres, and these statements are relied on to limit the effect of the deeds. But the various instruments purported to convey "all of section 30," or "an undivided half of section 30," and these clear words of description are not to be cut down or modified by a recital of the quantity. 13 Cyc. 635. It will be remembered that all of the deeds in question were made after the approval of the Shackelford survey, and at a time, consequently, when lots 7, 8, 9, and 10 were, as appellants contend, a part of section 30.

[3] But, irrespective of the question just discussed, the respondent must be sustained in his contention that the appellants have failed to locate on the ground any land answering the description of lots 7, 8, 9, and 10, and outside of the boundaries of section 30, as that section was delineated on the original plat of 1867. The difference between the two plats is in the location of the range line forming the western boundary of the township and of section 30. The Shackelford plat locates this line further west than does the earlier plat, and lots 7, 8, 9, and 10 are placed in the strip bounded by the two lines. But there was ample evidence to justify the court in believing that no strip could be found within the township, and west of the range line as delineated upon the earlier plat. Testimony was given that the range line was in the center of the county road, and that the fence of respondent's inclosure was 27 feet east of the line. The fence had been in the same position since 1870. A surveyor who had surveyed section 30 shortly before the trial found that the entire section, as occupied by Cecil, measuring east from the center of the county road, had an area of 658 acres, less than the acreage of the section as shown by the original plat. The appellant's claim was that lots 7, 8, 9, and 10 were within the boundaries inclosed by plaintiff's fence. There was thus presented, at the least, a conflict of evidence, under which the court might find that the land inclosed and occupied by Cecil was only the original section 30 delineated on the plat of 1867. In other words, the evidence justified the inference that, notwithstanding the approval of the Shackelford survey, there was no tract of land corresponding to lots 7, 8, 9, and 10 as described in that survey. *Harrington v. Boehmer*, 134 Cal. 196, 199, 66 Pac. 214, 489.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.

(170 Cal. 141)

HAGAN v. McNARY. (Sac. 2190.)

(Supreme Court of California. May 5, 1915.)

FRAUDS, STATUTE OF $\Rightarrow$ 50—**AGREEMENT NOT TO BE PERFORMED DURING THE LIFETIME OF THE PROMISOR—MAINTENANCE.**

Under Civ. Code, § 1624, subd. 7, and Code Civ. Proc. § 1973, subd. 7, providing that a contract shall be invalid unless it is in writing and signed by the party to be charged or his agent, where it is an agreement which by its terms is not to be performed during the lifetime of the promisor, an oral agreement whereby defendant's intestate offered to pay plaintiff \$7,000 if she would furnish him a regular and permanent home for and during his natural life, although performed, was invalid; since plaintiff's agreement was not completed until the decedent's death and his part of the agreement could not be performed during his lifetime.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 75-77; Dec. Dig. $\Rightarrow$ 50.]

Department 1. Appeal from Superior Court, Colusa County.

Action by Maria Hagan against J. D. McNary, administrator of the estate of C. A. Kupper, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Seth Millington and U. W. Brown, both of Colusa, for appellant. J. W. Goad and Thomas Rutledge, both of Colusa, for respondent.

SHAW, J. The plaintiff appeals from a judgment in favor of the defendant. It is alleged in the complaint that in January, 1912, Kupper offered and agreed to pay the plaintiff the sum of \$7,000 if she would give and furnish him for and during the term of his natural life a regular, permanent, and established home; that plaintiff accepted said offer; and that thenceforth to the time of his death she furnished Kupper such permanent and established home. Kupper died on May 17, 1912, and thereafter the defendant, McNary, was appointed and qualified as administrator of his estate. Thereafter plaintiff presented for allowance a claim against the estate of deceased for the sum of \$7,000, which claim was rejected by the administrator. Plaintiff then commenced this action to establish said claim.

The agreement was not in writing, and it was proven upon the trial by oral evidence. The objection is made that, the agreement being oral, it is within the statute of frauds, and therefore invalid. Civ. Code, § 1624, subd. 7; Code Civ. Proc. § 1973, subd. 7. The provisions of these sections above referred to are as follows:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: * * *

"7. An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will."

The question is fairly presented whether or not the agreement falls within the language of these provisions.

Subdivision 7 aforesaid was added to these two sections in 1905 and 1907, and it has not heretofore been presented to this court for consideration. Plaintiff contends that its construction is controlled by a number of cases arising under subdivision 1 of the same sections. That subdivision provides that "an agreement that by its terms is not to be performed within a year from the making thereof" is invalid, unless it is in writing and subscribed by the party to be charged, or by his agent. The decisions referred to hold that an oral agreement is not invalid under this subdivision if its terms are such that it may be performed within a year, although it is not expressly so stipulated, and that before such a contract can be held void under subdivision 1 its terms must be such that performance within a year is impossible without a departure from such terms. For the purposes of this case it may be conceded that the same principle of law will apply to subdivision 7. The agreement, as alleged and proven, states no time for the payment of the \$7,000 which Kupper agreed to pay to plaintiff for the services to be rendered. The services consisted of furnishing Kupper a regular, permanent, and established home during the term of his natural life. This, of course, includes his whole life, and the service was not and could not be completed so long as breath remained in his body. The plaintiff's part of the agreement became completely executed upon his death, and not until then. The case comes under the somewhat familiar rule that, where services are to be performed for a given period for a stated sum, without any agreement as to when the payment is to be made, and the contract is entire, as it is here, the obligation to pay does not become matured, and payment is not due until the services are completely performed. *Krump v. Campbell*, 102 Cal. 375, 36 Pac. 664; 2 Pars. on Cont. (9th Ed.) 521; 2 Page on Cont. § 1157; 3 Elliott on Cont. § 2102. Complete performance of the service did not take place until the moment of Kupper's death. No obligation for immediate payment arose, therefore, until the moment after; that is, after the death of Kupper. His part of the agreement was not by its terms to be performed in his lifetime, but was by its terms to be performed immediately after his death; consequently it comes within the condemnation of the statute of frauds. It is invalid, and no action can be maintained upon it. The plaintiff's remedy, if any, is an action for the value of the services rendered, and not an action for the sum alleged to have been agreed to be paid therefor.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

170 Cal. 144

KNOBLOCH v. ASSOCIATED OIL CO.
(Sac. 2197.)

(Supreme Court of California. May 7, 1915.)

1. TAXATION ⚡428—**ASSESSMENT BOOKS—**
DESIGNATION OF VALUATION—OMISSION OF
DOLLAR MARK.

In an assessment book prepared by the assessor with appropriate headings, as required by Pol. Code, § 3650, no dollar mark was printed in the first column following the description of the property, headed "Value of Real Estate Other than City and Town Lots," but such mark was printed at the head of the following columns, intended for improvements, city and town lots, deductions, etc., and in the ninth column, headed "Total Value of All Property after Deductions." The columns were divided into perpendicular lines appropriate for the insertion of a figure between each line. In the first column appeared the figures "160," with nothing to indicate whether they represented dollars or cents, and, there being nothing in the intervening columns, the same figures appeared in the first three subdivision lines of the ninth column at the right-hand side thereof. *Held* that, from the book as an entirety, it sufficiently appeared that the assessed value of the property was \$160, and the assessment was not invalid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 736, 738-740, 767; Dec. Dig. ⚡428.]

2. ABATEMENT AND REVIVAL ⚡47—**CHANGE**
IN TITLE OR INTEREST—CONTINUANCE BY
PURCHASER.

Under Code Civ. Proc. § 385, providing that an action or proceeding does not abate by the death or disability of a party or the transfer of any interest therein, if the cause of action survives or continues, and that, in case of any transfer of interest other than by death or disability, the action or proceeding may be continued in the name of the original party, or the court may allow the transferee to be substituted, where, pending an action to quiet title, plaintiff transferred an interest in the property, it was optional with the transferee to continue the action in the name of the original plaintiff, or to have himself substituted and proceed in his own name, and, if he elected to proceed in the name of the original plaintiff, the court might give judgment according to the conditions existing at the time the case was begun.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 239-244; Dec. Dig. ⚡47.]

Department 1. Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by F. Knobloch against the Associated Oil Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Edmund Tauszky, of San Francisco, for appellant. M. K. Harris and J. R. Webb, both of Fresno, for respondent.

SHAW, J. The defendant appeals from the judgment and from an order denying its motion for a new trial.

The complaint sets forth a cause of action to quiet the title of the plaintiff in a tract of land against the unfounded claim of the defendant. The answer denies the title of the

plaintiff and alleges that the defendant is the owner of the land in controversy. The defendant's title is derived from a deed executed by the county tax collector on behalf of the state of California to William O. Maxwell, based upon a sale of the property for delinquent taxes levied and assessed for the year 1902. Maxwell thereafter conveyed the property to the defendant. The court made findings holding the alleged tax title of defendant invalid upon the ground that the property was not duly or legally assessed for the year 1902, the tax upon which the delinquent tax sale was based.

[1] The only defect urged against the validity of the assessment is the absence of the dollar mark at the head of the column in the assessment book headed "Value of Real Estate Other than City and Town Lots." The evidence shows that this defect existed. We think, however, that other parts of the assessment book completely cured the omission. The essentials required in an assessment book are set forth in section 3650 of the Political Code. That section provides that:

"The assessor must prepare an assessment book, with appropriate headings as directed by the state board of equalization, in which must be listed all property within the county, under the appropriate head."

The section then proceeds to state the matters that must be specified under appropriate headings. The evidence shows that the state board of equalization prepared the form of assessment book by requiring a number of columns with distinct headings. The column headed "Value of Real Estate Other than City and Town Lots" comes first after the columns provided for a description of the real property. In this column no dollar mark was printed. It is divided into perpendicular lines appropriate for the insertion of a figure between each line. In these lines were the figures "160," and the column, as it appears on the book, has nothing to indicate whether the figures represent dollars, cents, or mills. If this constituted the entire assessment book upon this subject, we should be compelled to sustain the decision of the court below upon the authority of *Fox v. Townsend*, 152 Cal. 51, 91 Pac. 1004, 1007, in which it was expressly held that a defect of this character was fatal to the validity of a tax sale. Upon examining the book, however, we find that there is no ground upon which such fatal effect can be given to this trifling defect. Immediately following, and to the right of the column above mentioned, appear other columns. Numbering the first column 1, the others are as follows: (2) "Value of Improvements Thereon;" (3) "Value of City and Town Lots;" (4) "Value of Improvements Thereon;" (5) "Value of Personal Property Exclusive of Money and Solvent Credits;" (6) "Amount of Money and Solvent Credits;" (7) "Deductions on Account of Mortgages, Deeds of Trust, Contracts, or Oth-

er Obligations by Which a Debt is Secured by Lien on Property;" (8) "Value of the Interest of the Mortgages, Trust Deeds, Contracts, or Other Obligations by Which a Lien is Secured in the Property Affected Thereby;" (9) "Total Value of All Property after Deductions." In each of these columns numbered 4, 5, 6, 7, 8, and 9, the dollar mark appears in the appropriate place at the head of the column, showing that the figures to be entered below in the subdivision lines of the column represent the stated number of dollars, respectively. In the assessment in question no figures were entered in any of the columns from 2 to 9, except column "9," headed "Total Value of All Property after Deductions." The effect of this condition of the book was equivalent to a statement that there were no improvements upon the land in question, no city or town lots assessed to the owner, no personal property, no money or solvent credits, no deductions on account of mortgages, and no mortgage or trust deed interests to be valued. In brief, that there was nothing to be added to the value of the real estate described on the line and preceding the figures "160" in column 1. In column 9, at the appropriate place opposite the description and opposite the figures "160" in column 1, appeared the figures "160" in the first three subdivision lines of column 9 at the right-hand side thereof. This clearly showed that the total value of all property after deductions was \$160. The previous columns showed that the only property valued was the property here in controversy. As an entirety the book was equivalent, therefore, to a statement that the value of the property in controversy was \$160. No person could be misled upon an examination of the assessment book. It would clearly inform him that the total assessed value of the property was \$160, and that nothing was deducted therefrom on any account whatever.

These facts clearly distinguish the case from *Fox v. Townsend*, supra, and the other cases upon which that case is founded. In none of them does it appear that there were other columns in which the dollar mark was properly entered, and which conclusively showed that the property was valued in dollars at the amount stated by the figures. Our conclusion is that the court erred in holding that the tax sale and deed were invalid because of this defect. It is necessary, therefore, to reverse the judgment and order.

[2] In view of the possibility of another trial, it is proper to mention another point urged for reversal. After the beginning of the action, and before the trial, the plaintiff conveyed to one Murray an undivided three-fourths interest in the land in question. It also appeared that the title he holds of the remaining fourth is held by him in trust for another person. The claim of the appellant is that because of these facts the court could not proceed with the case, or give judgment in favor of the plaintiff, in case it should properly decide that the plaintiff was the owner thereof at the time the action was begun. This claim is without merit. Where a transfer by the plaintiff of the property in controversy occurs after the beginning of the action, it is optional with the transferee to continue the action in the name of the original plaintiff, or to have himself substituted and proceed in his own name. Code Civ. Proc. § 385. If he elects the former alternative, the court may give judgment according to the conditions existing at the time the case was begun. The transferee, in that event, must be deemed to have elected to trust the original plaintiff to make over the title to him in some appropriate manner after the judgment has become final.

The judgment and order are reversed.

We concur: SLOSS, J.; LAWLOR, J.

27 Cal. App. 120

CUTTING v. OLIPHANT et al. (Civ. 1489.)

(District Court of Appeal, First District, California. March 29, 1915. Rehearing Denied by Supreme Court May 27, 1915.)

1. PLEADING ⚡205—STOCKHOLDERS—LIABILITY—COMPLAINT—GENERAL DEMURRER.

A complaint against the stockholders of a corporation to recover from them a corporate debt, which alleged that within three years last past the corporation became indebted to plaintiff for a balance due on an open account, sufficiently alleged, against a general demurrer, that the indebtedness was incurred within three years before the commencement of the action, so that the stockholders were liable therefor, since it can be reasonably construed to allege that the indebtedness, a balance of which remains due, was all incurred within the three years, and, if it was not sufficiently definite in that particular, a special demurrer should have been interposed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-493, 495, 496, 498-510; Dec. Dig. ⚡205.]

2. LIMITATION OF ACTIONS ⚡58—COMPUTATION OF PERIOD—STOCKHOLDERS—LIABILITY.

Where plaintiff agreed to deliver to a corporation certain goods, to be sold by it when necessary and the proceeds applied on its indebtedness, and the trial court found on sufficient evidence that the obligation of the corporation to pay for the goods was not to arise until the money from the sale was received by it, the three-year limitation against an action to enforce the stockholders' liability for that debt did not begin to run until the money was received.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 324-328, 346, 347; Dec. Dig. ⚡58.]

3. APPEAL AND ERROR ⚡1057—HARMLESS ERROR—EXCLUSION OF EVIDENCE—ADMITTED FACT.

Error in excluding preliminary evidence to lay a foundation for the admission of warehouse receipts offered by defendants for the purpose of showing the date on which goods were delivered was cured by the subsequent admission by both parties that the goods were delivered prior to a certain date.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. ⚡1057.]

4. APPEAL AND ERROR ⚡1061—HARMLESS ERROR—DENYING NONSUIT—CURE BY DEFENDANTS' EVIDENCE.

Error in overruling defendants' motion for a nonsuit will not be reviewed, where defendants thereafter offered evidence which supplied the proof lacking in plaintiff's case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4137, 4209-4211; Dec. Dig. ⚡1061.]

Appeal from Superior Court, Alameda County; K. S. Mahon, Judge.

Action by F. P. Cutting against Anna R. Oliphant and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Frank D. Stringham, of San Francisco, and D. D. Oliphant, Jr., Schwartz & Powell, and Hayes & Oliphant, all of Oakland, for appellants. Gerald C. Halsey, of San Francisco, for respondent.

RICHARDS, J. This is an action brought to recover from the defendants the amount

of their respective liabilities as stockholders of the D. D. Oliphant Company, a corporation, arising out of an alleged indebtedness of said corporation to the assignor of the plaintiff, in the sum of \$2,236.97.

The facts out of which this corporate indebtedness arose are substantially these: During the year 1907 and thereafter the D. D. Oliphant Company was a corporation doing business in the city and county of San Francisco. In the month of May of that year it became necessary for the corporation to raise a sum of money to meet certain obligations then coming due. The plaintiff, F. P. Cutting, was the secretary of the corporation, and was also the manager of the F. P. Cutting Company, another corporation. In order to raise money to meet the accruing obligations of the Oliphant Company, an agreement was made with Mr. Cutting, representing the Cutting Company, which was then the owner of a thousand cases of tomatoes, by the terms of which the Cutting Company was to turn over to the Oliphant Company these tomatoes upon the understanding that the latter was to sell them, and use the proceeds of their sale, if necessary, to meet the obligations of the Oliphant Company as they fell due. In pursuance of this arrangement, the Oliphant Company proceeded to sell and deliver these tomatoes to various customers, and to use the money collected upon such sales. There were also some other articles, such as cans and solder, bought by the Oliphant Company from the Cutting Company during that year, and, on the other hand, some payments made or credits given, leaving a balance due from the Oliphant Company to the Cutting Company of the sum of \$2,236.97, which being unpaid by the Oliphant Company, and being by the Cutting Company assigned to F. P. Cutting, he commenced this action against these defendants, as stockholders of the Oliphant Company, to recover their proportionate share of this indebtedness.

Upon the trial the court gave judgment against each of the defendants for the sum of \$619.18 principal, and \$240.57 interest, from which judgment and from the order denying a new trial the defendants appeal.

The first point presented by the appellants is that the complaint does not state facts sufficient to constitute a cause of action, and that their general demurrer thereto should have been sustained.

[1] The complaint is in two counts, which are, however, substantially the same in the form and substance of their material averments. In the first of these counts it is alleged that:

"Within three years last past the said D. D. Oliphant Company became and now is indebted to the plaintiff for a balance due upon an open book account in the sum of \$2,236.97, for money paid, loaned, and advanced, and for goods, wares, and merchandise sold and delivered by

plaintiff to said D. D. Oliphant Company at its special instance and request."

It is also alleged that at all times mentioned in the complaint each of the defendants was the owner of 83⅓ shares of the capital stock of the corporation. The objection which the appellants make to these averments of the complaint is that it does not appear therefrom that the defendants were stockholders of the Oliphant Company at the time the original indebtedness arose, but only at a time when there was a balance of such indebtedness due. We think, however, that this is altogether too strained a construction of the complaint to be availed of, at least upon general demurrer. It is true that the complaint refers to a balance of an account upon which the Oliphant Company became and was indebted within three years last past; but a balance of an account is not a new indebtedness; and the words "became indebted," as used in the complaint, may reasonably be held to refer to the time of the creation of the original account, and of which only the balance remains unpaid. The cases cited by the appellant in support of his contention all refer to actions against stockholders based upon new obligations given by the corporation in lieu of the original indebtedness, and hence they have no application to the case before us. Whatever doubt may arise in the construction of this complaint, from the use of the form of the common count therein in pleading the indebtedness of the corporation, amounts at most to an uncertainty, which should have been assailed by a special demurrer, in the absence of which we must hold the complaint to be sufficient.

[2] The next contention of the appellants is that the transaction between the Oliphant Company and the Cutting Company with regard to the transfer of the tomatoes amounted to a present sale of said goods as of the date of the agreement; and hence that the stockholders' liability of the defendants had that date for its inception; and that this action, having been commenced more than three years after that date, must be held to be barred by the statute of limitations. The findings of the court, however, are against this contention, and are in effect that the agreement between these two corporations relating to the tomatoes was that the Cutting Company merely authorized the Oliphant Company to sell the specified number of cases of its tomatoes, and received the money arising from such sale, and to use the same when so received to relieve, if necessary, its financial stress; and that

the obligation of the Oliphant Company to the Cutting Company took its inception from the date of the actual receipt and use of the money derived from the sale of the tomatoes. The evidence in the case fully justifies this finding of the court; and this being so, and the action having been begun within three years of the earliest date of the receipt of the proceeds of the sales of the tomatoes by the Oliphant Company, it follows that the plea of the statute of limitations on the part of the defendants is of no avail.

[3] The appellants' next contention is that the court erred in excluding from evidence the warehouse receipt for the tomatoes which had been issued to the Cutting Company and delivered by it to the Oliphant Company. The statement of the case discloses that when it was proposed to introduce evidence preliminary to the introduction of the warehouse receipt, and the court inquired as to the purpose of its introduction, counsel for the defendants stated that their purpose was to show the date of the delivery of the goods in order to fix the date of the inception of the defendants' liability. The court sustained the objection to the defendants' offer; but a little later on in the trial it was admitted by both parties that the delivery of the goods was made prior to May 27, 1907. This admission must be held to have satisfied the purpose of the defendants, in the introduction of this evidence; and hence the error of the court, if any, in excluding it, was cured. The evidence does not disclose that the warehouse receipt itself was ever produced in court, or was ever offered in evidence by the defendants.

[4] We deem the appellants' final contention, that the court erred in refusing to grant the defendants' motion for a nonsuit as to the second alleged cause of action, to be without substantial merit, in view of the fact that both counts in plaintiffs' complaint cover substantially the same ground, and especially in view of the fact that, after the denial of the motion, the defendants presented evidence with respect to the dealings between these two corporations which would have the effect of eking out whatever defects in proof on the part of the plaintiff which, uncured, might have formed a proper basis for the defendants' motion. We discover no reversible error in this record.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

27 Cal. App. 97

McCAMPBELL v. OBEAR. (Civ. 1397.)

(District Court of Appeal, First District, California. March 26, 1915.)

1. CORPORATIONS 82—SALE OF STOCK—CONTRACT TO REPURCHASE—CONSTRUCTION.

A promoter of a corporation, who, to induce a subscription, executed in January, 1908, an instrument reciting that he guaranteed specified dividends, and providing that, should the subscriber desire to sell the stock on or before April 12th, he would purchase it at par, and, should the subscriber thereafter desire to sell, the promoter would purchase for an additional price prior to October 20th, and declaring that the promoter reserved the right to terminate his obligations on written offer to buy the stock and tendering the money at the agreed price at any time on or before the expiration of two years from date of agreement, gave the promoter the right to terminate such of the obligations of the guaranty as had not been either performed or insisted on by the subscriber either at the time provided for their performance or at any later time before the exercise by the promoter of the option to buy, and where in October the subscriber demanded performance of the guaranty, and the promoter failed to perform, an action begun in April, 1909, on the guaranty, was not premature.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285-295; Dec. Dig. 82.]

2. CONTRACTS 147—CONSTRUCTION.

The court, in construing a contract, must read all the parts thereof together, and, if possible, give effect to all.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. 147.]

3. APPEAL AND ERROR 1002—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. 1002.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by G. W. McCampbell against W. H. Obear. From a judgment for plaintiff, defendant appeals. Affirmed.

Archibald Barnard, of San Francisco, for appellant. J. L. Fleming, of Los Angeles, and Costello & Costello, of San Francisco, for respondent.

RICHARDS, J. This is an action brought to recover the sum of \$11,500, alleged to have become due to the plaintiff from the defendant in accordance with the terms of a contract between them arising out of a stock transaction.

The two chief witnesses upon the trial of the case were the plaintiff and the defendant. The testimony of the plaintiff tended to show the following to be the facts out of which the contract in question arose: The plaintiff, who was a rancher and vineyardist then living in Los Angeles county, met the defendant, a real estate agent and promoter, in the city of Los Angeles in the year 1907. He had been interested in transactions with the defendant before, and upon this occasion the

latter sought to enlist his interest and cooperation in a plan for the purchase, development, and sale of a tract of land in San Mateo county. He asked the plaintiff to go in with him, and assured him that he would double his money in a short time, and offered to give him a written guaranty to that effect if he would put \$5,000 into the venture. In October, 1907, the plaintiff came to San Mateo county and looked the land over, and, upon so doing, told the defendant that he would go in with him, and then gave him the sum of \$2,500 on account of the transaction, for which the defendant gave a receipt, in which the organization of a stock company to handle the project is referred to, and also in which the defendant offers a guaranty that the stock of the plaintiff shall have a guaranteed dividend of 10 per cent. per annum, and a guaranteed value of \$200 per share. A little later the plaintiff paid an additional \$2,500 to the defendant, and received another receipt referring to his former subscription. In the meantime the corporation was in process of organization, with a capital stock of \$550,000 divided into 3,750 shares of preferred stock and 1,750 shares of common stock, each of the par value of \$100 per share. The plaintiff signed the subscription for stock in this corporation to the amount of \$5,000, and upon the completion of the organization of the corporation the San Mateo county property was bought. Early in January, 1908, the plaintiff visited the office of the defendant in Los Angeles and asked for the formal guaranty which he was to receive, whereupon the following document was executed and delivered to him:

"This memorandum of agreement witnesseth: This is to certify that said G. W. McCampbell has this day purchased through us, as agents, fifty (50) shares of the preferred capital stock of the East San Mateo Land Company of the par value of five thousand dollars, the receipt whereof is hereby acknowledged.

"That for and in consideration of the purchase of said stock, through me as such agent, I hereby jointly and severally agree to and do hereby guarantee said G. W. McCampbell dividends upon said stock at the rate of eight (8) per cent. per annum, to be paid on or before the following dates, to wit: April 29, 1908; October 29, 1908; April 29, 1909, and October 29, 1909; and in the default of the payment of any of such dividends at the rate above specified, I hereby agree to pay said G. W. McCampbell, at any of said times when there is a default in payment of such dividends, an amount equal to an eight per cent. dividend upon said stock, said payment to be made upon demand.

"We also agree to save and hold said McCampbell harmless against any loss or depreciation in the market value of said stock below its par value. And should he desire to sell said stock on or before April 12, 1908, we hereby agree upon demand to purchase the same for the sum of \$5,000. And thereafter, should he retain said stock, and desire to sell the same, we hereby agree to purchase the same at any time upon demand prior to October 20, 1908, for the sum of \$10,000.

"This agreement and guaranty is subject, however, to the following conditions: That the undersigned reserve the right to terminate all

their responsibility and all obligations under this guaranty upon written offer to buy said stock of said G. W. McCampbell and tendering to him the money therefor at the agreed price of \$200 per share at any time on or before the expiration of two years from date hereof. And should he not elect to accept such offer, this guaranty shall be at an end.

"Dated at Los Angeles, California, this 16th day of January, 1908.

"[Signed]

W. H. Obear."

The defendant's plans for the subdivision and sale of the property in question do not seem to have come to fruition according to his hopes; and in the month of October, 1908, the plaintiff demanded in writing the fulfillment of the defendant's aforesaid guaranty, which not being forthcoming after several months of delay and some correspondence between the parties, he commenced this action on April 30, 1909, to recover the sum of \$10,000. He subsequently filed a supplemental complaint for the additional amount of \$1,500, alleged to have been paid in three assessments of \$500 each upon his stock after the commencement of the action.

The defendant in his answer denied much of the preliminary negotiations prior to the giving of the alleged guaranty, but did not deny its execution and delivery to the plaintiff.

The verdict of the jury was in favor of the plaintiff upon all of the issues in the case, and judgment was rendered thereon for the full amount of his demand. This appeal is from the order denying defendant's motion for a new trial.

[1, 2] The first contention of the appellant is that this action was prematurely brought. This contention is based upon the construction which is placed by the appellant upon the concluding paragraph of the contract of guaranty above set forth, and which, according to appellant's insistence, postpones his liability upon all of the other obligations of his guaranty until a period later than the date of the inception of this action. We do not so construe this clause of the contract, for to do so would be to practically nullify

the other provisions and conditions of the document, and thus violate the rule of construction that all parts of a writing are to be read together, so that, if possible, all shall be given effect. When the concluding clause of the defendant's contract is so read and so construed, we think that it must be held to intend that the only right which the defendant reserved by the terms of said concluding clause of his guaranty was the right to terminate such of the obligations thereof as had not been either performed or insisted upon by the plaintiff either at the time provided for their performance, or at any later time before the exercise on the part of the defendant of the option contained in the closing clause of his contract, which, as the evidence shows, he never exercised. It follows that the action was not prematurely brought.

[3] The next contention of the appellant is that the contract of guaranty was without consideration, and therefore void. The argument of appellant in support of this contention rests wholly upon his construction of the evidence in the case; his theory being that the testimony of the plaintiff as to the circumstances leading up to his investment of the sum of \$5,000 in the venture and to the giving of the guaranty is not to be believed. We do not find in the record any such inconsistencies in the plaintiff's testimony as would have justified its rejection; and it is evident that the jury believed, and we think were justified in believing, the plaintiff's story. This being so, and the jury having resolved the conflicting evidence in the case in favor of the plaintiff, its verdict will not be disturbed.

As to the several objections urged by the appellant to certain rulings of the court during the course of the trial, and also to certain of the instructions given to the jury, we think that none of these has any sufficient merit to require individual consideration.

The order denying a new trial is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

27 Cal. App. 79

PEOPLE v. BYRNES. (Cr. 363.)

(District Court of Appeal, Second District, California. March 25, 1915.)

1. CRIMINAL LAW ⇨371—EVIDENCE—PROOF OF OTHER OFFENSES.

Where the criminal act charged is proved, evidence of other like offenses may be shown to repel any inference of accident or mistake, and to negative an innocent state of mind existing at the time of committing the act charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. ⇨371.]

2. CRIMINAL LAW ⇨371—EVIDENCE—PROOF OF OTHER OFFENSES.

Where, on trial for larceny through bets on a fake horse race in what appeared to be a real pool room in operation, but which was altogether a fake pool room, the evidence was sharply conflicting on the identity and presence of accused as a participant in the fraud, evidence of accused's participation in other fully equipped betting exchanges was inadmissible, in the absence of evidence that the other exchanges were not what they purported to be or that the bets were not actually made and the races run with the results as announced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. ⇨371.]

3. CRIMINAL LAW ⇨371—EVIDENCE—PROOF OF OTHER OFFENSES.

Where, on a trial for larceny through bets on a fake horse race in what appeared to be a real pool room in operation, accused relied on an alibi, and the evidence established his criminal intent if he participated in the fraud, evidence of his participation in other pool rooms was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. ⇨371.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

James W. Byrnes was convicted of grand larceny, and he appeals. Reversed.

Earl Rogers, H. L. Giesler, Frank E. Dominguez, and M. M. Cohen, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted upon an indictment charging him with committing the crime of grand larceny. He appeals from the judgment and an order denying his motion for a new trial.

The scheme, trick and device, by means whereof the property of one Friesz was stolen, is fully described in an opinion of this court filed in the case of *People v. Lee Rial*, 23 Cal. App. 713, 139 Pac. 661, the theory of the prosecution being that defendant was the one therein referred to as the "man behind the counter," who, as shown, aided and abetted Rial in the commission of the crime for which the latter was convicted. While conceding the property of Friesz was obtained by Rial and his accomplices in the manner there set forth, defendant nevertheless claimed that he was not a party to or par-

ticipant in the fraud, and that at the time when the transaction occurred in Venice he was in San Bernardino, some 75 miles distant therefrom, from which fact, if true, it must follow that he was innocent of the charge. The crime was, as alleged, committed on February 18, 1913, and the case was tried in June, 1914. At the trial Friesz identified defendant as being the man behind the counter who received the bets and, from pretended information received by him over the telephone, shown to have been a false pretense in that it was not connected with or a part of a telephone system, called off the places of the horses falsely represented to be running, and announced the result. The testimony of Friesz was the only evidence offered which tended to identify defendant as being present and participating in the commission of the crime. To controvert this proof, defendant testified that at the time in question he was in San Bernardino, and he procured a witness who, so far as shown, had no interest in the matter, who testified that in said city he met and talked to defendant at about the same hour when the prosecution claimed he was in Venice. A few days after the alleged offense, defendant was placed under arrest and incarcerated in jail. While there he was conducted to a room wherein there were a number of others, and Friesz being present was asked by officers accompanying him if he recognized any one in the room, other than Rial, who was at the pool room or acted in connection with Rial, to which, according to the testimony of the officers, he replied in the negative. And on another occasion about the same time, when inquiry into the matter was being considered by the grand jury, and Friesz being in the corridor near the grand jury room, defendant was brought into the corridor, and Friesz was informed by officers that the man arrested as being the one who received the bets was present among the persons there gathered, and, as shown by the testimony of such officers, after looking around, replied that he did not recognize him. Friesz claimed that he did at the times in question recognize defendant, but made no answer to the inquiry for the reason that he was "working under the rulings of the district attorney." He also admitted that after the trial of Rial, wherein he appeared as a witness, he stated to the deputy district attorney in charge of the prosecution of that case that he could not identify the "man behind the counter," who aided Rial in the perpetration of the crime, giving as a reason for making the statement the alleged fact that he feared if he told the truth "some of the bunch" would inflict bodily injury upon him. Upon this evidence so given by Friesz, and notwithstanding the evidence tending to impeach him as a witness, the jury were clearly justified in refusing to accept the testimony of defendant

and his witness as sufficient to establish the alibi as claimed. The reason for thus referring at length to this phase of the case is that the sharp conflict therein presented, and Friesz' theretofore admitted inability to identify defendant as the man who participated with Rial in committing the offense, became highly important in considering the prejudicial effect of a ruling of the court in admitting evidence of other alleged like offenses, which ruling is the chief ground upon which appellant insists upon a reversal of the judgment.

The evidence, admitted under this ruling, was the testimony of J. A. Torline and A. N. Koehler as to the commission of alleged like offenses at Redondo Beach in February and November, 1912, whereby it is claimed their property was made the subject of grand larceny, and according to whose testimony Byrnes, the defendant, was fully identified as the chief operator, or man behind the counter.

As stated by the court in its instructions to the jury, evidence of these alleged collateral offenses was received for the sole and only purpose of showing that defendant was knowingly engaged in promoting and operating a criminal scheme or system of criminal action, and they were told that if they found there was such scheme or system, and that the crime with which defendant was charged was committed pursuant to or as a part thereof, then they might consider such evidence of alleged collateral offenses, "for the purpose of determining, and only for the purpose of determining, whether the defendant, if he was a party to the taking of the property of Friesz, acted with a guilty knowledge or with a guilty and felonious intent. But for no other purpose can you consider the evidence respecting any of such other alleged offenses."

[1] It is settled law that, the doing of the act being proved, evidence of other like offenses may, as an exception to the general rule, be received to "repel any inference of accident or mistake," and negative an innocent state of mind existing at the time of the doing thereof. Underhill on Criminal Evidence (2d Ed.) §§ 87, 89; *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; *People v. King*, 23 Cal. App. 259, 137 Pac. 1076; *Wigmore on Evidence*, vol. 1, §§ 303 and 346.

[2] As in the case of Friesz, these witnesses were first induced to place bets with the operator of what purported to be a fully equipped betting exchange, having telephonic and telegraphic connection with the track where races were run and, as in the case of Friesz, in making their first bets they used checks drawn upon banks where sufficient funds were not on deposit to meet the same. After it was announced that the horse upon which they had placed their bets was the winner, and upon presenting their pool tick-

ets, the question arose as to whether or not the money was on deposit to meet the checks. Whereupon, it was agreed that the cash and checks used in making the bets should be sealed up in an envelope and held until the checks were made good. The witnesses procured sufficient money to cover the checks and, in company with their new found purported friends, who were engaged with Byrnes in committing the offense, went to the so-called betting exchange for the purpose of collecting the money so won. The operator, stating that everything was correct and that they were entitled to payment, made the excuse that he was waiting for the books which would shortly arrive, when he would make payment. While waiting one of the bunko steerers expressed a desire to bet upon a race about to be run, and upon being informed by Byrnes that they could use the money in his possession to which they were entitled, in making a wager thereon, he instructed the other accomplice to place the entire sum upon a horse which he named to win, but through misunderstanding this other party placed it upon the wrong horse and the entire sum was lost. This evidence as to the paraphernalia and fittings contained in the pool room, scheme and system operated, is almost identical with that used in the so-called pool room at Venice, whereby Friesz was fleeced out of his money, with, however, this very material difference: While in the Venice case it was conclusively shown that the telephone and telegraph instruments therein had no connection with the wires or system of any telephone or telegraph company, by reason of which fact the entire scheme whereby Friesz was induced to place his wager was shown to be a fraud and to have no existence in fact, such evidence was wholly lacking in the case of the Redondo Beach betting exchange where Torline and Koehler placed their bets. Indeed, so far as shown, the telephone and telegraph instruments installed at Redondo may have been connected with systems and wires from which the operator received information, and the money may have been hazarded in all respects as Koehler and Torline intended it to be, and the races actually run, since there was nothing shown to the contrary. The room at Redondo appeared from the furnishings and fittings to be a fully equipped betting exchange or pool room for placing bets on races, having installed therein telephone and telegraph instruments which purported to be connected with a line of wire and system over and by means of which the operator was in constant communication with the tracks where the races were being run, and the representations were made to both Torline and Koehler that they were betting on what were termed and understood by them to be "fixed races." Not a word of evidence was offered tending to

show that these representations were untrue, or that the pool room and its equipment were other than what they purported to be, or that the bets were not actually made as they intended them to be, and the races run with the result as announced by Byrnes. That the evidence tended strongly to show that at the times in question defendant was present, engaged in the operation of an unlawful scheme whereby these witnesses were swindled, may be conceded, but the transaction was wholly lacking in the material element existing in the main case, viz., the fraud and deception practiced upon Friesz. "When the body of the offense has been established, and that defendant passed the check, and it is sought to show guilty knowledge by the fact that defendant also passed other forged paper, the prosecution assumes the same burden as to all the other checks introduced. It must show that such checks were forged." *People v. White-man*, 114 Cal. 338, 46 Pac. 99; *People v. King*, 23 Cal. App. 259, 137 Pac. 1076; *People v. Bird*, 124 Cal. 32, 56 Pac. 639. The testimony of Torline and Koehler, wherein they identified defendant as operating a betting exchange or pool room at Redondo, was insufficient to establish a like offense in that it was wholly lacking in the essential element of deception and fraud required to constitute the crime with which defendant was charged.

[3] Moreover, as stated, the reception of this character of evidence for the purpose of showing intent, is an exception to the rule and should only be received in cases where the intent accompanying the act is equivocal, or where it otherwise becomes an issue in the trial, as where it is claimed the act was the result of mistake, accident, or inadvertence, where from the nature of the acts constituting the crime with which the accused is charged, proof of

its commission carries with it the evident and conclusive implication of guilty knowledge, there is no occasion for admitting such evidence, and the rule, not the exception, should apply. *People v. Glass*, 158 Cal. 654, 112 Pac. 281. Surely, if a man is captured while making his exit in the nighttime through a broken window of a storeroom, having in his possession goods of the owner stolen therefrom, and his defense is an alibi, no evidence of other like acts committed by him should be required to show the criminal intent with which he committed the act. So in the case at bar, proof of the acts, by means whereof Friesz claimed to have lost his property, was of a character which could leave no doubt in the minds of the jurors as to the criminal intent accompanying the act.

That such evidence so erroneously admitted must necessarily have prejudiced defendant in the minds of the jurors, admits of no doubt. The chief question in issue, and the one upon which the evidence of the prosecution was weak, was the identity and presence of defendant as a participant in the criminal act. As to this, the testimony of Torline and Koehler not alone tended strongly to corroborate that given by Friesz, but taken as a whole was well calculated to, and no doubt did, "create in the minds of the jury a prejudice against the defendant so pronounced as to preclude an unbiased consideration of the question as to whether or not, in its entirety, the evidence upon the main case left a reasonable doubt of the defendant's guilt." *People v. King*, supra.

A number of other alleged errors are discussed in appellant's brief, a consideration of which, however, is, under the view here expressed, rendered unnecessary.

The judgment and order are reversed.

We concur: CONREY, P. J.; JAMES, J.

27 Cal. App. 57

PENNINGTON v. GEORGE W. PENNINGTON SONS et al. (Civ. 1483.)

(District Court of Appeal, First District, California. March 24, 1915.)

CORPORATIONS — 298 — BOARD OF DIRECTORS — QUORUM.

Under Civ. Code, § 308, providing that a majority of the directors is sufficient for the transaction of business, and every decision of a majority of the directors duly assembled is valid as a corporate act, the power of a board to transact corporate business is not affected by the fact of a vacancy in the board, unless the number of directors is reduced below the required quorum; and a resolution removing a member of the board from his position as superintendent of the corporation, adopted by two directors at a meeting attended by the four of the five members, is a valid corporate act, the member removed being disqualified from voting and one vacancy existing by reason of death.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292, 1317, 1319; Dec. Dig. — 298.]

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by George W. Pennington against George W. Pennington Sons, a corporation, and another. From an order denying relief to plaintiff, he appeals. Affirmed.

Arthur H. Barendt, of San Francisco, for appellant. Edwin L. Forster and Robert R. Moody, both of San Francisco, for respondents.

PER CURIAM. This is an appeal from an order, which was the equivalent of a final judgment, denying plaintiff's petition for a writ of mandate, commanding the corporation defendant and its president, the defendant Thomas Pennington, to restore the plaintiff to his position and salary as superintendent of the corporation, from which he had been removed by a resolution of the board of directors of the corporation at a meeting of the board which admittedly was regularly called in compliance with the by-laws of the corporation.

But one question of law is presented for consideration, and that arises out of the undisputed facts of the case, which are in substance as follows: On the 8th day of September, 1913, a meeting of the board of directors of George W. Pennington Sons, Incorporated, was held in the office of the corporation. There were present at this meeting four of the five directors of the corporation. At the time of this meeting there was a vacancy in the board of directors caused by the death of Mary Ann Pennington. The directors present at the meeting were Thomas Pennington, Edmond Pennington, George W. Pennington, and John Pennington. The meeting was called to order by Thomas Pennington, the president of the corporation, who, after appointing Edmond Pennington as acting secretary, offered a resolution provid-

ing that the plaintiff, George W. Pennington, be deprived of all salary as superintendent of the corporation from the date of the meeting. This resolution, after being seconded by Edmond Pennington, was put to a vote; Thomas Pennington and Edmond Pennington voting "Yes," and George W. Pennington and John Pennington voting "No." Thereupon Thomas Pennington declared the resolution carried, and then proceeded to offer another resolution, which called for the removal of George W. Pennington from the office of superintendent of the corporation, and deprived him of all authority to sign checks and documents for or in the name of the corporation. The latter resolution was also seconded by Edmond Pennington, and upon being put to a vote was declared carried by the affirmative votes of Thomas and Edmond Pennington.

The only disputed question of fact in the case is as to whether or not George W. and John Pennington were given an opportunity to vote upon the latter resolution. It is conceded, however, that the determination of this question of fact is immaterial to a discussion of the paramount point in the case, because admittedly the plaintiff was a party interested in the subject-matter of the resolution, and therefore disqualified, as a matter of law, from voting upon it. In other words, it is admitted that, if there had been in existence a full board of five directors, the affirmative vote of two of the three qualified directors present would have been sufficient to legally adopt the resolution deposing the plaintiff; and it is conceded, therefore, to be immaterial to know whether or not the third director was given an opportunity to vote.

It will thus be seen that the paramount question in the case is, as stated by counsel for the plaintiff, "narrowed down to an enunciation of the legal effect of an unfilled vacancy on the board of directors caused by the death and consequent inability to give notice to five directors." In this behalf it is the contention of counsel for the plaintiff, as we understand it, that, when a vacancy is created by death in a corporation's board of directors, no business of the corporation can be transacted until the vacancy in the board is filled, notwithstanding the fact that a sufficient number of the living directors to constitute a quorum may be present at a regular meeting of the board duly called for the purpose of transacting the corporation's business.

Section 308 of the Civil Code provides that:

"A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act."

Admittedly, if there had been no vacancy on the board of directors in the present case, and after due notice of the meeting one of

the directors had failed to attend, the resolution in controversy would undoubtedly have been legally adopted by a majority vote of the qualified quorum of directors present at the meeting. No good reason for a contrary conclusion because of a vacancy in the board can be conceived; and, indeed, a contrary conclusion would necessitate a radical revision of the Code section above quoted, and that may be done only by the Legislature. The generally accepted rule which defines a quorum in the event of unfilled vacancies in corporate boards of directors is that:

"A quorum is a majority of the entire board as it would be constituted if all the vacancies were filled, and not a majority of the board as it remains with the vacancies unfilled." 10 Cyc. p. 778.

In other words, the power of the board to transact corporate business is neither diminished nor defeated by the fact of a vacancy in the board, unless the number of statutory directors be reduced below the required quorum; and the number of directors necessary to be present in order to constitute a quorum for the transaction of corporate business remains the same, even though there be unfilled vacancies in the board of directors. 3 Cook on Corporations (7th Ed.) § 713a, p. 2462; *Wright v. Commonwealth*, 109 Pa. 560, 1 Atl. 794. Practically the same question presented here was involved in the case of *Porter v. Lassen County, etc.*, 127 Cal. 261, 59 Pac. 563; and, while the court there did not definitely and directly decide the question, nevertheless it quoted with approval the doctrine announced in *Wright v. Commonwealth*, supra, that "the power of a board is never suspended by vacancies unless the number be reduced below a quorum;" and it is very evident that, if necessary, the court would have decided that "such boards, though curtailed in number, could carry on the corporation's business."

The corporate proceedings complained of in the present case being well within the statutory rule covering and controlling the creation, deliberations, and decisions of the board of directors, its action in adopting the resolution in controversy must be held to be valid, and therefore beyond the reach of the mandate of the court.

The order appealed from is affirmed.

27 Cal. App. 102

COSTELLO v. BELL et al. (Civ. 1456.)

(District Court of Appeal, First District, California, March 26, 1915.)

1. VENUE $\S$ 41—PLACE OF TRIAL—NONRESIDENCE OF DEFENDANTS.

Where an action was brought in the county in which two persons, properly made defendants, resided, codefendants residing in another county were not entitled to a change of venue to the county of their residence, under Code Civ. Proc. § 395, providing that, if any person is improperly joined as defendant, his residence

must not be considered in determining the proper county for trial of the action.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 62, 63; Dec. Dig. $\S$ 41.]

2. APPEAL AND ERROR $\S$ 965 — DISCRETION OF TRIAL COURT — CHANGE OF VENUE — FINDINGS.

Where the affidavits on a motion for a change of venue are conflicting, the discretion of the trial court in reaching its conclusion as to the facts will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3836; Dec. Dig. $\S$ 965.]

3. VENUE $\S$ 41—CHANGE OF VENUE—FINDINGS—CONCLUSIVENESS.

Where an action in claim and delivery for the possession of an automobile or its value was brought in the county of the residence of the two defendants who defrauded plaintiff out of the machine in that county by a fictitious check for its price, and who then took the machine to codefendants residing in another county, and placed it in their care, codefendants, who did not deny that plaintiff had been defrauded, as claimed by him, nor dispute that they came into the possession of the property from defendants, were not entitled to a change of venue to the county of their residence.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 62, 63; Dec. Dig. $\S$ 41.]

4. REPLEVIN $\S$ 1—RIGHT OF ACTION—RE-TAKING PERSONAL PROPERTY—FRAUD.

The remedy of retaking personal property through claim and delivery is available as an auxiliary remedy, in an action wherein plaintiff asserts a present right to the possession of personal property of which he has been defrauded by the device of a fictitious check for its price.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 1; Dec. Dig. $\S$ 1.]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by John P. Costello against John Doe Bell and others. From an order denying a motion of defendants Bell and another for change of venue, they appeal. Affirmed.

Charles O. Busick, of Sacramento, for appellants. Fitzpatrick & Greeley, of San Francisco, for respondent.

PER CURIAM. This is an appeal from an order denying a motion of the defendants Bell and Schlut for a change of venue from the city and county of San Francisco to the county of Sacramento, their place of residence.

The facts of the case, as shown by the plaintiff's complaint, are as follows: On February 9, 1913, the plaintiff was the owner of a certain Stoddard-Dayton automobile which he had intrusted to the Acme garage in San Francisco for sale. On that day the defendants Menrath and Williams (alias Fisk) undertook to purchase said machine from said garage, giving therefor a false check for the sum of \$1,300, being its entire purchase price; and, by this means having obtained possession of the machine, they drove it to Sacramento, where they placed it with the defendants Bell and Schlut. The fraud being discovered, the plaintiff brought

suit in the city and county of San Francisco against Bell, Schlut, Menrath, and Williams, setting forth the foregoing facts, and praying for the return of the machine or its value. Plaintiff also seized the machine upon the usual affidavit and writ in claim and delivery. The defendants Bell and Schlut were served with process, but the other two defendants had for the time being disappeared and could not be found. The defendants Bell and Schlut in due course appeared and made this motion to change the place of trial, and in their affidavits filed in support of said motion deposed upon information and belief that the defendants Menrath and Williams were made parties to the action by the plaintiff for the sole purpose of defeating the right of said moving parties to a change of venue. In these affidavits it was conceded that the defendant Menrath was a resident of San Francisco at the time the action was brought. Later these affidavits were amended so as to be made direct instead of upon information and belief; and the residence of Menrath in San Francisco was denied. The defendants also asserted in these later affidavits that the transaction between themselves and their codefendants was one of sale, and that they bought and paid for the machine, and that it was their property, and that their codefendants had no interest therein. The plaintiff by counter affidavit denied that the defendants Menrath and Williams were made such for the purpose of defeating the other defendants' motion for change of venue, and asserted that the defendants Menrath and Williams both resided in San Francisco at the time the action was brought, and that they were necessary and proper parties to it, and hence that the motion of the defendants Bell and Schlut should be denied.

[1-3] We are of opinion that no error was committed by the court in denying the motion of the defendants Bell and Schlut for a change of the place of trial. It is not to be disputed that if the defendants Menrath and Williams were proper parties defendant, and that if they or either of them resided in San Francisco at the time the action was brought, their codefendants Bell and Schlut would not have been entitled to a change of the place of trial to Sacramento county, under section 395 of the Code of Civil Procedure. *Greenleaf v. Jacks*, 133 Cal. 506, 65 Pac. 1039. The evidence adduced by the affi-

davits of the respective parties to the motion is conflicting; and in such case this court will not interfere with the discretion of the lower court in reaching its conclusion as to which affiants were to be given credence. As to the showing sought to be made by the defendants Bell and Schlut to the effect that the plaintiff had named defendants Menrath and Williams as defendants in the action for the purpose of defeating a motion for change of venue, we do not deem such showing sufficient to establish that fact. It appears from the face of the complaint that the plaintiff had been defrauded out of his automobile by the defendants Menrath and Williams in the city and county of San Francisco, through the device of a fictitious check for its purchase price; and that, having obtained possession of it in this fraudulent way, these defendants took it to Sacramento, and there placed it in the care and custody of the defendants Bell and Schlut. It does not appear from said complaint that the last-named defendants were other than merely the agents of their codefendants in the custody of said machine.

[4] The plaintiff in his complaint sets up the fraudulent transaction, and prays judgment against all of the defendants for the return of the machine. This we think he had a right to do. The remedy of retaking personal property through the process of claim and delivery is not to be classed as an independent form of action, under our system of pleading; but it is available as an auxiliary remedy in any action wherein the plaintiffs assert a present right to the possession of personal property. *Faulkner v. First Nat. Bank*, 130 Cal. 258, 62 Pac. 463, and cases cited. In the showing made by the defendants Bell and Schlut in support of their motion, it is nowhere denied that the plaintiff had been defrauded out of the possession of his property in the manner detailed in his complaint; nor is it disputed that the defendants Bell and Schlut came directly into the possession of the property from those who had perpetrated the fraud. This being so, the plaintiff was not bound to inquire closely into the exact relation between the several defendants before commencing his action against them all, and enlisting the process of claim and delivery to aid him in the recovery of his property.

The motion for change of venue was properly denied. The order is affirmed.

27 Cal. App. 89

BRUNSON v. CITY OF SANTA MONICA.
(Civ. 1671.)

(District Court of Appeal, Second District, California. March 25, 1915.)

1. MUNICIPAL CORPORATIONS — 745½ — NEGLIGENCE OF OFFICERS — LIABILITY.

In the absence of a statute permitting it, an action does not lie against a municipal corporation for damages caused by the negligence of its officers and servants in the performance of public or governmental duties.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1568, 1569; Dec. Dig. — 745½.]

2. MUNICIPAL CORPORATIONS — 747 — NEGLIGENCE OF OFFICERS — LIABILITY.

In the absence of a statute providing otherwise, a municipal corporation is not liable for the negligence of its officers in maintaining a dump as a public work of the city, though the person injured was compelled and permitted to use the dump within the exercise of the police power of the municipality for the protection of the public health.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1570–1577; Dec. Dig. — 747.]

3. STATUTES — 120 — TITLE — SUFFICIENCY.

Under Const. art. 4, § 24, providing that every act shall embrace but one subject which shall be expressed in its title, the title of St. 1911, p. 1115, entitled, "An act relating to the liability of public officers for damages resulting from defects and dangers in streets, highways, public buildings, public work, or property," is not sufficient to justify a provision in the body of the act subjecting municipalities to liability for negligence of its officers.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 168–172; Dec. Dig. — 120.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by C. E. A. Brunson against the City of Santa Monica. From a judgment for defendant, rendered on sustaining a demurrer to the amended complaint without leave to amend, plaintiff appeals. Affirmed.

E. Burton Ceruti, of Los Angeles, for appellant. Hutton, Jensen & Fogel, of Los Angeles, for respondent.

CONREY, P. J. In this action judgment was entered in favor of the defendant under an order sustaining its demurrer to plaintiff's amended complaint without leave to further amend said complaint. Plaintiff appeals from the judgment.

In the complaint it was alleged that the defendant maintained a dumping ground, "the same being the street, highway, public work and property of said city"; that defendant and its agents, officers, servants, and employes negligently and carelessly operated said dump so that it was in a dangerous and defective condition, and maintained a fire in the pit thereof; and did "compel and permit the plaintiff to use said dump so maintained, operated, and conducted as to cause the horses and wagon of the plaintiff to fall therein and in the pit thereof," with consequent damage and injury.

[1] In the absence of a statutory provision permitting it, an action will not lie against a municipal corporation for damages caused by the negligence of its officers, agents, and servants in the performance of the public or governmental duties of such corporations. On the other hand, it has been established that such corporation is liable for damages caused by negligence in its conduct of some kinds of business carried on by it for the public use, such as gas works, electric works, and waterworks. *Davoust v. City of Alameda*, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847.

[2] In the absence of a statutory provision declaring otherwise, a municipal corporation in California is not liable in damages for the neglect of its officers or agents in the maintenance or care of streets or bridges (*Winbiger v. City of Los Angeles*, 45 Cal. 36), nor for such negligence committed while engaged in repairing a sewer. *Chope v. City of Eureka*, 78 Cal. 588, 21 Pac. 364, 4 L. R. A. 325, 12 Am. St. Rep. 113. The case at bar comes within the doctrine of these cases of nonliability. The complaint does not definitely state for what purpose the so-called "dump" was being maintained; but it is stated that the dump was a public work of the city, and that the plaintiff was compelled, as well as permitted, to use it. This implies the use of a power of compulsion for some public reason, such as the exercise of the police power for protection of the public health. The decisions in other states, to which we are referred in the brief of appellant, show that there is a conflict of decision on the question here presented; but it is equally clear that the rule in this state is as above stated.

[3] An attempt has been made to modify, by statutory provisions, the rule of law above stated. An act approved April 26, 1911 (Stats. 1911, p. 1115), is entitled:

"An act relating to the liability of public officers for damages resulting from defects and dangers in streets, highways, public buildings, public work or property."

Section 1 of this act reads as follows:

"If, in consequence of the dangerous or defective condition of any street, highway, public building, public work or property, any person shall suffer injury to his person or property, no officer who has charge of, or whose duty it is to care for or repair, any street, highway, public building, public work or property, shall be liable for any injury to person or property arising from the dangerous or defective condition thereof or failure to repair the same, unless such officer shall have had actual notice of such defective or dangerous condition and shall have failed for a reasonable time after such actual notice to repair the same; provided, that such officer had authority to remedy such condition, or to make such repair at the expense of the state, or a political subdivision thereof, and funds were available for that purpose; and provided, further, that it shall further appear that such damage or injury was sustained while said street, highway, public building, public work, or property was being carefully used and that due care was exercised to avoid such dan-

ger, but in all such cases damage may be recovered against the county, city, or city and county as in ordinary actions for damages, and in cases of judgment recovered against the county the amount thereof and cost shall be paid out of the road district fund of the district where the accident occurred, and in all other cases the judgment must be paid out of the general fund of such county, city, or city and county."

Respondent contends that this act is unconstitutional, at least in so far as it attempts to create a new liability against any county, city, or city and county, for the reason that such liability or nonliability is not a subject within the scope of the act as described in its title.

"Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title. * * * Constitution, art. 4, § 24.

"It is not necessary that the title of an act should embrace an abstract or catalogue of the contents. 'When the general purpose of the act is declared, the details provided for the accomplishment of that purpose will be regarded as necessary incidents.' Ex parte Liddell, 93 Cal. 637 [29 Pac. 252]. In *Spier v. Baker*, 120 Cal. 370 [52 Pac. 659, 41 L. R. A. 196], it was held that an act, by its title pertaining to primary elections, could not contain legislation as to political conventions. Such character of legislation furnishes a clear example of a violation of the provision of the Constitution here involved." *People v. Linda Vista Irrigation Dist.*, 128 Cal. 477, 485, 61 Pac. 86, 89.

Here we have an act which, in its title, purports to deal with the liability of public officers for damages resulting from certain specified causes. This cannot, by any process of reasoning, be made to include the subject of liability of the public corporations in whose service such officers may be. The act is void as to any purported legislation therein contained attempting to create a new rule of liability as against such corporations.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

27 Cal. App. 105

VAN HORN v. PACIFIC REFINING & ROOFING CO. (Civ. 1622.)

(District Court of Appeal, First District, California. March 27, 1915. Rehearing Denied by Supreme Court May 24, 1915.)

1. MASTER AND SERVANT ⇨265—DANGEROUS PREMISES—RES IPSA LOQUITUR—APPLICABILITY OF DOCTRINE.

An owner, employing a contractor to install machinery, agreed to install steam pipes and connect them with the machinery. The owner was notified by the contractor's foreman to cap a steam pipe near which a machine was to be installed. The owner's steam fitter placed a cap on the pipe, but it blew off, permitting the escape of steam injuring an employé of the contractor. *Held*, that the doctrine of *res ipsa loquitur* was applicable, and, in the absence of any explanation as to the cause of the

accident, the liability of the owner for negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. ⇨265.]

2. MASTER AND SERVANT ⇨278—EVIDENCE—QUESTION FOR JURY.

In an action for injuries to an employé of a contractor to install machinery caused by a cap on a steam pipe, maintained by the owner, blowing off, evidence *held* to establish a prima facie case of actionable negligence of the owner.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. ⇨278.]

3. APPEAL AND ERROR ⇨997—DENIAL OF NONSUIT—REVIEW.

Where a nonsuit has been denied, and defendant has then introduced evidence as to the accident complained of, denial of nonsuit will not be disturbed, if all the evidence supports a verdict for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. ⇨997.]

4. TRIAL ⇨250—INSTRUCTIONS—ISSUES.

A requested instruction submitting the issue of contributory negligence of plaintiff, suing for a personal injury, is properly refused, where contributory negligence was not pleaded, and where there was no evidence thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. ⇨250.]

5. NEW TRIAL ⇨105—GROUNDS—NEWLY DISCOVERED EVIDENCE.

Newly discovered evidence, which is merely impeaching, does not support a motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 183, 221-223, 229; Dec. Dig. ⇨105.]

6. NEW TRIAL ⇨108—GROUNDS—NEWLY DISCOVERED EVIDENCE.

New trial for newly discovered evidence, which, if produced, would not affect the result, is properly denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226-227; Dec. Dig. ⇨108.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by W. H. Van Horn against the Pacific Refining & Roofing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Francis Dunn and Thomas E. Curran, both of San Francisco, for appellant. C. L. Dam and George Appell, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action for damages for personal injuries, and from an order denying the defendant's motion for a new trial.

The first contention of the appellant is that its motion for a nonsuit should have been granted. The following are the conceded facts of the cause as presented by the evidence in support of the plaintiff's case: The defendant is a corporation which for several years past has been engaged in the manufacture of roofing and other building material in the city of San Francisco. In the month of March, 1912, it entered into a contract with

the San Francisco Mill Furnishing Company, another corporation, by which the latter agreed to undertake the installing of certain machinery in the premises of the defendant, which machinery required connection with steam pipes for operation and use. The installation of these steam pipes, and their connection with the machine, was to be done wholly by the defendant. Some of these steam pipes were placed in position before the furnishing company commenced its work, and others were being installed while the work of installing the machinery was going on. Among the steam pipes which were thus installed when the furnishing company commenced work under its contract was a short upright pipe about three inches in diameter and a foot long, protruding from the floor at a point where one of the machines was to be and was being placed. This pipe was at first uncapped and emitted steam and hot water for a considerable period after the work of installing the machinery began; but finally the foreman of the furnishing company notified the defendant that the work of installing a machine near this pipe was to be begun, and asked that the pipe be capped. Thereupon, and on or about May 17, 1912, a steam fitter employed by the defendant placed a cap over the top of this pipe. The plaintiff was employed by the furnishing company on May 17, 1912, to assist in the work of installing the machines. He worked a portion of that day and the forenoon of the following day, which was Saturday, and also worked on Monday up to the hour of about 3 o'clock, when the accident occurred. During a portion of Monday afternoon, and for about an hour before the accident, he had been working in the vicinity of this upright pipe, passing back and forth near it, but not taking notice of it particularly, although he heard the steam sizzling around the edges of its cap. His immediate occupation there was that of assisting his foreman, George Marshall, in the erection of a scaffold, to be used in the course of installing the machine which was to stand near the pipe. He was presently ordered by Marshall to get a large box, which was on the floor in the vicinity of the upright pipe, to be used as a part of the scaffold. In order to get this box into the position in which he had been told to place it, he would have to move it from 16 to 20 inches toward and up against the pipe. In attempting to get the box into this position, the plaintiff was leaning over the pipe where the box stood, with his face within a foot of it, when suddenly the cap was blown off and the plaintiff struck in the face by it and by a stream of steam and hot water, from which he suffered the injuries for which he brought this action. The box which the plaintiff was handling at the time of the accident was 102 inches long, 14 inches wide, and 8 inches deep, and weighed 92 pounds.

The foregoing was the state of the plain-

tiff's case when he rested and when the defendant moved for a nonsuit.

[1] It is practically conceded by the briefs of opposing counsel that, in order to defeat this motion, the plaintiff must rely on the doctrine of *res ipsa loquitur*, and that the question as to whether or not this doctrine can have application to the facts of this case is the main issue upon this appeal.

The plaintiff was not an employé of the defendant, and had no relation with it, except that arising out of the fact that he was an employé of the independent contracting company engaged in the installation of certain machines in the defendant's premises. With the work of constructing or installing the steam pipes upon the premises, the employer of the plaintiff had nothing to do. The defendant was bound to furnish to the contracting company and its employés a reasonably safe place in which to do their work. The employés of the defendant who were installing its system of pipes, were not the plaintiff's fellow employés. There was nothing in the evidence offered in the course of the plaintiff's case from which an inference of negligence on his part could fairly arise, nor was there any evidence tending in the remotest degree to show that the employer of the plaintiff, or his fellow employé, or any other person, save and except defendant's employés, had ever touched or tampered with the steam pipes of the defendant, or this particular pipe, or the cap which covered it, and which was blown off at the time of plaintiff's injuries.

Such being the state of the evidence at the close of the plaintiff's proofs, we think that a case was presented to which the doctrine of *res ipsa loquitur* may be fairly and properly applied. The cap of this steam pipe, which blew off at the critical moment when the plaintiff was bending over it in the course of his work, had been placed upon it only three days previously by an employé of the defendant. There are only three possible ways by which its dislocation could be explained: Either it was defectively constructed, or negligently and insufficiently affixed to the pipe, or else it had been tampered with and loosened to the point of danger under pressure by some one other than the defendant's employés. In either of the first two of these possibilities the defendant would be liable. But the appellant contends that, because the third possibility exists, the doctrine of *res ipsa loquitur* cannot be given application. In support of this contention, counsel for the appellant argues that the mere fact that persons other than the defendant or its employés were working in and about the building, and had access to the particular floor where this steam pipe was located, would be sufficient to prevent the application of the rule, because some one or other of these might possibly have so struck or tampered with this pipe as to have caused the loosening of its cap to

such an extent that it would be liable to blow off at any moment under pressure.

We think this argument, unsustained, as it is by any semblance of evidence or proof tending to show such interference with this pipe or cap, carries the possibilities in cases of this kind entirely too far. To give it application would be to practically eliminate the doctrine of *res ipsa loquitur* from the law, since it would be difficult to imagine a case where the appliance causing the accident would be so immured as to make it impossible for any person but its owner or operator to have access to it. The cases which the appellant cites as sustaining this view fall short of doing so; and among these the case of *White v. Spreckels*, 10 Cal. App. 287, 101 Pac. 920, will serve as a good illustration of the distinctions to be drawn in the application or nonapplication of the rule. In that case a steamheating radiator in a room occupied by the plaintiff exploded. The evidence showed that while the defendant, the owner of the building, had installed and was maintaining the radiator, it was as to its immediate use under the control of the plaintiff, who was actually engaged in heating or drying towels upon it (a use for which it was not intended) at the moment of its explosion. The rule declared in this and the other cases cited by appellant, to the effect that the exclusive control and management of the appliance causing the injury must be shown to have been in the defendant, must be taken to refer to the right of such control; otherwise, as we have seen, the doctrine of *res ipsa loquitur* could seldom if ever be given application.

In the case at bar the exclusive control over the construction, installation, operation, and use of the steam pipes in this building and of this particular steam pipe was in the defendant and in no one else. And this condition is not affected by the fact that it would have been possible for other persons, in no way entitled to do so, to have touched or tampered with this pipe. It would not be reasonable to require that the trial court, upon a motion for nonsuit and in the absence of any shred of evidence as to the fact, should hazard a guess that some unauthorized person had wrongfully tampered with the instrumentality of the defendant causing the plaintiff's injury, in order to defeat the application of the doctrine to this case. The rule laid down in *Shearman & Redfield on Negligence*, and quoted with approval by the Supreme Court in *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, to the effect that "when a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that

the accident arose from a want of care," may be given application to the case at bar. *Shearman & Redfield on Negligence*, § 60; *Judson v. Giant Powder Co.*, supra, and cases cited.

The recent case of *O'Connor v. Mennie*, 146 Pac. 674, in no way militates against this rule, but, on the contrary, it expressly re-states and upholds it, while at the same time defining the limitations attending its application to cases between employes and employers, which do not exist in the case at bar.

It follows from these views that the defendant's motion for a nonsuit was properly denied.

[2] It is, however, urged by the respondent that, even if it were conceded that the court erred in denying the motion for a nonsuit, the error, if any, was cured by affirmative evidence offered by the defendant, and from which the jury would have been justified in finding that the defendant was negligent. The defense produced as its own witness, and after the motion for nonsuit had been denied, the steam fitter in its employ who had placed the cap on the pipe a few days before the accident. He testified:

"I screwed it on as tight as I could by gripping it with my two hands. I screwed it down tight. I put in on, I think, about eight or nine days before the accident happened. During that time steam was being continually passed through the pipes."

If this evidence had been before the court and jury at the time the defendant's motion for nonsuit was made, it would seem quite clear that, taken in connection with the evidence which the plaintiff had offered, it would have sufficed to constitute such a *prima facie* showing of negligence as to have justified the court in denying the motion for nonsuit.

[3] The rule is well settled in this state, in cases where a motion for nonsuit has been denied, and the defendant has then proceeded to offer evidence as to the facts and circumstances attending the accident, that if all the evidence given on the trial by both parties, considered together, sufficiently supports the verdict, the order denying the motion for nonsuit will not be disturbed. *Srivani v. Dondero*, 128 Cal. 31, 60 Pac. 463; *Williams v. Long*, 139 Cal. 186, 72 Pac. 911; *Lowe v. S. F. & N. W. Ry. Co.*, 154 Cal. 575, 98 Pac. 678, and cases cited.

[4] The appellant urges several alleged errors of the court in respect to its instructions to the jury. None of these merit especial attention, except the objection that the court erred in its ruling refusing to give a requested instruction on the subject of the plaintiff's contributory negligence. The answer to this objection is that there was no evidence of any contributory negligence on the part of the plaintiff sufficient to justify or warrant the giving of such an instruction. Besides,

the defendant had not presented the issue of contributory negligence in its answer. *White on Personal Injuries*, § 441.

[5] The appellant further contends that its motion for a new trial should have been granted upon the ground of newly discovered evidence. The two items of newly discovered evidence upon which the appellant relied were, first, a written statement of one of the plaintiff's main witnesses as to the circumstances of the accident, made a day or two after its occurrence, which varied in certain material respects from his testimony given at the trial, and which the defendant claims it could have used for the purpose of impeachment of such witness, had this written statement been in its possession at the time his testimony was given. It is a well-established rule, however, that newly discovered evidence, which is simply impeaching or cumulative in character, is insufficient to support a motion for a new trial. *People v. Golden-son*, 76 Cal. 328, 19 Pac. 161.

[6] The second item of evidence which the defendant claimed to have been newly discovered by it was the cap of the steam pipe which was blown off at the time of the plaintiff's injury. We do not think that the affidavits offered in support of the defendant's motion amount to a sufficient showing of due diligence as to either the statement of the witness Marshall, or the search for the missing cap, to have entitled the defendant to a new trial. Nor do we think that either of these items of newly discovered evidence, if produced, would have materially aided the defendant or affected the result of the trial.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

27 Cal. App. 43

WILLIAM WILSON CO. v. TRAINOR et ux.
(Civ. 1425.)

(District Court of Appeal, First District, California. March 23, 1915.)

1. APPEAL AND ERROR ⇨934—JUDGMENT ⇨131—REVIEW—SUFFICIENCY OF AFFIDAVIT.

Upon a direct attack by appeal a judgment cannot be held to be void merely because the affidavit, upon which the order for publication of summons was granted, does not appear in the judgment roll, as required by Code Civ. Proc. § 670, so that where the affidavits in support of an order for publication were filed in the action and were in existence prior to the making of the roll order the clerk's failure to include them in the default judgment was not a ground for reversal; and, if in fact no affidavits in support of the order had been made, that should have been affirmatively shown in the record upon appeal, and without such a showing the judgment upon direct attack would be presumed to be correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. ⇨934; Judgment, Cent. Dig. §§ 160, 245; Dec. Dig. ⇨131.]

2. PROCESS ⇨98—PUBLICATION—ORDER.

An order for publication of summons was not defective because it did not include the proof upon which the court found the existence of the jurisdictional facts, jurisdiction to make the order resting upon the averments of the affidavits and not upon the recitals in the order.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 121-124, 126; Dec. Dig. ⇨98.]

3. APPEAL AND ERROR ⇨914—ORDER FOR PUBLICATION—PRESUMPTION—JURISDICTION OF FACTS.

An order for publication of summons having been made, it will be presumed on appeal that the necessary jurisdictional facts were duly established.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3693-3698; Dec. Dig. ⇨914.]

4. PLEADING ⇨354—STRIKING OUT—IRRELEVANCY.

Where the denials of the answer of a defendant tendered no issue save upon conclusions of law, and the answer as a whole was evasive and contained numerous negative pregnant, the trial court was justified in striking it out as irrelevant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1092-1095; Dec. Dig. ⇨354.]

5. CORPORATIONS ⇨612—FORFEITURE OF CHARTER—PROCLAMATION.

A corporation's failure to pay its license tax does not effectually and finally forfeit its corporate franchise, until the forfeiture has been duly proclaimed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2445; Dec. Dig. ⇨612.]

6. CORPORATIONS ⇨514—ANSWER—INFORMATION AND BELIEF—MATTERS OF PUBLIC RECORD.

The plaintiff's allegation of its corporate capacity and existence could not be denied upon information and belief, because it might have failed to pay its license tax, as the statutory acts to be performed before its franchise would be forfeited were matters of record, and the existence of a fact ascertainable from an inspection of a public record cannot be put in issue by a denial solely upon information and belief.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2052-2081; Dec. Dig. ⇨514.]

7. PLEADING ⇨129—ANSWER—ADMISSION.

Where plaintiff's allegation that the lease provided for an attorney's fee not to exceed a certain sum, taxable as part of the costs of the action, was not denied, an answer denying the reasonableness of the maximum sum provided in the lease and claimed in the complaint, admitted the plaintiff's right to attorney's fees.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. ⇨129.]

8. PLEADING ⇨354—STRIKING OUT—MATERIAL ISSUE.

In such case, where it was the duty of the court to ascertain and allow a reasonable attorney's fee, such denial did not raise a material issue, so as to compel a denial of the motion to strike.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1092-1095; Dec. Dig. ⇨354.]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the William Wilson Company against John Trainor and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. Hoff Cook, of San Francisco, for appellants. Percy E. Towne, of San Francisco, for respondent.

PER CURIAM. This is an appeal upon behalf of both defendants from a judgment in an action of unlawful detainer.

[1] Upon a direct attack by appeal the judgment cannot be held to be void merely because the affidavits upon which the order for publication of summons was granted, do not appear in the judgment roll as is required by section 670 of the Code of Civil Procedure. It appears from the order for publication upon which the default of the defendant John Trainor was entered, that the affidavits made in support of the order for publication were on file in the action, and that they were subsequently offered and received in evidence upon the hearing of a motion to quash the service of summons. It thus clearly appears from the record before us that the affidavits referred to in the order were in existence prior to the time of the making of the order. No claim or showing was made that the affidavits were insufficient to support the order, and the failure of the clerk of the court to perform the ministerial duty of including in the judgment roll necessary papers which were on file and available, cannot be considered as a ground for reversal. If in fact no affidavits in support of the order had been made that could and should have been affirmatively shown in the record upon appeal, and in the absence of such a showing the judgment upon direct attack must be presumed to be correct. *Kahn v. Matthai*, 115 Cal. 689, 47 Pac. 698.

[2] The order for publication was not defective, because it did not include the proof upon which the court found the existence of the jurisdictional facts necessary to the making of the order. Jurisdiction to make the order rested upon the averments of the affidavits, and not upon the recitals of facts found in the order.

[3] The order having been made, it will be presumed that the jurisdictional facts necessary to its making were duly established. *Goodale v. Coffee*, 24 Or. 346, 33 Pac. 990.

[4] The denials of the answer of the defendant Elizabeth Trainor tendered no issue save upon conclusions of law, and the answer as a whole was so evasive and contained so many negative pregnant that the trial court was justified in striking it out upon motion of the plaintiff upon the ground that it was sham and irrelevant.

[5, 6] The allegation of the corporate ca-

pacitancy and existence of the plaintiff could not be successfully denied upon information and belief because, perchance, the plaintiff had failed to pay its license tax, and might, therefore, unknown to the defendant, have lost its corporate character by operation of law. A failure to pay the license tax would not have operated to effectually and finally create a forfeiture of the corporate franchise until "the acts required to be performed by the secretary of state or the Governor (proclaiming the forfeiture) shall have been performed in the manner required." *Kaiser, etc., Co. v. Curry*, 155 Cal. 639, 654, 103 Pac. 341. "Without the performance of such acts, the forfeiture does not result. * * *" *Alaska, etc., Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454. As a matter of course the statutory acts required to be performed in conjunction with the failure to pay the license tax, before a forfeiture of the corporate franchise will occur, must become matters of public record, and it is well settled that when the existence of an alleged fact may be ascertained from an inspection of a public record, its existence cannot be put in issue by a denial based solely upon information and belief.

[7, 8] It is claimed that the denial in the answer of the defendant Elizabeth Trainor relative to the allowance of attorney's fees, raised a material issue, and that therefore this denial alone should have compelled a denial of the motion to strike out. In this behalf the answer denies the reasonableness of the maximum sum provided in the lease, and claimed in plaintiff's complaint as an attorney's fee for the recovery of the possession of the leased premises. The allegation that the lease provided for the allowance of an attorney's fee, not to exceed a certain sum, which might be taxed as part of the costs of the action, was not denied. The plaintiff's right to attorney's fees was therefore an admitted fact in the case, and inasmuch as it was the duty of the court to ascertain and allow a reasonable attorney's fee within the limit of the sum fixed by the condition of the contract of the parties, it was unnecessary in the plaintiff's complaint to allege that any specific sum was a reasonable attorney's fee (*First National Bank, etc., v. Holt*, 87 Cal. 158, 25 Pac. 272; *White v. Allatt*, 87 Cal. 245, 25 Pac. 420); and as the court below fixed the attorney's fee at a sum very much less than that specified in the contract of lease, we cannot see how the defendant was prejudiced by the order complained of.

The judgment appealed from is affirmed.

27 Cal. App. 125

PEARSON et al, v. BROWN. (Civ. 1462.)

(District Court of Appeal, First District, California, March 29, 1915. Rehearing Denied by Supreme Court May 27, 1915.)

1. VENDOR AND PURCHASER ⇐187 — CONTRACT OF SALE—STIPULATION—WAIVER OF CONDUCT.

Where purchasers had been repeatedly in default under an installment purchase of land, and the vendor had received, without objection, the tardily made payments, by so doing he waived the stipulation of the contract making time of the essence, and providing that, upon default in payment of an installment for 60 days, payments made were to be forfeited as liquidated damages, and he was no longer entitled to take advantage of delinquencies, without express notice of his intention to enforce the stipulation, by declaring the contract canceled because of the delayed payments, and by claiming forfeiture of such payments as he had received; the only effect such declaration and forfeiture could have being to notify plaintiffs that such vendor intended to insist upon a strict compliance with the contract, which the plaintiffs fulfilled by immediately paying all back installments and interest.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 374, 375; Dec. Dig. ⇐187.]

2. VENDOR AND PURCHASER ⇐102—BREACH OF AGREEMENT—"RESCIND"—"CANCEL."

In an action by purchasers of land under an installment contract to recover amounts paid thereunder, which defendant vendor had refused to return to them upon notice that he had "canceled" the contract, his statement in a letter to plaintiffs that he had canceled the contract was an abandonment by him, entitling plaintiffs either to sue for specific performance or to recover what they had paid on the purchase price, since "cancel" is equivalent in meaning to "rescind," which, when used with reference to the refusal of a party to a contract for sale of land to proceed further with its performance, is not employed in the sense in which it is used in Code sections referring to the termination of contracts by the technical process of rescission, but is employed rather to signify an abandonment of the contract by the party refusing to be bound.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 175-177; Dec. Dig. ⇐102.

For other definitions, see Words and Phrases, First and Second Series, Cancel; Rescind.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Shepard K. Pearson and another against Herbert F. Brown. Judgment for defendant, and plaintiffs appeal. Reversed, with instructions.

J. L. Kennedy, of Eureka, and J. W. Henderson, of San Francisco, for appellants. C. H. Oatman, of Sacramento, and W. H. Humphrey, of San Francisco, for respondent.

PER CURIAM. This is an appeal by plaintiffs from a judgment on the pleadings in favor of the defendant. The action was one to recover the sum of \$390, with interest, alleged to have been paid by the plaintiffs on account of two certain contracts for the purchase by them of certain lots in Richmond

from the defendant, which contracts, it was claimed, the latter had broken and abandoned by his refusal to receive further payments thereon, and by his express cancellation of said contracts.

The facts regarding the making and execution of these contracts, and the defendant's alleged breach of them, out of which the plaintiffs' claim arises, are, according to the admissions of the pleadings, as follows: On August 21, 1909, the plaintiffs and the defendant entered into a contract by which the former was to purchase from the latter a lot in a certain tract in Richmond for the sum of \$800, to be paid in monthly installments of not less than \$10; the first deferred installment to be payable on September 21, 1909, and the balance in monthly installments of \$10 payable on the 21st of each and every month thereafter until the purchase price was fully paid. These deferred payments were to be without interest, except that it was agreed that, if the purchaser should be delinquent for a period of 60 days, interest at the rate of 6 per cent. per annum was to be paid thereon during the period of such delinquency. It was also provided that time was to be of the essence of the agreement; and that, if the payments were not made according to the terms and conditions of the contract within 60 days after they became due, then all of the payments were to be forfeited as liquidated damages, without recourse, at the option of the seller. On the 14th of October, 1909, a similar contract for the purchase of two additional lots in the same tract, for the purchase price of \$400 each, payable by like monthly installments on the 14th day of every month thereafter, was entered into between the parties. The admissions in the pleadings show that the plaintiffs commenced making payments on both of these contracts, but that almost from the beginning they fell behind in paying the installments on the stipulated dates, sometimes being only a few days in arrears, and at other times allowing a month or more of delinquency to occur. On their first contract the plaintiffs paid in all and at irregular intervals the sum of \$200 up to May 15, 1911. On their second contract they had paid in all and at like irregular intervals the sum of \$190 up to May 15, 1911. These various payments were all received by the defendant without any objection on his part that they were not being made on time. No further payments upon the installments of either contract were made or offered by the plaintiffs after May 15, 1911, until December 30, 1911. On December 5, 1911, the defendant wrote plaintiffs a letter in the following words:

"December 5, 1911.

"James F. and S. K. Pearson, Arcata, Calif. —Gentlemen: This is to advise you that I have on this day canceled your contracts for lots in the Brown Andrade tracts on account of non-payment of installments, as you are now delin-

quent ten months, and I feel that I have carried this account long enough. However, if at any time within one year from date of this letter you should wish to buy four lots from me, I shall be very glad to apply what payments you have made on any four lots that you may select that I have in any of my tracts, at current prices.

"Yours very truly, Herbert F. Brown."

This letter was sent by mail to the plaintiffs at their place of residence in Arcata, Humboldt county, and in the ordinary course of the mails probably reached them a few days later. On December 30th the plaintiffs paid to one J. G. Dolson, the agent of the defendant to whom their previous installments had been paid, the sum of \$120 upon each contract, which, according to the admitted averments of the plaintiffs' complaint, would have fully paid up all back installments then delinquent, and all interest upon deferred payments to that date. On January 19, 1912, the defendant wrote again to the plaintiffs, informing them that he had received their said payments of December 30th, but that he returned same, inasmuch as he had canceled their contracts on December 5th, and that he could not reinstate them as to the lots in question. On January 24, 1912, the plaintiffs demanded of the defendant that he retain and credit the said money, and apply the same upon the payments and interest on said contracts, which demand the defendant again refused to comply with. Thereupon, and on February 16, 1912, the plaintiffs demanded the return of the sum of \$390 which they had previously paid on said contracts; and, this being also refused, this action was brought to recover said sum.

The court on motion rendered judgment on the pleadings in favor of the defendant, from which judgment the plaintiffs have appealed.

[1] Upon the foregoing admitted facts, the first question that arises is as to what the rights of the respective parties were on December 5, 1911, the date of the defendant's first letter to the plaintiffs informing them that he had canceled their contracts. On that date the plaintiffs were about eight months in default in respect of their monthly installments upon each of these contracts; and, according to the strict letter of their agreements making time the essence of such contracts, the plaintiffs would then have been subject to the penalty of having their contracts canceled, and of a forfeiture of the payments which they had theretofore made. On the other hand, however, the defendant, by repeatedly receiving without objection the several payments which the plaintiffs had been tardily making upon these contracts, must be held, by his action in so doing, to have so far waived his right to insist upon the strict letter of the contracts as to be no longer entitled to take advantage of the plaintiffs' past delinquencies so as to either declare the contracts canceled because of them, or to claim the forfeiture of such payments as he had theretofore received with-

out objection when they were not being made on the dates fixed by the contract. *Pomeroy on Contracts*, § 337; *Boone v. Templeman*, 158 Cal. 291, 110 Pac. 947, 139 Am. St. Rep. 126; *Stevinson v. Joy*, 164 Cal. 279, 128 Pac. 751; *Sausalito, etc., Co. v. Sausalito Imp. Co.*, 166 Cal. 302, 136 Pac. 57; *Standard B. K. Co. v. Anderson*, 121 La. 935, 46 South. 926, 15 Ann. Cas. 251; *Barnett v. Sussman*, 116 App. Div. 859, 102 N. Y. Supp. 287.

The foregoing cases not only sustain the rule above set forth, but they also undertake to distinguish and declare what the rights of a vendor are as to all subsequent payments due or to become due upon such contracts after such waiver on his part of the default of the vendee as to prior dilatory payments. The rule in this regard is well expressed in *Stevinson v. Joy*, *supra*, wherein it is said:

"Where time is made of the essence of the contract for the payment of rent or other payments of money, and this covenant has been waived by the acceptance of the rent or other moneys after they are due, and with knowledge of the facts, such conduct will be regarded as creating 'such a temporary suspension of the right of forfeiture as could only be restored by giving a definite and specific notice of an intention to enforce it.'"

The rule is also well stated in *Barnett v. Sussman*, *supra*, wherein it is held that:

"The acceptance by the vendor from the beginning of payments not made according to the contract, but irregular as to time and amount, the purchaser being all the time in arrears, was a waiver of the forfeiture contract, which could not be revived, except on notice to the purchasers that, if they did not pay the balance due within a reasonable time specified, such forfeiture would then be exercised."

This statement of the rule accurately defines what the rights of the respondent in this case were on December 5, 1911, the date of his letter to the appellants, in which he assumed to cancel the appellants' contracts by reason of their default in making payments according to their terms. The respondent was not entitled to work such cancellation, and his said letter could not be given that effect. The utmost effect, under the foregoing rule, which would be given to it, would be that of a notification to the vendees that the vendor intended thereafter to insist upon a strict compliance with the terms of the contracts; and that unless within a reasonable time the vendees paid up their deficiency, and thereafter made their payments strictly in accordance with the time conditions of their contracts, the forfeiture clauses would be enforced. The vendees apparently placed this construction upon the defendants' letter of December 5, 1911, which the evidence shows they received through the mails at their home in Arcata, Humboldt county, on December 11, 1911, for the admitted pleadings show that on December 30, 1911, they paid to J. G. Dolson, the agent of defendant authorized to receive installments due on such contracts, and to whom their previous payments

had been made, the sum of \$120 on each contract, which fully paid their delinquencies thereon to that date. In so doing we think they acted within a reasonable time after receipt of defendant's letter; and we are also entirely satisfied, under the authority of *Stevinson v. Joy*, supra, that, when the plaintiffs had paid these sums of money to the agent of the defendant, they had fully relieved themselves of their past default, and were in the position of having fully complied with the conditions of their contracts up to the date of such payments. This being so, it was the duty of the defendant to have accepted such payments, and this failure and express refusal so to do constituted a breach of the contracts on his part. The pleadings show that on January 19, 1912, the defendant sent back to the plaintiffs the money they had paid on December 30th, and again informed them that he had canceled their contracts, and refused to further proceed with their fulfillment. On January 24, 1912, the plaintiffs again demanded that the defendant retain the sums which they had paid on December 30th, and which had not yet been actually returned to them, and apply the same upon their contracts. This the defendant again refused to do, whereupon the plaintiffs on February 16, 1912, demanded the repayment to them of the sums which they had previously paid in installments upon each of the contracts, and, this being also refused, they instituted this action for the recovery thereof.

[2] The contention of the respondent is that, conceding that he had not the right to abruptly terminate the contracts between himself and the plaintiffs in the manner and to the extent attempted in his letter of December 5, 1911, still his use of the word "cancel" in that and his later letter in respect to said contracts is not to be considered as the equivalent of the term "rescind," nor as amounting to a rescission of the contracts on the defendant's part; and hence, he argues, there being no rescission, the plaintiffs are not entitled to recover what they had paid upon the purchase price. In making this contention the respondent seeks to bring

this case within the reasoning of Mr. Justice Henshaw in the case of *Glock v. Howard*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. We think, however, that the reasoning by which the respondent seeks to do this is based upon an over-refinement of terms. The word "rescind," when used with reference to the refusal of a party to a contract for the sale of real estate, to further proceed with the fulfillment, is not employed in the sense in which it is used in the Code sections which refer to the termination of contracts by the technical process of rescission; but it is rather employed in the sense and as the synonym of an abandonment of the contract by the party refusing to longer be bound by its terms. It is not necessary for such a party to use the word "rescind" in order to accomplish what the cases intend by the use of that term. Any appropriate words, or any definite acts, by which the vendor indicated that he would not proceed further with the fulfillment of the contract, and that he would not permit the plaintiffs to proceed further with the performance of its obligations on their part to be performed, will be taken to amount to a rescission or an abandonment of the contract, so far as the vendor is concerned, and will be held to entitle the vendees not in default to their choice of remedies for the breach of the contract on the vendor's part, in the exercise of which they could either stand upon their contracts and insist in a court of equity upon their specific performance, or they could accept the defendant's attempted repudiation and abandonment of the contracts, and, treating them as thus rescinded, sue for the return of the money already paid on them. The plaintiffs chose the latter course, as we think, under the admitted facts of this case as disclosed by the pleadings, they were entitled to do. It follows that the plaintiffs, and not the defendant, should have had judgment upon the pleadings.

Judgment reversed, with instructions to the trial court to enter judgment in favor of the plaintiffs for the amount prayed for in their complaint, with interest from January 19, 1912, at the legal rate.

27 Cal. App. 51

WOOSTER v. SUNDERLAND et al.
(Civ. 1505.)

(District Court of Appeal, First District, California. March 24, 1915.)

**1. SCHOOLS AND SCHOOL DISTRICTS —169—
DISCIPLINE OF SCHOOLS—POWER OF BOARD
OF EDUCATION—STATUTE.**

Under Pol. Code, § 1617, regulating the power of boards of education and giving such boards the right to suspend or expel pupils for misconduct, when other means of correction have failed, where plaintiff, a high school student, made a speech condemning the board of education at a students' meeting, held on a school day, during school hours, the proceedings of which were a part of school work, prescribed by the city superintendent, ex officio secretary of the board of education, and held under the observation of the high school principal, cognizance of the plaintiff's conduct, while participating in the meeting was within the jurisdiction of the board of education.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 341; Dec. Dig. —169.]

**2. SCHOOLS AND SCHOOL DISTRICTS —177—
DISCIPLINE OF SCHOOLS—EXPULSION—CONDUCT OF SCHOLAR.**

Although Pol. Code, § 1617, regulating the power of boards of education and giving such boards the right to suspend or expel pupils for misconduct, when other means of correction have failed, did not expressly make misconduct of a student, in criticising the board of education in a school meeting, ground for expulsion, nevertheless, where the speech was intended as an attack on the board and delivered to create a spirit of insubordination in the students, the speaker's admitted purpose having been to belittle the board of education and its members in their official capacity, and the whole tenor of the speech having been calculated to produce that result and to engender a feeling of disrespect toward the board in the minds of the student body, it was within the power of the board to punish the insubordination of the speaker by expulsion.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 346, 347; Dec. Dig. —177.]

**3. SCHOOLS AND SCHOOL DISTRICTS —177—
EXPULSION OF PUPIL—DEMAND FOR APOLOGY—STATUTE.**

Under Pol. Code, § 1617, subd. 8, providing that the board of education may expel a pupil to maintain school discipline when other means of correction have failed, where a pupil was guilty of misconduct in having delivered before a school meeting a speech criticising the board, such board's demand for an apology was not a waiver of the right to expel upon refusal.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 346, 347; Dec. Dig. § 177.]

**4. SCHOOLS AND SCHOOL DISTRICTS —169—
DISCIPLINE OF SCHOOLS — MISCONDUCT OF
PUPIL—SUMMONING PUPIL TO INVESTIGATION.**

Where a high school student was guilty of misconduct in criticising the board of education at a meeting of the school pupils, held in the course of school work, the board had inherent power to summon such pupil before it to investigate and pass upon his alleged misconduct.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 341; Dec. Dig. —169.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Petition for mandamus by Earl Wooster, suing by Ernest Wooster, guardian ad litem, against A. E. Sunderland and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. A. Williams and C. E. Beaumont, both of Fresno, for appellant.—M. F. McCormick, of Fresno, for respondents.

LENNON, P. J. The plaintiff in this proceeding sought by mandamus to compel the defendants, as the board of education of the Fresno city high school, to reinstate him as a student of the school, from which he had been previously expelled by an order of the board. The judgment of the lower court was given in favor of the defendants, from which and from an order denying a new trial the plaintiff has appealed upon the judgment roll, and a statement of the case used upon the hearing of the motion for a new trial.

The facts of the case are substantially these: During the year 1913 the plaintiff was a student in the Fresno city high school; and just before the close of the school term, and before he had taken his final examinations, the plaintiff, during school hours, in the assembly hall of the school, delivered an address to the student body of the school, wherein he declared in substance that the auditorium, the chemistry room, and the domestic science department of the school, all of which were located in the same building, were unsafe because of the possibility of fire; and then denounced the defendants for compelling the students to hold their mass meetings, social entertainments, and class productions in the auditorium, because, in the event of fire, the means of exit were inadequate. Following the somewhat caustic criticism of defendants' management of the school and the school's properties, the plaintiff, in no uncertain terms, objected to and denounced the action of the defendants, previously taken, prohibiting the students from engaging in the class performance known as "a donkey fight," which it seems was an annual event with the students, and oftentimes resulted in "cracked heads and injured bodies." The plaintiff declared, during the course of his address, that it "was not fair of the board of education to forbid a donkey fight, in which the boys took their own chances of being injured, and forced them to take chances of being injured in a fire trap." The plaintiff closed and climaxed his incendiary address by offering a resolution, which was adopted by the student body, requesting the defendants in their official capacity as members of the board of education, to "no longer talk about bonds, but to do all in its power to put such a bond issue before the people of the district." In due season, as was to be expected, the defendants were informed of the plaintiff's ad-

dress to the student body; and thereupon plaintiff was cited to appear before the defendants, sitting as the board of education, and explain his motive for making the address. The plaintiff appeared before the defendants; and while attempting to justify his conduct, declared incidentally that his address to the student body "was intended as a slam" at the defendants. At the conclusion of the hearing of the matter the defendants formally decided that the plaintiff's conduct was a breach of school discipline, and that it was intended and calculated to discredit and humiliate the defendants in the eyes of the student body; and as a punishment therefor demanded of the plaintiff an apology, and a public retraction of his offensive remarks. The plaintiff refused to comply with the demand of the defendants, and as a consequence an order was finally and formally entered of record upon the official minutes of the defendants, expelling the plaintiff as a student from the Fresno city high school.

But two points are presented and relied upon in support of the appeal, and they are in effect: (1) That the student body was not a co-ordinate branch of the high school, and therefore the defendants, as the board of education, were without jurisdiction in the premises; (2) that the particular conduct of the plaintiff, for which he was expelled, was not sufficient to warrant and justify his expulsion, even if the defendants had jurisdiction of the matter.

[1] The defendants, as the board of education of the Fresno city high school department, were empowered to prescribe and enforce rules not inconsistent with the state law or the rules of the state board of education, for the government of the high school; and "to suspend or expel pupils for misconduct when other means of correction have failed to bring proper conduct." Pol. Code, § 1617. The evidence adduced upon the hearing had in the lower court shows, without conflict, that the student body of the Fresno city high school was at all times under the immediate supervision of the principal of the school; that the meetings of the student body were held on school days and during school hours; and that its proceedings were a part of the school work prescribed for the students by the city superintendent of schools, who was ex officio secretary of the board of education; and finally, that the meeting of the student body at which the plaintiff delivered the offensive address was held on a school day, during school hours, and under the immediate observation of the high school principal.

This being so, it seems idle to contend that the proceedings of the student body were beyond the control and regulation of the defendants in their official capacity. Being a part of the school work prescribed for the

students upon school days, and during school hours, the proceedings of the student body, and its conduct individually and collectively, when in meeting assembled, were undoubtedly as much within the control and cognizance of the defendants, as would be the ordinary school work and conduct of the students when assembled in the class rooms upon school days and during school hours. That this is so seems plain to us beyond the need of further discussion; and being so, there is no room for argument that cognizance of the conduct of the plaintiff, while participating in the proceedings of the student body, was not within the jurisdiction of the defendants sitting as the board of education.

[2] It cannot be successfully contended that the defendants were without jurisdiction to expel the plaintiff, because neither the statute nor any rule or regulation of the defendants expressly made the misconduct charged against the plaintiff a ground for expulsion. This contention, in our opinion, is met and overcome in the case of *State ex rel. Burpee v. Burton*, 45 Wis. 150, 30 Am. Rep. 706, where, in disposing of a similar contention, the court said:

"In the school, as in the family, there exists on the part of the pupils the obligation of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils, and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it, whether it has or has not been re-enacted by the district board in the form of written rules and regulations. It would indeed seem impossible to frame rules which would cover all cases of insubordination. * * *

The reasoning and the conclusion of the opinion in the case just quoted was commended and followed in the case of *State ex rel. Dresser v. Board*, 135 Wis. 619, 116 N. W. 232, 16 L. R. A. (N. S.) 730, 128 Am. St. Rep. 1050, where it was said that there are "certain obligations on the part of the pupil, which are inherent in any proper school system, and which constitute the common law of the school, and which may be enforced without the adoption in advance of any rules upon the subject."

The minutes of the meetings of the defendants, at which the conduct of the plaintiff was considered, were read in evidence at the trial of the case; and it is apparent therefrom that the order of expulsion complained of was based upon findings made by the defendants to the effect that the conduct charged against the plaintiff was intended to discredit and humiliate the board in the eyes of the students, and tended to impair the discipline of the school. The trial court, among other things, found that the plaintiff's address to the student body was intended as "a slam at the defendants," and delivered for the purpose of creating in the minds of the students a spirit of insubordination, and was subversive of the good order and discipline

of the school. We have no doubt but that the respective findings of the defendants and the trial court were sufficiently supported by the testimony taken at the hearing had before the defendants and the evidence adduced upon the trial of the case. In our opinion no other findings were permissible under the undisputed facts and circumstances of the case. The admitted purpose of the plaintiff's address was to belittle the defendants in their official capacity; and the whole tenor of the address was well calculated to produce not only that result, but to engender as well, in the minds of the students, a feeling of disrespect for the defendants, and a secret if not an open hostility to their control of the student body and management of school affairs. Such being the natural tenor and tendency of the plaintiff's address, his conduct in making the same cannot be classed as anything but a species of insubordination to constituted authority, which required correction at the hands of the defendants in order that the discipline of the school might be maintained unimpaired by anything that was said and done by the plaintiff. *State ex rel. Dresser v. Board*, supra.

[3] There is no merit in the contention incidentally made that the defendants' demand for an apology from the plaintiff was a waiver of the right to expel. To the contrary, such demand and the refusal of the plaintiff to comply therewith, were, under the particular facts of the present case, essential as a predicate to the greater punishment of expulsion. The exercise of the power of expulsion is expressly limited to cases where other means of correcting misconduct have failed (*Pol. Code*, § 1617, subd. 8). In other words, a resort to the harsh penalty of expulsion may not be had until milder measures for the correction of misconduct in any given case have failed. In the present case an apology would have been adequate punishment for the misconduct of the plaintiff, and doubtless would have served to prevent a repetition thereof; and at the same time would have tended to correct the evil resulting therefrom. The refusal of the plaintiff to make the apology demanded not only accentuated his misconduct, but made it necessary for the defendants to resort to an order of expulsion as the only effective means of punishing the plaintiff and maintaining the discipline of the school. *State ex rel. Dresser v. Board*, etc., supra.

[4] Involved in the contentions made upon behalf of the plaintiff is the suggestion that the defendants exceeded their power when they ordered the plaintiff to appear before them to explain and justify his conduct. In response to this it will suffice to say, that having jurisdiction in the premises, the defendants undoubtedly had the inherent power to summon the plaintiff before them for the purpose of investigating and passing upon his alleged misconduct.

The judgment and the order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

27 Cal. App. 132

W. R. BRADSHAW & CO. v. EGGERS,
Sheriff. (Civ. 1497.)

(District Court of Appeal, First District, California. March 30, 1915.)

1. APPEAL AND ERROR ⇨856 — REVIEW — GRANTING OF NEW TRIAL.

Where any one of a number of grounds urged by a party on his motion for new trial is sufficient to sustain the granting order, such order will be affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3406-3424, 3429-3434; Dec. Dig. ⇨556.]

2. TROVER AND CONVERSION ⇨54—DAMAGES —ATTORNEY'S FEE.

In an action for conversion, where plaintiff recovered a judgment which included \$50 which it had paid to its attorney for services prior to suit, defendant's motion for new trial was properly granted.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 252, 255-257; Dec. Dig. ⇨54.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by W. R. Bradshaw & Co. against Frederick Eggers, as Sheriff. Judgment for plaintiff, and from an order granting defendant's motion for new trial, it appeals. Affirmed.

Samuel T. Bush, of San Francisco, for appellant. Wm. Tomskey, of San Francisco, for respondent.

PER CURIAM. This is an appeal from an order granting the defendant's motion for a new trial.

The facts are these: The plaintiff, a wholesale dealer in tailors' cloths, entered into an arrangement with one Muller, a tailor, by which the former was to place with the latter in his tailoring establishment 50 suit patterns of cloth, which the latter was to sell in the form of suits as ordered, and for which patterns of cloth he was to pay as the suits were sold. While this cloth was in the possession of Muller under this arrangement, a portion of it was attached upon the suit of a creditor of Muller, and taken into the possession of the defendant as the attaching officer. The secretary of the plaintiff, who was in its employ under a regular monthly salary, spent some time in looking up the matter of the attachment and whereabouts of the property; and he also, acting for the plaintiff, placed the matter of the recovery of the property into the hands of Mr. Samuel T. Bush, the regular attorney for the company, with instructions to retrace the goods and reclaim the property, paying him the sum of \$50 for his services. Upon the

trial it appeared from the testimony of Mr. Bush himself that he prepared the plaintiff's verified claim and demand for the property to be presented to the sheriff, signing the same as the attorney for the plaintiff, and that the clerks in his office did some work in the service of papers, etc., prior to the institution of the suit. Mr. Bush also testifies that the \$50 paid to him was not paid to him as an attorney's fee, but for the purpose of trying to recover the property without litigation; but he also very frankly testifies that he—

"acted in the capacity of an attorney in representing the claimant in the effort to recover the property, and received the \$50 for that."

This action for the conversion of the property was presently begun. Upon its trial the case was submitted upon the plaintiff's proofs, the defendant offering no evidence. The court found in favor of the plaintiff, awarding it the sum of \$305 as damages, of which sum, according to the findings of the court, the item of \$16.65 was awarded as compensation for the time expended in the proper pursuit of the property, and apparently the further item of \$50, paid to plaintiff's attorney as above set forth, was included in the above award of damages.

[1] The defendant moved for a new trial upon several specified grounds of insufficiency in the evidence to sustain the findings and judgment of the court. The court granted said motion generally, without specifying upon what particular ground it based its order. It is not required of this court that

upon this appeal it shall review all of the grounds urged by the defendant upon his motion for a new trial. If any one of these was sufficient, the order of the trial court will be sustained, and that one of the defendant's grounds of motion was sufficient we entertain no doubt.

[2] The trial court awarded plaintiff damages in the sum of \$305.65; and in making up this sum included the item of \$50 paid to the attorney for the plaintiff, as testified to by himself. It is evident that this fee was paid to plaintiff's attorney as such, and for services which consisted chiefly, if not wholly, in consultations and in the preparation of the claim and demand of the plaintiff, which were necessary preliminaries to the institution of this action. The rule is well settled that attorneys' fees are not recoverable as damages in actions of claim and delivery or conversion. *Martland v. Bekins*, etc., 19 Cal. App. 283, 125 Pac. 759; *Nicholls v. Mapes*, 1 Cal. App. 349, 82 Pac. 265; *Hays v. Windsor*, 130 Cal. 230, 62 Pac. 395; *Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200; *Greenbaum v. Martinez*, 86 Cal. 459, 462, 25 Pac. 12; *McDonald v. McConkey*, 57 Cal. 325. The evidence in this case being insufficient to sustain the finding and judgment of the court as to this element and item of the damages awarded to the plaintiff, the court properly granted defendant's motion for a new trial.

It is not necessary to consider the other points in the case.

Judgment affirmed.

27 Cal. App. 67

BERMAN v. RUTLEY. (Civ. 1501.)

(District Court of Appeal, First District, California. March 25, 1915.)

APPEAL AND ERROR — 1011—REVIEW—FINDINGS—CONFLICTING EVIDENCE.

An appellate court will not interfere with the discretion of the trial court in finding upon conflicting evidence as to disputed issues of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.]

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Mendel Berman against Byron Rutley. Judgment for plaintiff, and defendant appeals. Affirmed.

L. D. Manning, of Oakland, for appellant. Lucius L. Solomons, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of plaintiff for the sum of \$1,769.15, alleged to be due according to the terms of a written contract between the parties.

The facts of the case, which are relied upon to sustain the findings of the court, are these: On the 1st day of May, 1912, the plaintiff and defendant entered into a written agreement, which recited that the defendant was the holder of a lease upon certain premises in the city of Oakland, in which he was to open a clothing store dealing in men's clothes, and to stock said store with a certain lot of goods which he had theretofore ordered from the Imperial Clothing Specialty Company, a corporation of New York; that the plaintiff was an experienced clothing salesman, whose services the defendant was desirous of procuring as manager of his said store for the ensuing year with a view to a future partnership between them. The agreement further recited that the defendant was presently to receive from the Imperial Clothing Specialty Company a bonus of \$500 for handling their goods, and that he was also to borrow \$1,500 from the plaintiff, which sums he was to use in the fitting up of the store and in the conduct and carrying on of the business; that the \$1,500 so to be received from the plaintiff was not to be repaid by the defendant in the event that a copartnership was entered into between them within the period of a year; but that in the event that no such partnership was entered into

the plaintiff was to be repaid the same, with interest at the rate of 6 per cent. per annum from the date of its advancement. It was also agreed that the plaintiff was to receive the sum of \$150 a month salary from the date of the agreement.

The testimony adduced upon the trial was chiefly that of the parties themselves, and was radically in conflict as to what had occurred subsequent to the execution of this agreement. The trial court, however, chose to accept the plaintiff's statement as to the relation and dealings and differences of the parties during the months immediately succeeding the making of their contract. The testimony on the part of the plaintiff so accepted by the court was in substance to the effect that, owing to some misunderstanding with the Imperial Clothing Specialty Company, and possibly to the unsatisfactory quality of their first consignment of goods, the defendant did not receive from that company its promised bonus, and did not handle their goods, and in fact never did open the store; but, owing to his capricious and procrastinating ways, kept the plaintiff at his beck and call for eleven months, paying him his stipulated salary with a fair degree of regularity during that time, but finally abandoning the enterprise and disposing of the leasehold of the store. During this period repeated attempts were made to arrive at a settlement of the mutual obligations and differences of the parties arising out of their agreement and subsequent conduct, but without avail, until finally, when the enterprise was abandoned and the design of forming a partnership given up, the plaintiff demanded the return of his \$1,500, with accrued interest, and the payment of the small remaining balance of his salary, which, being refused, this action was brought to recover those sums, aggregating the amount for which judgment was given.

As heretofore stated, the testimony of the plaintiff and the defendant is in sharp conflict upon many of the foregoing matters; and practically the entire brief of appellant is devoted to a discussion of those disputed issues of fact. The trial court, however, resolved these conflicts in favor of the plaintiff, and with its discretion in so doing this court will not interfere.

We do not discover in this record any legal question which requires consideration.

Judgment affirmed.

27 Cal. App. 69

LAURENCE v. PACIFIC OIL & LEAD WORKS. (Civ. 1464.)

(District Court of Appeal, First District, California. March 25, 1915. Rehearing Denied April 23, 1915. Denied by Supreme Court May 24, 1915.)

1. SALES ⚡S7 — EXECUTED SALE — SUFFICIENCY OF EVIDENCE.

In an action to recover an amount due plaintiff on sales of oil which had been bought by his vendor from the defendant, which had agreed with plaintiff to deliver such oil to plaintiff's customers, collecting the price and accounting therefor, evidence held sufficient to show that the transaction between defendant and plaintiff's vendor was an executed transaction of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 239-247, 1046; Dec. Dig. ⚡S7.]

2. PRINCIPAL AND AGENT ⚡25—ESTOPPEL OF AGENT.

Where defendant, which had sold oil, agreed with plaintiff, who had bought such oil from the original buyer, that it would deliver to plaintiff's customers, collecting the plaintiff's prices, and would pay over to him the difference between the prices at which plaintiff had bought and sold the oil, the agreement showing agency between the parties, the obligations of which had been accepted by the defendant, it could not question the consideration moving to it for the agreement after it received the plaintiff's money through the exercise of its authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 42-45; Dec. Dig. ⚡25.]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by C. R. Laurence against the Pacific Oil & Lead Works. Judgment for plaintiff, and defendant appeals. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, for appellant. Powell & Dow, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff for the sum of \$687.13.

The facts out of which this action arose are substantially these: On the 25th day of April, 1911, the Pacific Oil & Lead Works, the defendant herein, made a written contract with the Cocoanut Products Company of Portland, Or., which recited that the Pacific Oil & Lead Works had sold, and the Cocoanut Products Company had bought, 400 tons of a certain grade of cocoanut oil, to be shipped from April 25 to October 31, 1911, in quantities to suit the purchaser. In the month of August, 1911, the Cocoanut Products Company found itself unable to use a portion of the oil which it had agreed to purchase, and since the market price of such oil seemed to be declining, the latter company concluded to sell the excess of the oil deliverable to it under its aforesaid contract. The plaintiff is a commission merchant and broker. His first transaction with the Cocoanut Products Company consisted in his

sale for them of 75 barrels of this oil upon a brokerage basis. Shortly after this transaction was placed, the plaintiff entered into a contract with the Cocoanut Products Company by which he was to buy from them a large part of the remaining portion of this oil for a net price, which he was to undertake to sell to customers of his own at figures which would yield him a profit. The oil was still in the hands of the Pacific Oil & Lead Works, and it was deemed desirable that, when the oil was delivered by the latter, it should be transmitted directly to the plaintiff's customers. The Cocoanut Products Company consequently requested the Pacific Oil & Lead Works to deliver said oil directly to the customers of the plaintiff as ordered by him. The plaintiff also came in touch with the Pacific Oil & Lead Works through its officers, and explained to them the situation, viz., that he had bought the oil from the Cocoanut Products Company for a fixed price, and was about to sell it to various customers of his own at an added price, and that he wished to make an arrangement with the Pacific Oil & Lead Works, by which the latter would deliver the oil directly to the plaintiff's customers as ordered by him, and collect from them the price at which he had sold it to them, and pay over to him the excess between the price at which he had bought it from the Cocoanut Products Company and the price at which he had sold it to his customers, which difference in price is called overage. The plaintiff testified that the defendant agreed to this arrangement, and the court found such to be the fact. Thereupon the plaintiff sold three separate consignments of this oil to as many customers, notifying the defendant of the fact and detail of each of these sales. The defendant filled these several orders for said oil, and made collections thereon, according to the plaintiff's direction, but, having done so, refused to pay plaintiff his overage. Hence this action. The court found substantially the foregoing to be the facts, and rendered judgment for the plaintiff for the amount of his alleged overage. The defendant appeals.

The two main points which the appellant presents upon this appeal are: First, that the contract between the appellant and the Cocoanut Products Company was a mere executory contract for the sale of certain oil not in existence at the time such contract was made, and hence that the Cocoanut Products Company had no such title to the oil as they could deliver to the plaintiff, and that, having no title to the oil, the plaintiff could have no interest in the price at which it was finally sold; and, second, that the agreement between the appellant and plaintiff was without any consideration.

[1] As to the first of these propositions, it may be noted that the written agreement between the appellant and the Cocoanut Products Company purports on its face to be

much more than a mere executory contract. It recites that the Pacific Oil & Lead Works "have sold," and that the Cocoanut Products Company "have bought," the oil covered by the contract. In addition to this the plaintiff averred in his complaint that the appellant "sold" the oil in question to the Cocoanut Products Company, and in responding to this averment the defendant expressly admitted that it had "sold" to the Cocoanut Products Company the oil mentioned in the complaint, and that said "sale" was made in San Francisco. In further support of the foregoing averments and admissions the manager of the defendant testified that:

"The oil involved in this suit had been by us sold to the Cocoanut Products Co.; they had bought it on April 25, 1911. It was their oil. They bought it and we had sold it."

In view of this state of the record it is rather late to urge for the first time on appeal that the transaction between the appellant and the Cocoanut Products Company of April 25, 1911, did not amount to such a complete purchase and sale as to pass the title to the oil to the Cocoanut Products Company.

[2] The second contention of the appellant is that the agreement between itself and the respondent by which it was to deliver the oil in question to his customers at the prices he directed, and collect and pay over to him the overage, was without consideration. We think that this contention is without merit. The plaintiff testified and the court found that the appellant had agreed to act for the respondent in the matter of delivering the oil which he had sold to his customers, collecting thereon at his prices, and paying over to him the difference between the price at which he had bought and sold the oil. This agreement reveals nothing more nor less than an agency between the parties to it, the obligation of which having been accepted by the appellant for reasons of its own not revealed by the evidence, it cannot be heard to question the consideration moving to it for undertaking such agency after it has received the respondent's money through its exercise. The money thus received does not belong to the Cocoanut Products Company, for it has already been credited with the full price at which it sold to the respondent the oil. It does not belong to the appellant, for it had no contractual relation with the ultimate purchasers of the oil, and could only have received the price at which it was sold to them as the agent of the respondent. This overage was therefore the respondent's money. Whether or not the price which the appellant received from the respondent's customers for the oil delivered to them was greater or less than the price at which the appellant had originally sold the oil to the Cocoanut Products Company is, in view of the findings of the court, an immaterial factor in this case.

The appellant urges several other points of alleged errors occurring during the trial of the cause. None of these, however, appear to us material, or sufficiently prejudicial to justify the reversal of the case.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

27 Cal. App. 93

BRIDGES v. CITY OF SIERRA MADRE.
(Civ. 1620.)

(District Court of Appeal, Second District, California. March 25, 1915.)

1. MUNICIPAL CORPORATIONS $\Leftrightarrow$ 162—OFFICERS—COMPENSATION—CITY ATTORNEY.

Under Municipal Corporations Act (St. 1883, p. 277), § 879, providing that the city attorney of a city of the sixth class shall advise the city authorities and officers in all legal matters pertaining to the business of the city or town, and that he shall receive certain specified compensation for the collection of delinquent taxes, and such other compensation as may be allowed by the board of trustees, and a city ordinance, providing that the duties of the city attorney shall be those now fixed by law, and such other duties as the board of trustees shall hereafter fix by ordinance, fixing the compensation of the city attorney at \$50 per month, and providing that the salaries therein fixed shall be in full compensation for all services rendered, the city attorney of such city cannot claim extra compensation for services rendered by him in addition to the collection of delinquent taxes and the giving of advice, without showing an agreement by the trustees to pay such compensation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 357-367, 369, 372, 374; Dec. Dig. $\Leftrightarrow$ 162.]

2. MUNICIPAL CORPORATIONS $\Leftrightarrow$ 162—COMPENSATION OF OFFICERS—STATUTES AND ORDINANCES—CONSTRUCTION.

As between a municipality and its officers, the statute and ordinance fixing the compensation are to be construed, in case of doubt, to protect the city treasury, especially where the officer claiming extra compensation is the one charged with the duty of advising the city concerning its legal obligations.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 357-367, 369, 372, 374; Dec. Dig. $\Leftrightarrow$ 162.]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by H. F. Bridges against the City of Sierra Madre. Judgment for defendant, and plaintiff appeals. Affirmed.

F. E. Dunlap, of Stockton, for appellant. Charles C. Montgomery, of Los Angeles, for respondent.

CONREY, P. J. The defendant corporation is a city of the sixth class. On April 28, 1911, on motion duly adopted by the board of trustees, appellant was appointed attorney for the city from month to month at a salary of \$50 per month, beginning May 1st, and thereafter acted as city attorney pursuant to that appointment. During the period of his incumbency in that office appel-

lant performed services in behalf of the city which he claims were outside of his duties under his general employment as city attorney, and for which he demands compensation in addition to the salary provided in the order by which he was appointed. The demand is for \$1,000, and the items of service rendered had relation to negotiations and contracts for acquiring a water system for the city; assistance rendered to special counsel in an action to condemn certain water rights and rights of way; examinations of records for purposes connected with the foregoing matters; work done relating to the issuance of municipal bonds; and sundry smaller business, including services as attorney in certain actions of minor importance. On April 9, 1913, appellant presented to the board of trustees his demand for the amount sued on herein. Prior to that time his official relation to the city as its attorney had been terminated. At the trial it was stipulated that Ordinance No. 3 of the city of Sierra Madre, approved March 28, 1907, from which we quote herein, was in force at the time of appellant's employment as city attorney, and that no ordinance repealing said Ordinance No. 3 was passed until after the services described in the complaint had been rendered, and that no ordinance, resolution, or motion, except those which have been mentioned, was passed or adopted by the board of trustees of defendant in relation to services to be performed by the plaintiff. It was further stipulated that the services sued upon "are claimed by plaintiff to have been performed as a result of conversations between the plaintiff and three members of defendant's board of trustees," but there is no evidence and there is no stipulation with respect to such conversations. The case was submitted to the court upon the stipulation of facts without taking evidence as to the value of plaintiff's services, upon the understanding that if the court should determine that plaintiff was entitled to judgment in his favor, further evidence would be taken as to the value of the services, but that if the court should find that plaintiff was entitled to take nothing by his action, judgment should be entered accordingly upon the stipulation and the pleadings. Thereupon the court rendered judgment in favor of the defendant, and the plaintiff appeals therefrom.

The duties of the city attorney of a city of the sixth class are described in section 879 of the Municipal Corporations Act. It is there provided that it shall be his duty "to advise the city or town authorities and officers in all legal matters pertaining to the business of said city or town," that he shall receive certain specified compensation in connection with the collection of delinquent taxes, and that "he shall receive such other compensation as may be allowed by the board of trustees." The ordinance above mentioned is entitled as an ordinance "defining the du-

ties of and fixing the salaries of and the bonds to be required of certain officers of said city." Sections I, IV, and VIII of this ordinance, so far as applicable to the city attorney, are as follows:

Section I. "The duties of the * * * city attorney * * * shall be those now fixed and specified by law for the said several officers and such other and further duties as the board of trustees shall from time to time hereafter fix by ordinances."

Section IV. "The salary and compensation of the city attorney of the said city is hereby fixed at the sum of fifty (\$50.00) dollars per month."

Section VIII. "The salaries hereinabove fixed shall be in full compensation for all services rendered by the respective officers hereinabove named. * * *"

[1] It is contended on behalf of appellant that, aside from services rendered in connection with the collection of delinquent taxes, his ordinary duties as city attorney were limited by the provision that it should be the duty of the attorney to advise the city officers in legal matters pertaining to the business of the city; that for any services beyond mere advice, where such services were rendered with the knowledge and consent of the members of the board of trustees, there arose an implied obligation of the city to pay compensation in addition to the agreed salary. This contention of appellant cannot be sustained as applicable to the case before us, except upon a narrow construction of the statutory duty of the attorney to advise the city officers with respect to the legal matters pertaining to city business. When the city by its ordinance fixed the "salary and compensation" of the city attorney at a specified sum per month, and then further provided that such salary "shall be in full compensation for all services rendered" by the attorney, these provisions must be deemed to be supplementary to the statute and must be considered as having in view, not only mere advice to be given by the attorney to the city officers, but also any other services that might be rendered by the officer in the nature of services by an attorney and for which no extra compensation was definitely and directly agreed to be paid. And when appellant accepted employment by the city at the agreed rate specified in the ordinance, it is reasonable to assume that he had in view these provisions of the ordinance, as well as the statute.

[2] If appellant at the time when these services were rendered intended to claim special compensation therefor, he should have obtained from the city trustees some official action providing for the allowance of such special or extra compensation. Since there is nothing in the record stipulating or otherwise proving even an informal understanding that such compensation was to be paid, we think that upon the facts shown in this record no implied obligation has arisen and that the salary paid was, as stated in section VIII of the ordinance, "in full compensation for all services rendered" by the ap-

pellant. "As between a municipality and its officers, the charter defining the duties of the officers and regulating their compensation is to be construed, in case of doubt, to protect the treasury of the city, for claims against the treasury of the city cannot be sustained on doubtful implication." *City of Ludlow v. Ritchie* (Ky.) 78 S. W. 199. And this is emphatically true where the officer claiming the compensation is the one charged with the duty of advising the city concerning its legal obligations.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

27 Cal. App. 61

LINCOLN v. SIBECK. (Civ. 1586.)

(District Court of Appeal, Second District, California. March 24, 1915.)

1. APPEAL AND ERROR ⇨933 — PRESUMPTIONS—MOTION FOR NEW TRIAL—FILING—GROUNDS.

Where the record contains a purported statement on motion for new trial, and recites that a notice of intention to move for a new trial was served on the adverse party, but does not show that the notice was filed with the clerk, or on what grounds the motion was presented, as required by Code Civ. Proc. § 659, and the trial court passed on the motion on its merits, it will be presumed, in the absence of a showing to the contrary, that the notice was duly filed, and that the errors assigned in the statement constituted the grounds of the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. ⇨933.]

2. APPEAL AND ERROR ⇨549—NECESSITY OF BILL OF EXCEPTIONS—EXCEPTION CONTAINED IN ORDER.

Under Code Civ. Proc. § 647, providing that an order made in the absence of a party shall be deemed excepted to, no bill of exceptions is necessary to show an exception taken to such an order, which states that the party was absent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2441-2451; Dec. Dig. ⇨549.]

3. APPEAL AND ERROR ⇨933 — PRESUMPTIONS—AUTHORITY OF THE JUDGE TO SETTLE STATEMENT.

Under Code Civ. Proc. § 1963, subd. 16, providing that it shall be presumed that a court or judge acting as such was acting in the lawful exercise of his jurisdiction, it will be presumed that a judge, other than the judge who presided at the trial, who settled the statement on motion for a new trial, was authorized to do so under section 653 and Supreme Court Rule 27 (119 Pac. xiv), providing that if the trial judge dies, is removed, becomes disqualified, is absent from the state, or refuses to settle the statement it may be settled by another, where the record does not show the reason why the trial judge did not settle the statement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. ⇨933.]

4. PUBLIC LANDS ⇨135—DISPOSAL OF UNITED STATES LANDS—RELINQUISHMENT—ADMISSIBILITY OF EVIDENCE.

In an action for breach of a contract for the purchase of a relinquishment to government

land, where the defense was a denial of plaintiff's right to the land and a denial that defendant or anyone for him had located thereon under the relinquishment, evidence by defendant that plaintiff had filed on 480 acres of land is not admissible, where there was no showing that the filing on the land in question was made after the other filing or was part of the excess over the legal amount.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 351-362; Dec. Dig. ⇨135.]

5. PLEADING ⇨276 — SUPPLEMENTAL ANSWER—DISCRETION OF COURT.

In such an action it was not an abuse of the court's discretion to refuse to permit defendant, at the commencement of the trial, to file a supplemental answer showing that the land covered by the relinquishment was held by a false and fraudulent entry, where there was no sufficient reason shown why the answer was not filed before the case was set for trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 833, 835; Dec. Dig. ⇨276.]

6. EVIDENCE ⇨163 — BEST EVIDENCE — ENTRIES ON GOVERNMENT LANDS.

Testimony by defendant as to a filing made by plaintiff on government land, unaccompanied by record evidence thereof, is incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 536, 543-545; Dec. Dig. ⇨163.]

7. PUBLIC LANDS ⇨135—DISPOSAL OF GOVERNMENT LANDS — RELINQUISHMENT — CONTRACT FOR SALE.

Defendant is liable for a breach of contract for the purchase of a relinquishment on government land where plaintiff had filed on the land, executed a relinquishment sufficient in form, and delivered it to defendant, under the terms of an agreement by defendant to sell it for a certain amount or return it to plaintiff, and defendant converted it to his own use by filing it in the government land office, even though he did not file on the land himself or procure another person to file thereon.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 351-362; Dec. Dig. ⇨135.]

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Grant Lincoln against D. W. Sibeck. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 143 Pac. 789.

James R. Choate, Edgar F. Hughes, and E. O. Leake, all of Los Angeles, for appellant. Robt. T. Linney and Ralph W. Schoonover, both of Los Angeles, for respondent.

CONREY, P. J. This is an appeal by the defendant from the judgment and from an order denying his motion for a new trial.

[1] Respondent claims that the appeal from the order denying a new trial should be denied for want of a sufficient record. The transcript contains a document purporting to be a statement on motion for new trial. It is recited therein that within ten days after entry of judgment the defendant "duly served on plaintiff" his notice of intention to move for a new trial. It is not stated anywhere in the record that such notice ever was filed, and it is pointed out that merely serving such a notice on the adverse party is

not sufficient. Code Civ. Proc. § 659. It may be observed further that the record does not show on what grounds the motion was presented. It does appear, however, that the court ruled on the motion as upon the merits, and this being so we are obliged to assume (in the absence of anything definitely appearing to the contrary) that the notice of intention was filed, and that the errors assigned in the statement constituted the grounds of the motion as presented. In *Cross v. Mayo*, 167 Cal. 594, 598, 140 Pac. 283, 285, the Supreme Court said:

"While on an appeal from an order denying a new trial it is necessary that it should in some way be made to appear in the record what the grounds of the motion for a new trial were (*Williams v. Hawley*, 144 Cal. 100 [77 Pac. 762]), it has several times been substantially held that where there is a statement on motion for a new trial or a bill of exceptions, containing specifications of insufficiency of evidence and assignments of errors of law, the presumption is, in the absence of a showing to the contrary, that notice was duly given, and that the specifications and assignments in the statement or bill of exceptions conform to those in the notice and constitute the grounds upon which the court was asked to grant a new trial."

[2] The statement shows that the trial was had before Hon. L. T. Price, presiding as judge of the court, and the judgment was rendered by him. Under the rule of judicial notice (Code Civ. Proc. § 1875) we know that L. T. Price was at that time, and at the time of the purported settlement of the statement on motion for a new trial he was a judge of the superior court of Alpine county. On the 17th day of October, 1913, a copy of defendant's proposed statement on motion for new trial was served on plaintiff's attorneys. On November 6, 1913, Hon. John M. York, a judge of the superior court of Los Angeles county, signed at the end of the statement a certificate reading as follows:

"The foregoing statement on motion for new trial is hereby allowed as settled and correct as no appearance is made by attorneys for plaintiff."

The court's order denying defendant's motion for a new trial, as stated in its minutes of December 8, 1913, reads as follows:

"The plaintiff's motion to dismiss the motion for a new trial heretofore submitted on December 1, 1913, is ordered denied on the ground that attorneys for the plaintiff did not appear at the time statement on motion for a new trial was settled. R. T. Linney, Esq., appearing as attorney for the plaintiff and Williams, Goudge & Chandler for defendants. It is ordered that the motion for a new trial be and is hereby denied."

The respondent now contends that the statement on motion for a new trial cannot be considered for the further reason that Judge York had no right to make the order of settlement. His action in so doing is admitted to have been excepted to, since the certificate signed by him shows that the settlement was made in the absence of the attorneys of the plaintiff. Section 647, Code Civ. Proc. A bill of exceptions to show an exception taken is unnecessary where, as

here, a statement of the fact which raises the exception is included in the order.

[3] But, the facts which might have justified the exception do not appear. If Judge Price had refused to settle the statement, or if any other condition described in section 653, Code of Civil Procedure, and in rule 27 (119 Pac. xiv) of the Supreme Court, had come into existence which would authorize another judge to act, then it would have been better practice to show such condition by proper recitals in the record, instead of relying upon the "presumption of regularity" attending official acts of courts and their judges. In this instance, however, it seems that the presumption of law is sufficient to support the act of the judge in settling the statement, since there is a possibility that for some reason Judge Price had refused to settle the statement after request duly made. Under section 1963, subdivision 16, Code of Civil Procedure, it is presumed "that a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction."

The demand stated in the complaint is for the sum of \$500 claimed as damages for breach of contract. It was alleged that on November 12, 1912, plaintiff delivered to defendant a document whereby he relinquished his right to certain described land; that at the same time the defendant delivered to the plaintiff a writing in which he acknowledged receipt of said relinquishment, "to sell within 10 days for the sum of \$500. * * * In case sale is not made within the specified time I agree to return same." It was further alleged that no sale of the relinquishment was made by defendant, and that after expiration of the ten days the plaintiff demanded from defendant the return of the relinquishment or the payment of said sum of \$500, which demand was by defendant refused; that the defendant has sold the relinquishment for a sum in excess of \$500. By his answer the defendant does not deny any of the foregoing allegations of the complaint, except the allegation that he sold the relinquishment, but "denies that the plaintiff was then or is now or at any time has been the owner of" the relinquishment above mentioned; "denies that the plaintiff was on the 12th day of November, 1912, or is now or at any time has been the owner of any estate, or interest in, or title to the said land last above described"; also denies that by the terms of said contract or otherwise the defendant agreed to pay the sum of \$500 to the plaintiff for the relinquishment referred to within ten days from November 12, 1912, or to return said relinquishment to the plaintiff. Defendant further denied that he had sold the relinquishment or received any sum whatever therefor; and alleged that the relinquishment was, on the day when received by him and is now and at all times has been,

of no value whatsoever; also alleged "that prior to the commencement of this action the defendant surrendered said last-mentioned relinquishment to the United States government, who was the legal owner and entitled to possession thereof."

Appellant insists that the evidence is insufficient to support the court's finding of fact that the plaintiff was by right of location thereon the owner of the tract of land in the state of Arizona described in the complaint and in said relinquishment, and that as such owner plaintiff had a right to and did execute and deliver to defendant said relinquishment. It is further claimed that the evidence is insufficient to support the finding that the filing of a relinquishment in the land office, as this relinquishment was filed by the defendant, is the usual and regular way of filing relinquishments of the kind herein specified for the use and purposes for which relinquishments are made; or the finding that after the filing of said relinquishment the land was filed upon by another person, which could not have been done had defendant returned said relinquishment to plaintiff; or that the value of said relinquishment was the sum of \$500, or that plaintiff has been damaged in said sum of \$500.

[4] The issue as to plaintiff's ownership by virtue of a location made by him in the government land office was distinctly raised by the answer of defendant, and the evidence thereon is contained in the testimony produced by the defendant. His counsel endeavored to prove that "other land besides this land in question" had been filed on by Mr. Lincoln. He asked leave to prove that the plaintiff "filed on 480 acres of land in Arizona in the year 1912, 160 acres under the Homestead Act, and 320 under the Desert Land Act." The theory of his defense clearly was that, although the plaintiff had filed on this land covered by the relinquishment in question, yet that he was not entitled to the land because he had filed upon an excessive amount. It may be noted that he did not offer to show that the filing on the land in question here was made after the other filings, or that this land was part of the excess over the legal amount. The defendant testified as to the relinquishment which he had received from the plaintiff; that he had delivered it to the land office at Phoenix, Ariz.; that it was filed there and he saw it on the record. He denied that he had made any filing on said land or that any one else had done so in his behalf or at his suggestion.

[5] At the commencement of the trial the defendant asked leave to file a supplemental answer in which he desired to set forth cer-

tain facts showing that the land covered by the relinquishment in question was held by a false and fraudulent filing by one Wyatt in the fictitious name of Grant Lincoln. Defendant claims that the court erred in refusing to allow the filing of this supplemental answer, and in refusing to allow defendant to put in evidence showing that plaintiff had filed on more government land than he was allowed to under the federal law.

The record does not show any sufficient reason why the proposed supplemental answer had not been filed before the case was set down for trial, and it cannot be said that the court in any way abused its discretion in refusing to allow such answer at the time when presented. As applied to the issues raised upon the complaint and answer on file herein, the court ruled correctly upon the matters of evidence above mentioned.

[6] Furthermore, no record evidence was offered by the defendant in connection with his proposed testimony concerning filings made by the plaintiff on government land. The objection that the testimony as offered was incompetent was a valid objection which was correctly sustained.

[7] The court's finding that after the filing by defendant of the relinquishment the said land was filed upon by another person is not sustained by the evidence, but that fact is not material to the case. The record herein sufficiently establishes that the plaintiff had filed upon this land; that he executed a relinquishment in form sufficient to release his claim so that the land could be filed upon by some other qualified person; that he delivered the relinquishment to defendant on the terms noted in the written memorandum; that the defendant converted the document to his own use by filing the same in the government land office without permission of the plaintiff. Upon these facts the plaintiff was entitled to judgment for the value of the relinquishment, and the only question remaining is whether or not that value was \$500. The evidence as to this value is very slight, but it is uncontradicted and is sufficient to support the finding. In *Lehmann v. Schmidt*, 87 Cal. 15, 22, 25 Pac. 161, 162, where a factor had received property of his principal to be sold at a fixed price, and the factor had converted the property to his own use, the court said that, "under these circumstances, having converted it to his own use, we think the price stipulated in the agreement is some evidence of the value of the property at the time of the conversion."

The judgment and order denying defendant's motion for new trial are affirmed.

We concur: JAMES, J.; SHAW, J.

27 Cal. App. 85

OSBORN v. BOARD OF SUP'RS OF MERCED COUNTY et al. (Civ. 1377.)

(District Court of Appeal, Third District, California. March 25, 1915.)

1. COUNTIES —55—BOARD OF SUPERVISORS—ORDINANCES—REFERENDUM PETITION.

A certificate to a petition for a referendum with respect to an ordinance of the board of supervisors certified that the clerk had examined the registration records to determine therefrom if a sufficient number of qualified electors signed the petition, and that he found that qualified electors in excess of 10 per cent. of the vote cast for Governor at the last general election signed such petition, each and all of whom were qualified electors of the county at the time they so signed. *Held*, that the certificate was sufficient, and not defective because of the failure to recite that the petition was signed by a sufficient number of "registered qualified electors," and that this fact was ascertained by an examination of "the great register of 1914."

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72; Dec. Dig. —55.]

2. COUNTIES —55—BOARD OF SUPERVISORS—ORDINANCES—REFERENDUM.

Under Pol. Code, § 4015, authorizing boards of supervisors to divide their respective counties into townships for the purpose of electing justices of the peace and constables, the action of the board in discontinuing a judicial township and re-establishing the boundaries of another so as to include the one abolished was not executive or ministerial, but legislative and subject to referendum, as the statute provides generally for judicial townships, but grants to boards of supervisors the authority to complete the legislation, and the creation and abolition of a judicial township imposes and takes away a form of government, and in either event the whole county is interested.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72; Dec. Dig. —55.]

3. COUNTIES —55—BOARD OF SUPERVISORS—ORDINANCES—REFERENDUM.

That some of those signing a referendum petition did not give their place of residence by street and number did not render the petition fatally defective, where the petition was sufficiently specific to enable the clerk to find the signers' names in the great register; the requirement as to residence being for the convenience and aid of the clerk.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72; Dec. Dig. —55.]

Original petition by W. H. Osborn, for a writ of mandate directed to the Board of Supervisors of the County of Merced and others. Writ issued.

A. R. Schottky and Henry Brickley, both of Merced, for petitioner. C. H. McCray and F. P. Tuttle, both of Merced, for respondents.

BURNETT, J. The application is for a writ of mandate to compel the board of supervisors of Merced county to repeal a certain ordinance enacted by said board, or to submit the same to the voters of said county. Respondents have filed a demurrer and an answer to the petition, although there seems to be no controversy as to the

facts. The ordinance in question is set out in the petition, and it is sufficient to say that it provides for discontinuing one of the judicial townships of the county and the re-establishment of the boundaries of another township so as to include the one abolished.

Three points are made by respondents:

"(1) That the protest petition does not conform to the law; (2) that the ordinance in question is not an ordinance subject to referendum; (3) that the protest petition was not properly circulated, signed, attested, and filed under and in compliance with the provisions of section 4058 of the Political Code."

For a discussion of the general principles involved herein it is sufficient to refer to *Chase v. Kalber*, 153 Pac. 397, and *Minges v. The Board of Trustees of the City of Merced et al.*, 148 Pac. 816, recently decided by this court. The special objections and criticisms of respondents as to the contemplated procedure may receive brief consideration.

[1] The first claim of respondents is that the certificate of the clerk attached to the referendum petition is insufficient by reason of its failure to recite that said petition was signed by a sufficient number of "registered qualified electors," and that the clerk ascertained this fact by an examination of "the great register of 1914." Said certificate, as far as material, is as follows:

"That after said petition was filed as afore-said I, as said clerk, examined the records of registration in said county to determine therefrom if a sufficient number of qualified electors signed said petition, and from said examination I, as said clerk, have found that a number of qualified electors in excess of 10 per cent. of the vote cast for all candidates for the office of Governor at the last general election signed said petition, each and all of whom were qualified electors of said county at the time they so signed."

The foregoing is similar to the certificate considered in the *Minges* Case, *supra*, and, for the reasons stated therein, we hold it sufficient.

[2] We think there is no more merit in the contention that the matter involved is not legislative in character. The authority for the action of the board of supervisors is found in section 4015 of the Political Code, as follows:

"The board of supervisors of each county, as public convenience may require, shall divide their respective counties into townships for the purpose of electing justices of the peace and constables; provided, however, that in the establishment of townships that may be hereafter established no incorporated city shall be divided so as to lie partly within one township and partly within another."

We think petitioner's position is correct that by statute the Legislature has provided generally for justices' courts and judicial townships, but has granted to the boards of supervisors the authority to complete the legislation by determining the number and establishing the boundaries of said townships

in their respective counties. The abolition or creation of a judicial township in a county would seem to be as distinctly legislative as anything the board of supervisors may be called upon to do in an official capacity. As suggested by petitioner, the creation of a judicial township establishes for and imposes upon the people residing within a certain prescribed territory a form of government consisting of a justice court and an executive officer or constable. The abolition of a township takes away this form of government, and in either act is the whole county interested, since it must bear the expense of the salaries of said officers. The ordinance in question is plainly of a general and permanent nature, its enactment involves judgment and discretion on the part of the board, and in no respect does it partake of the quality of a mere ministerial or executive act. In fact, the ordinary and usual form of legislation by the board of supervisors finds expression in the enactment of an ordinance, and it would certainly be an exceptional case where it could be held that such enactment was not legislative.

[3] The last objection of respondents grows out of the failure of some of the petitioners to give after their signatures the places of their residence by street and number. The requirement as to "residence" is undoubtedly for the convenience and aid of the clerk in finding the names in the great register. While the petition might have been more specific in this respect it was apparently sufficient for the clerk's information, and the objection goes to a mere irregularity that could and did result in no prejudice. The point is really covered by the case of *Conn v. City Council*, 17 Cal. App. 713, 121 Pac. 718, and *Locher v. Walsh*, 17 Cal. App. 727, 121 Pac. 712. In the former it is said:

"In this connection it appears that some of the signers of the several recall petitions did not sign their names in full; that is to say, they gave only the initials of their given names. Others failed to comply with the charter requirement that each signer 'shall add to his signature his place of residence, giving the street and number.' Because of this it is urged that the petitions upon their face fail to contain the requisite number of adequate signatures called for by the charter, and that therefore the petitions were wholly insufficient to confer jurisdiction upon either the city clerk or the city council to inaugurate the recall election petitioned for."

After stating that such strictures were quite technical, and that the charter in question should receive a liberal construction with a view of promoting the purpose for which it was enacted, it was declared that said specifications were "intended solely for the purpose of facilitating the work of the clerk in investigating, identifying, and verifying the persons and signatures of the purported signers of the recall petition," and that there was a substantial compliance with the requirement of said charter.

As we view the law and authorities, we think the writ should issue; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

27 Cal. App. 152

DUNCAN v. F. A. HIHN CO. (Civ. 1506.)
(District Court of Appeal, First District, California, April 1, 1915. Rehearing Denied April 30, 1915; Denied by Supreme Court May 27, 1915.)

1. PRINCIPAL AND AGENT ⇨82 — JOINT AGENTS—SHARING COMPENSATION.

Where defendant company contracted with a manufacturer company that it should assist the manufacturer's selling agent in certain territory, agreeing to receive 25 per cent. of the total commissions on business done by itself and such agent, if defendant's individual sales should amount to 25 per cent. or more of such business, and, if its individual sales should amount to less than 25 per cent. of the combined sales, to receive 5 per cent. commission on actual sales made by it, under such agreement defendant and the manufacturer's agent were to operate as joint agents until the expiration of the time limited in the agreement; and, where defendant sold about half of the product disposed of by the joint agency, it was entitled to no commission other than 25 per cent. of the amount earned by the agency.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 216-219; Dec. Dig. ⇨82.]

2. ACCORD AND SATISFACTION ⇨11—ACCEPTANCE OF CHECK MARKED "IN FULL."

Where defendant company, acting as agent for plaintiff, sent a check marked "In full" to close up their account under a certain agreement, stating at the time that it had no personal knowledge regarding the transaction, but relied on its books of account, which seemed correct, the plaintiff not applying the payment as closing the account, but merely giving defendant credit on its books, and, in subsequent monthly statements, disclosing such application of the check, defendant making no objection, and upon further demand from plaintiff for full settlement, stating that it was entitled to take the position that the account was squared, but that it should be pleased to consider the matter further if plaintiff did not agree, later sending off another check, expressly tendering it in full settlement of all accounts, which was returned, the acceptance of the first check did not amount to an accord and satisfaction.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 75-82; Dec. Dig. ⇨11.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by John L. Duncan against the F. A. Hihn Company. Judgment for defendant, and from such judgment and an order denying a new trial, plaintiff appeals. Judgment and order reversed.

Netherton & Johnston, of Santa Cruz, for appellant. Chas. B. Younger, of Santa Cruz, for respondent.

KERRIGAN, J. This is an action brought to recover the sum of \$1,327.56, with legal interest from January 12, 1911, and costs; the plaintiff contending that the amount is

due from the defendant, as the assignee of the California Pine Box & Lumber Company, a corporation. The court gave judgment in favor of the defendant, and denied plaintiff's motion for a new trial, from which judgment and order this appeal is taken.

Plaintiff's claim is founded upon a written contract entered into between said California Pine Box & Lumber Company, and defendant by correspondence. The box company was engaged in the business of manufacturing and selling, among other things, fruit boxes. White & De Hart Company had for some time been the agent of the box company in Watsonville territory. In the year 1908 F. A. Hihn Company, desiring to represent the box company in that field, entered into a contract with it, by the terms of which the former was to receive 25 per cent. of the total commissions payable on the business done by White & De Hart Company and itself should its individual sales amount to 25 per cent. or more of such business; and in the event of its sales amounting to less than 25 per cent. of such combined sales, it was to receive 5 per cent. commission on the actual sales it made. The contract was entered into in April, and was to be effective until December 31, 1908. In effect, the contract provides that, if the F. A. Hihn Company should make one-quarter or more of the sales effected by the joint efforts of itself and its coagent in the Watsonville section, the total commission was to be shared in certain proportions; otherwise F. A. Hihn Company was to receive 5 per cent. commission only on the sales made by it.

No doubt, as suggested by the plaintiff, the defendant was anxious to get a footing in the fruit box business in and around Watsonville, and to that end was willing to make concessions in favor of the old and principal agents of the box company; and perhaps too, the defendant did not expect to sell much more than one-quarter of the boxes to be disposed of by the joint agency. However that may be, the fact is it sold nearly half as many; and it now contends, as it did in the trial court, that it is entitled, not to 25 per cent. of the commission due on the combined sales, but to 5 per cent. on all sales made by it. In making returns to the box company it credited itself with commissions on this basis. The suit, which was brought by the assignee of the box company, is to recover the difference between the amounts arrived at by these different methods of calculation.

[1] We think it quite plain under the terms of the contract that White & De Hart Company and the defendants were to operate together as joint agents until the end of the year, and that the defendant was not entitled to any commission other than the 25 per cent. of the amount earned by the joint efforts of the agents specified in the contract, if its sales amounted to more than one-quarter of the joint sales.

[2] The defendant, however, depends principally for an affirmance of the judgment of the trial court upon its claim that the evidence established an accord and satisfaction between the parties. As we have just seen, there was a controversy over the amount due to the box company; and while matters were in this state the defendant, in January, 1911, sent to the box company a check, saying in an accompanying note that it was "in full settlement of the account." The check was cashed by the box company; and the defendant now contends that, the receiver of the check having accepted it, it must be regarded as having done so subject to the condition that it was in full settlement of the account, and that thus an accord and satisfaction is established, citing section 1521 of the Civil Code and *Creighton v. Gregory*, 142 Cal. 34, 75 Pac. 569.

This would doubtless be true if the statement just made embraced all that was done in relation to this phase of the case, but, unfortunately for the contention of the defendant, it does not. In its note accompanying the check the defendant (which by the way, the record shows was disposed to be very fair throughout the whole controversy) stated that it had no personal knowledge regarding the transaction, but relied on an inspection of its books of account, which seemed correct. The box company itself did not apply the payment as closing the account, but merely gave the defendant credit for it on its books, and its subsequent monthly statements to the defendant disclosed such application of the check—to all of which the defendant made no objection. In December, 1911, the defendant, in answering a rather insistent demand for a settlement of the account, stated, among other things, that the box company having accepted the check referred to with the condition noted in the letter accompanying it entitled the defendant to take the position that the account "was squared." "However," continues the letter, "we shall be pleased to further consider this matter, should you disagree." Three days later the defendant, in another letter to the box company, after again referring to the circumstance that it had no personal knowledge concerning the correctness of the account, but was compelled to depend upon its books, which appeared to be correct, and after also referring to long-standing friendly relations between them, wrote that "in order to dispose of the difference, etc., we hereby inclose a check for \$214.16, and tender the same in full settlement and adjustment of all accounts." This check was returned, and the box company assigned its claim to the plaintiff, who immediately commenced this action.

The conduct of the parties themselves, taken as a whole, shows unmistakably, we think, that they did not consider the acceptance of the check of January, 1911, a final settlement of the account.

Defendant relies to sustain its position on the case of *Creighton v. Gregory*, supra, but there is nothing in the views which we have just expressed that is in conflict with that case. There the defendant gave a check in full payment of a disputed account, and it was signed at plaintiff's request and cashed by him. The court determined that the plaintiff must be held to have known that the defendant signed the check on the supposition that it closed the transaction and ended their dealings under the contract; that plaintiff was estopped to deny the effect of his deliberate act under the circumstances disclosed. Here, as already stated, there was a time during negotiations looking to a settlement of the account, when the defendant, on the authority of the case just cited, could perhaps have successfully regarded the transaction as closed. This, however, was not done; and, as before stated, viewing all that was said and done concerning the adjustment of the account, it cannot be held that the plea of accord and satisfaction is sustained by the evidence.

In passing upon this case we have spoken only of the contract of the year 1908, while the contract of 1909 is also involved; but this is because it is conceded that, if the plaintiff is correct in his construction of the former contract, he is entitled to the judgment demanded, with legal interest from January 12, 1911. We agree with plaintiff, and it follows from what has been said that the judgment and order appealed from should be reversed; and it is so ordered.

We concur: LENNON, P. J.; RICHARDS, J.

27 Cal. App. 135

LEWIS-SIMAS-JONES CO. v. C. KEE & CO. et al. (Civ. 1474.)

(District Court of Appeal, First District, California. March 30, 1915. Rehearing Denied by Supreme Court May 27, 1915.)

1. APPEAL AND ERROR ⇐356 — DELAY IN PERFECTING APPEAL—EFFECT.

An appeal from a judgment, which was not perfected within 60 days after notice of entry of judgment, rests on the judgment roll alone.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. ⇐356.]

2. SALES ⇐162—DELIVERY—SYMBOLICAL DELIVERY—ORDER ON WAREHOUSEMAN.

Under Warehouse Receipts Act (St. 1909, p. 438) § 9, providing that a warehouseman is justified in delivering goods in his keeping to a person who is either himself entitled to delivery by the terms of a nonnegotiable receipt issued for the goods or who has written authority from the person so entitled, either indorsed on the receipt or written on another paper, the former distinction between negotiable and nonnegotiable warehouse receipts is recognized, and the delivery and acceptance of an order for goods not capable of actual delivery, signed by the holder of a nonnegotiable warehouse receipt, is a symbolical delivery and acceptance of the goods, though the warehouse

receipt was not delivered, and renders the buyer liable for the purchase price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 376, 381-385; Dec. Dig. ⇐162.]

Appeal from Superior Court, Alameda County; Harris, Judge.

Action by the Lewis-Simas-Jones Company against C. Kee & Co. and C. Kee. Judgment for plaintiff, and defendants appeal. Affirmed.

Johnson & Shaw, of Oakland, and C. W. Slack and Chauncey S. Goodrich, both of San Francisco, for appellants. Fred L. Dreher, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff and from an order denying the defendants' motion for a new trial.

[1] The appeal from the judgment, not having been perfected within 60 days, after notice of entry of judgment, rests upon the judgment roll alone; and, this being admittedly sufficient to support the judgment, it follows that the judgment must be affirmed.

Upon the appeal from the order denying a new trial, the appellants urge that the evidence is not sufficient to support the findings of the court as to the delivery to, and receipt and acceptance by, the defendants of the goods for the purchase price of which this action is brought.

The proofs in this case, upon which the findings of the court are predicated, are substantially these: The plaintiff was on March 18, 1912, the owner of three certain lots of potatoes which were stored in a public warehouse in San Francisco, and were there segregated and set apart in certain stalls and designated with certain identifying numbers and marks, and for which potatoes the warehouseman has issued to the plaintiff nonnegotiable receipts, which were held by it at the time of the following transaction. On said day the defendant C. Kee, who was doing business under the name of C. Kee & Co., came to the salesman of plaintiff with a request for the purchase of potatoes, whereupon he was taken by the latter to the warehouse, and shown the several lots of potatoes of the plaintiff there, of which he made a thorough examination in the presence of the agent of the plaintiff, and the warehouse employes, after which offers and counter offers were made, which resulted in the defendant Kee finally consenting to the price and agreeing to take the entire three lots of potatoes, whereupon three written orders were made out by the salesman of plaintiff, designating each of these three lots of potatoes by number of sacks, number of stall, and other identifying marks, and also stating the prices, which orders were directed to the warehouseman, signed by the name of the plaintiff, with the initials of its salesman, and were then and there delivered to, received and ac-

cepted and carried away by, said Kee. The potatoes were charged to the defendants' account with the plaintiff in the usual manner. A day or two thereafter the defendant Kee came back to plaintiff's salesman, and claimed that his partner was not satisfied with the potatoes, and that he did not want them, and he then tried to return the orders, which the salesman refused to receive, telling him that the potatoes had been sold and charged to him, and that the seller could not take them back. The defendant Kee left the receipt upon a weigher's desk in the office of the plaintiff and went away. There was no showing that the defendant ever presented these orders to the warehouseman, or that the latter or any other person had any lien or claim upon the potatoes which would have interfered in any way with their actual and immediate delivery to the defendant Kee upon the presentation of such orders. The defendant Kee having refused to pay for the potatoes, the plaintiff brought this action for their purchase price.

The only legal question presented upon this appeal is the question as to whether the execution and delivery by the plaintiff of the aforesaid written orders for the several lots of potatoes sold to the defendant Kee, and the receipt and acceptance of such orders by him, constituted such a symbolical delivery, receipt, and acceptance of the potatoes in question as would satisfy the statute of frauds.

It is conceded that these several lots of potatoes were all of such size and quantity as to bring them within the rule permitting their symbolical delivery; and it also seems to be conceded by the appellant that had the plaintiff transferred to the appellant its warehouse receipts for this property, and had the defendant received and carried these away with him as he had the written orders, the symbolical delivery, acceptance, and receipt of these potatoes would have been such as to satisfy the statute of frauds. The appellant, however, contends that under the so-called "Warehouse Receipts Act," passed and approved by the Legislature on March 19, 1909 (Stats. 1909, p. 437), the transfer of the plaintiff's warehouse receipts for these several lots of potatoes was essential to accomplish the delivery, receipt, and acceptance of the property by the defendant in order to satisfy the statute. Prior to the passage of this act, upon which the appellant thus relies, the Supreme Court had decided in a number of cases, commencing quite early in our judicial history, that the execution and delivery of a written order for personal property not susceptible of manual delivery to a buyer, and the receipt and acceptance of such order by him, was sufficient to constitute such a delivery, receipt, and acceptance of the property as to perfect its sale. *Ghirardelli v. McDermott*, 22 Cal. 539; *Goldstone v. Merchants', etc., Co.*, 123 Cal. 625, 56 Pac. 776. The case last above cited was decided

in the year 1899, at which time there was in existence a statute, the forerunner of the present Warehouse Receipts Act, and which had been enacted by the Legislature in the year 1878. Stats. 1877-78, p. 949. The court in its decision called attention to the distinction drawn in that act between negotiable and nonnegotiable warehouse receipts in relation to the passage of title to property susceptible of symbolical delivery, holding that, in cases where the outstanding warehouse receipt for such property was a nonnegotiable receipt, the delivery of such receipt by the seller was not essential; but that his written order upon the warehouseman would suffice, if received and accepted by the purchaser, to pass title to the property. The statute of 1878 seems to have been carried in substance into the Civil Code, and to have formed the basis of sections 1858 to 1858f, adopted in the year 1905, and in which the same distinction between negotiable and nonnegotiable receipts as to the necessity of the delivery of either upon the sale of personal property in storage appears to have been preserved, for section 1858d of the Civil Code, as then enacted, reads as follows:

"If a nonnegotiable receipt is issued for any property, neither the person issuing nor any other person in whose care or control the property comes must deliver any part thereof, except upon the written order of the person to whom the receipt was issued."

[2] The present Warehouse Receipts Act was passed in 1909. A careful reading of this act will show that it was intended to deal chiefly with the relation between warehousemen and their depositors. Section 9 of that act appears to preserve the distinction recognized in the earlier decisions and statutes between negotiable and nonnegotiable warehouse receipts, for it provides that a warehouseman is justified in delivering the goods in his keeping to "a person who is either himself entitled to delivery by the terms of a nonnegotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper, or a person" who is "in possession of a negotiable receipt." Stats. 1909, p. 438. Upon the reading of the entire act, we do not find that there is anywhere expressed in it an intention to require a departure from the rule laid down in the earlier cases and remaining unchanged up to the time of its passage, making the written order of a depositor of goods in a warehouse, upon which there has been issued a nonnegotiable receipt, sufficient to pass, by its delivery, receipt, and acceptance, the title and symbolical possession of personal property not capable of manual delivery, so as to satisfy the statute of frauds, and entitled the seller to recover from the buyer its purchase price.

This being our conclusion, it follows that the evidence in the case at bar must be held to have been sufficient to sustain the findings of the court in plaintiff's favor; and hence

that the order denying a new trial should also be affirmed.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

27 Cal. App. 73

Ex parte VICTOR. (Cr. No. 380.)

(District Court of Appeal, Second District, California. March 25, 1915.)

1. PHYSICIANS AND SURGEONS ⇨2—PRACTICING WITHOUT AUTHORITY—DENTISTS—STATUTE—CONSTRUCTION—"ANY PERSON."

St. 1909, p. 800, amended Act March 23, 1901 (St. 1901, p. 564), regulating the practice of dentistry, section 1, so as to provide that it should be unlawful for any person to practice dentistry without obtaining a license from dental examiners, except that the right of dentists to practice who had lawful right to do so at the time of passage of the act should not be affected, and amended section 14 to provide that before any person could practice dentistry he should obtain a license which should be good until a certain date, when it should expire by limitation, and that an annual license fee should thereafter be paid. *Held* that, under the rule that in construing statutes the court must reconcile the different provisions to make them consistent and harmonious and to give intelligible effect to each, sections 1 and 14 were not irreconcilably inconsistent, since in the provision of section 14 that before any person can practice dentistry he must obtain a license, "any person" does not mean every person, but any person other than those belonging to the class which, under the proviso of section 1, were exempted from the operation of section 14, those who had lawful right to practice at the time of the passage of the act.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. ⇨2.]

For other definitions, see Words and Phrases, First and Second Series, Any.]

2. PHYSICIANS AND SURGEONS ⇨5—PRACTICING WITHOUT AUTHORITY—DENTISTS—ANNUAL LICENSE FEE—STATUTE.

By St. 1909, p. 800, amending Act March 23, 1901 (St. 1901, p. 564), regulating the practice of dentistry, sections 1 and 14, the obligation is imposed upon every person practicing dentistry, without exception, and without regard to when or how he became entitled to practice, to pay the annual license fee of \$2, established by the act, which expressly provides that no dentist shall be exempt from the tax, which applies to all alike.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 5; Dec. Dig. ⇨5.]

3. STATUTES ⇨114—TITLE OF ACT—PRACTICING WITHOUT AUTHORITY—DENTISTS.

Act March 23, 1901 (St. 1901, p. 564), repealing Act March 12, 1885 (St. 1885, p. 110), regulating the practice of dentistry, and amended by St. 1909, p. 800, is not obnoxious to Const. art. 4, § 24, providing that the title of every act shall comprehend the subjects regulated, since the provision of the act requiring payment of an annual license fee by dentists is included in the general subject of regulation of the profession expressed in the title; since, when the object of an act is to regulate the practice of a given profession, the Legislature may include in the act the means for effecting such object.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 145, 147-149; Dec. Dig. ⇨114.]

4. PHYSICIANS AND SURGEONS ⇨2—PRACTICING WITHOUT AUTHORITY—DENTISTS—STATUTE.

Section 14 of the act of March 23, 1901 (St. 1901, p. 568), regulating the practice of dentistry, repealing Act March 12, 1885 (St. 1885, p. 110), and amended by St. 1909, p. 800, providing for the collection of initial and annual license fees from dentists, and section 21½, providing for the revocation of a license, where the licensee has been convicted of a public offense, unprofessional conduct, inefficiency, etc., are not in conflict; their subjects being distinct and separate.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. ⇨2.]

5. STATUTES ⇨81, 95—SPECIAL AND LOCAL LAWS—PRACTICE OF DENTISTRY.

Act March 23, 1901 (St. 1901, p. 564), regulating the practice of dentistry, repealing Act March 12, 1885 (St. 1885, p. 110), and amended by St. 1909, p. 800, does not violate Const. art. 4, § 25, subd. 2, as a special law for the punishment of a misdemeanor, nor subdivision 10, by providing for the collection of taxes which are local and special.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 90, 105, 106; Dec. Dig. ⇨81, 95.]

6. TAXATION ⇨193—ACT REGULATING PRACTICE OF DENTISTRY—CONSTITUTIONALITY.

Act March 23, 1901 (St. 1901, p. 564), regulating the practice of dentistry, repealing Act March 12, 1885 (St. 1885, p. 110), and amended by St. 1909, p. 800, does not violate Const. art. 13, § 1, as levying a tax upon property not taxable under the Constitution.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 309; Dec. Dig. ⇨193.]

7. CONSTITUTIONAL LAW ⇨136 — OBLIGATION OF CONTRACTS — ACT REGULATING PRACTICE OF DENTISTRY—CONSTITUTIONALITY.

Act March 23, 1901 (St. 1901, p. 564), regulating the practice of dentistry, repealing Act March 12, 1885 (St. 1885, p. 110), and amended by St. 1909, p. 800, is not violative of Bill of Rights, § 16, as impairing the obligation of contracts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 299, 300, 343, 362; Dec. Dig. ⇨136.]

Application by E. R. Victor for writ of habeas corpus. Petitioner remanded to custody, and writ discharged.

R. H. Wilson, of Bakersfield, and Clyde Woodworth, of Los Angeles, for petitioner. Ray E. Nimmo, of Los Angeles, for respondent.

SHAW, J. Petitioner seeks discharge from the custody of the sheriff of Kern county, by whom he is held in virtue of a warrant issued upon an information filed by the district attorney charging him with practicing dentistry contrary to the provisions of the law enacted for the regulation of such practice.

The act upon which the information is founded is entitled:

"An act to insure the better education of practitioners of dental surgery, and to regulate the practice of dentistry in the state of California, providing penalties for the violation hereof, and to repeal an act now in force relating to the same and known as 'An act to insure the better education of practitioners of dental sur-

gery, and to regulate the practice of dentistry in the state of California," approved March 12, 1885," approved March 23, 1901.

As then adopted, section 1 of this act provided:

"It shall be unlawful for any person to engage in the practice of dentistry in the state of California, unless said person shall have obtained a license from a board of dental examiners, duly authorized and appointed under the provisions of this act to issue licenses; provided, that this act shall not affect the right under the laws of the state of California, of dentists to practice dentistry who have lawful right to practice dentistry at the time of the passage of this act."

Section 14 of the act, in addition to provisions not pertinent to this discussion, required the applicant for license to practice dentistry to pay to the dental board a fee of \$15, and that the fees so received should constitute a fund out of which the necessary expenses of the members of the board, together with the expense of prosecuting cases, should be paid. By an act approved April 6, 1909 (Stats. 1909, p. 800), sections 1 and 14 of the act, among others, were amended. The amendment to section 1 of the act consisted in adding thereto the following words:

"And no dentist shall be exempt from paying an annual license tax, as hereinafter provided."

Section 14 was amended so as to read as follows:

"Before any person can practice dentistry in this state, he shall obtain a license to do so from the board of dental examiners. Each application shall be accompanied by a fee of twenty-five (\$25.00) dollars, which shall in no case be refunded. Such license shall be good until the following first day of May when it shall expire by limitation. An annual license fee of two (\$2.00) dollars shall thereafter be paid annually by every person practicing dentistry in this state, and it shall be the duty of said board to issue to all regularly licensed dentists upon application and the payment of \$2.00, if made before the expiration of the applicant's license, a new license which shall entitle said person to practice dentistry in this state for a period of one year, and which license shall expire upon the following first day of May. Said board shall have no authority to issue an annual license to any person who is not a regularly licensed dentist, and who has not paid said license fee of \$2.00 on or before the date when his previous license expired. Every person who was a regularly licensed dentist and who failed to pay said annual license of \$2.00 before the expiration of his license, shall be considered as if no license had ever been issued to him, and before he can again practice dentistry in this state, shall make a new application therefor as in the first instance and pay the regular fee of \$25.00 therefor, except that he shall not be required to submit to any examination. * * *

By an act approved June 11, 1913 (Stats. 1913, p. 573), section 14 of the act was further amended. Such amendment, however, is not material to a consideration of the question here involved.

It is conceded, as shown by the information, that prior to the enactment proved April 6, 1909, petitioner had been duly licensed to practice dentistry by the board of dental examiners of the state of California and had, by virtue of his compliance with the laws

theretofore in force, the legal right to practice dentistry in said state. It appears, however, that, notwithstanding the amendment to sections 1 and 14 of the act providing for the payment of an annual license fee of \$2, petitioner has failed, neglected, and refused to pay the same, and notwithstanding the fact that his license and right to practice ceased on May 1, 1909, he nevertheless, without compliance with the said provisions, has engaged in the practice of dentistry, which act it is claimed constitutes the misdemeanor, with the commission of which he is charged.

[1] The chief, and in fact the only, contention of petitioner which merits extended notice, is what he claims to be the irreconcilable inconsistencies existing between sections 1 and 14 of the act as amended in 1909. Having in mind the rule that "it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent and harmonious and to give a sensible and intelligible effect to each," we find no difficulty in the interpretation of the provisions. Section 1 of the act of 1901, as a condition of lawfully practicing dentistry, required every one, other than those who under the provisions of the law theretofore in force (act of 1885) were so entitled, to obtain a license so to do from the board of dental examiners. The meaning of the proviso contained in the section is "that all those having, at the time of the passage of the act, the lawful right under the laws of the state to practice dentistry, shall be excepted from the operation" of the act. Ex parte Hornef, 154 Cal. 355, 97 Pac. 891. By the act of 1909 the Legislature, as we have seen, amended section 14 so that as amended it reads, "Before any person can practice dentistry, * * * he shall obtain a license," etc. Petitioner insists that the words "any person," here used, mean "every person." On the contrary, the language must be construed in the sense limited by the proviso contained in section 1, which exempts certain persons from the requirement. Thus considered, it means any person other than those belonging to the class which, under the proviso contained in section 1, were made exempt from the operation of this portion of the law.

[2] Section 14 was further amended by the act of 1909, by providing that the license so issued should expire by limitation on the 1st day of May following the date of its issuance, and further providing that an annual license fee of \$2 should be paid annually by every person practicing dentistry in this state. It will be noticed that this requirement applies, as stated, "to every person practicing dentistry in this state." While this language might be deemed broad enough to include those falling within the exempted class described in the proviso contained in section 1, the Legislature has, nevertheless, removed any doubt as to its

intention by, at the same time, amending section 1, adding the words, "and no dentist shall be exempt from paying an annual license tax as hereinafter provided" in section 14. Taking the two sections together as amended, it seems absolutely clear to us that the intent of the Legislature was to exempt all persons who, prior to April 6, 1909, were entitled to practice dentistry in this state, from the requirement of making application for license or paying the general license fee; their status being recognized as having become fixed under the former law; that when it made provision for the payment of the annual license fee of \$2 it not only in express terms provided that such provision should apply to every person practicing dentistry, but, in order to leave no doubt of its applicability to all dentists, expressly provided that no dentist, without regard to when or how he became entitled under the laws of this state to practice dentistry, should be exempt from paying the annual license tax, which should apply to all alike.

[3] There is no merit in the contention that the act embraces subjects not comprehended in the title thereof. The subject of the act is, as stated, "the better education of practitioners of dental surgery, and to regulate the practice of dentistry." The provision in the act requiring the payment of this annual license fee of \$2 is included in the general subject of regulation expressed in the title. The title is a sufficient index to the subject of legislation contained in the body of the act, and hence is not obnoxious to section 24, article 4, of the Constitution. "The subject of an act being to regulate the practice of a given profession, the Legislature may include in the act the means related to the subject for effecting the object sought." *State ex rel. Smith v. Board of*

Dental Examiners, 31 Wash. 492, 72 Pac. 110. See, also, *Ex parte Whitley*, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; *Ex parte Horne*, supra; *County of Los Angeles v. Spencer*, 126 Cal. 670, 59 Pac. 202, 77 Am. St. Rep. 217; *Ex parte Hallawell*, 155 Cal. 112, 99 Pac. 490.

[4] It is also insisted that the provisions of sections 14 and 21½ are in conflict. The latter section makes provision for the revocation of a license where the licensee has been convicted of a public offense, unprofessional conduct, inefficiency, etc. The subjects of the two sections are distinct and separate and in no wise conflict with each other.

[5-7] Petitioner further insists that section 14 is obnoxious to the provisions of section 25, subd. 2, art. 4, of the Constitution, in that it purports to be a special law for the punishment of a misdemeanor; that it violates section 25, subd. 10, of said article, in that it provides for the collection of taxes which are local and special; that it violates section 1, art. 13, of the Constitution, in that it undertakes to levy a tax upon a class of property not taxable under the Constitution; that it violates section 16 of the Bill of Rights, in that it impairs the obligation of contracts. Such contentions are without merit. The constitutionality of the original act has been repeatedly upheld by the Supreme Court of this state, and similar statutes have long stood attacks from every angle in other jurisdictions. In addition to the cases cited, see *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *State v. McIntosh*, 205 Mo. 636, 103 S. W. 1071.

Petitioner is remanded to the custody of the sheriff of Kern county, and the writ discharged.

We concur: CONREY, P. J.; JAMES, J.

27 Cal. App. 112

MACKROTH v. SLADKY. (Civ. 1458.)

(District Court of Appeal, First District, California. March 27, 1915. Rehearing Denied by Supreme Court May 24, 1915.)

1. PLEADING **236**—**AMENDMENT—DISCRETION OF COURT.**

In an action by plaintiff to recover half of commission earned by defendant through negotiating a sale, where the original complaint set up a written agreement to divide commissions, the court's permission to plaintiff to file an amended complaint setting up an oral agreement was not an abuse of discretion, since the two claims could have been set up separately as different causes of action in one complaint, while recovery on the original complaint would bar recovery on the amended complaint, which are the tests when the allowance of an amendment is proper, the obligation of the defendant being the same whether founded upon a written or oral contract; since an agreement between brokers to share commissions need not be in writing.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. **236**.]

2. LIMITATION OF ACTIONS **127**—**AMENDMENT OF PLEADING—DISCRETION OF COURT.**

Where the complaint originally pleaded a written agreement to divide a commission, and where such complaint was amended to set up an oral agreement barred by the statute of limitations at the time the amended complaint was filed, the action of the court in granting leave to amend was not rendered an abuse of discretion by the fact that the statute had run; since the cause of action stated in the amended complaint, being, in effect, the same as that stated in the original complaint, dated back to the date of original filing, so far as the statute of limitations was concerned.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. **127**.]

3. EVIDENCE **177**—**BEST EVIDENCE—CONTENTS OF LETTER.**

Where secondary evidence of the contents of a letter was sought to be introduced, the original being shown to be in Mexico, such evidence was admissible; since a letter beyond the territory of the state is lost, within the meaning of the statute allowing secondary proof of the contents of writings.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 557, 570-579; Dec. Dig. **177**.]

4. BROKERS **66**—**COMMISSIONS—AGREEMENT TO DIVIDE—"PROPERTY."**

Where the agreement in suit was to divide equally with the plaintiff commissions which the defendant might receive upon sales of any properties located in Mexico for any person having such properties for sale who might be introduced to the defendant by the plaintiff, a sale of a fishing concession procured by defendant after his introduction by the plaintiff to its owner was within the agreement, although the agreement did not specifically mention the concession; since it was "property" that was placed in the defendant's hands for sale through the intercession of the plaintiff.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 51; Dec. Dig. **66**.]

For other definitions, see Words and Phrases, First and Second Series, Property.]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nstrand, Judge.

Action by I. R. Mackroth against Charles

Sladky. Judgment for plaintiff, and defendant appeals. Affirmed.

J. E. White, of San Francisco, and A. A. Montagne, of Oakland, for appellant. Clarke & Kinsey and Wm. M. Sims, all of San Francisco, for respondent.

LENNON, P. J. The plaintiff's original complaint in this action was unverified. It stated a cause of action against the defendant for moneys had and received in the sum of \$2,500. Pursuant to the defendant's demand therefor the plaintiff served and filed her bill of particulars, which, as the foundation of her cause of action, declared that:

"On July 20, 1909, * * * defendant made, executed, and delivered to the plaintiff the following: 'July 20, 1909. In the event of my making a sale I will give one-half the commissions received on any of the Mexican properties I obtain through I. R. Mackroth directly or indirectly. [Signed] Charles Sladky.'"

The bill of particulars further stated that, in accordance with the foregoing memorandum of agreement, plaintiff gave to the defendant a letter of introduction to Louis Martinez de Castro, a resident of the state of Sinaloa, Mexico; that some time during the year 1909 the defendant negotiated a sale of certain fishing concessions and business situated in Mexico from said Louis Martinez de Castro to the Pacific Canning & Exploration Company, for which service the defendant received as a commission from de Castro the sum of \$2,500, and that defendant was indebted to the plaintiff for one-half of said sum under and by virtue of the memorandum of agreement previously referred to.

The unverified answer of the defendant consisted of a general denial of the allegations of the plaintiff's complaint, and upon the issues thus framed the case proceeded to trial on March 20, 1912, but before the trial was concluded the trial court, "pursuant to the stipulation of the parties herein in open court," ordered that all of the testimony theretofore offered and received be stricken out. Apparently the trial of the case was thereupon continued by consent to January 28, 1913, at which time by agreement of counsel the trial court ordered that the case be tried de novo. Some time between the first and second hearing of the case the plaintiff, pursuant to a motion duly noticed and granted, served and filed an amended complaint, which for a cause of action alleged an oral agreement on the part of the defendant, made on or about September 1, 1908, to divide equally with the plaintiff any and all commissions that might thereafter be earned and received by the defendant for making a sale of certain described properties and concessions in the republic of Mexico which had been previously placed with, and through her intercession intrusted to, the defendant; that, relying on the promise of the defendant to divide such commissions, the

plaintiff, in addition, placed in his hands for sale a number of different properties in the republic of Mexico which she, the plaintiff, had already been employed to sell; that the plaintiff gave to defendant a letter of introduction to one Louis Martinez de Castro, the owner of many properties in the republic of Mexico, and at the same time wrote, addressed, and mailed to said de Castro a separate letter recommending that the defendant be employed to make a sale of such properties as de Castro might be willing to sell; that the letter of introduction which had been forwarded to de Castro by the defendant brought about a correspondence concerning the sale of certain of de Castro's properties, which resulted in the defendant proceeding personally to Mexico, where he met de Castro and procured from him authority to negotiate a sale of certain fishing concessions; that the defendant thereafter, and upon returning from Mexico, negotiated a sale of said concessions to the Pacific Canning & Exploration Company, for which, as a commission, de Castro paid to the defendant the sum of \$2,500 in gold coin of the United States, which the defendant refused to divide with the plaintiff. The answer of the defendant denied in detail every material allegation of the plaintiff's complaint; and upon the issues thus reframed the case was tried anew. Judgment was entered against the defendant and in favor of the plaintiff for the sum of \$1,250, from which the defendant has appealed upon a certified record of all of the proceedings had in the lower court.

[1] The ruling of the trial court granting the plaintiff permission to file her amended complaint was not an abuse of discretion, nor did it prejudice the defendant. "Liberality in the allowance of an amendment to a pleading * * * is the rule, rather than the exception; and in cases where such an amendment can be made in furtherance of justice without jeopardizing the rights of an adverse party it should be freely allowed." *B. & W. Engineering Co. v. Beam*, 23 Cal. App. 164-177, 137 Pac. 624, 629. This, of course, assumes that neither the cause of action nor the issues involved therein will be radically changed by the proposed amendment. In the present case the cause of action relied upon in the plaintiff's original complaint, although stated in the form of an action for moneys had and received, was, as indicated by the plaintiff's bill of particulars, in fact, founded upon an agreement to divide the commissions received by the defendant for the sale of property, which was procured to be placed in his hands through the intercession of plaintiff for the purpose of negotiating a sale. This being so, it is obvious that the original and amended complaint deal primarily and practically with the same subject-matter, and to all intents and purposes seek precisely the same relief. As was said in *Born v. Castle*, 22 Cal. App. 282, 134 Pac. 347:

"The claim made by the plaintiff, considered either as a cause of action arising upon contract or as one for money had and received, could have been set out separately as different causes of action in one complaint; and this, according to the rule adopted in some jurisdictions, is the test as to whether or not an amendment shall be allowed. * * * Another test suggested by the New York courts to ascertain whether a new cause of action has been introduced by an offered amendment is to learn if 'a recovery on the original complaint would be a bar to a recovery upon the amended complaint.'"

The fact that the proof required to support the cause of action stated in the amended complaint might be different from that offered and received in support of the original complaint would not necessarily tend to show that the amended complaint stated a new and an entirely different cause of action. *Born v. Castle*, supra. An agreement between broker and broker to share commissions need not be in writing. Therefore the obligation of the defendant would be the same whether founded upon a written or an oral agreement; and clearly, if the complaint in two counts had separately stated two causes of action—one upon a written and the other upon an oral agreement—the failure of the plaintiff's proof to establish the execution of a written agreement would not have precluded proof of the existence of an oral agreement. In our opinion, the situation of the parties under the amendment in question in the present case is, in effect, not any different from what would be the situation of the parties in the supposed case. Although the plaintiff's proofs in the present case fell short of showing a written agreement by the defendant to divide the commissions in controversy, nevertheless it tended to show the existence of an oral agreement to that effect, and in no sense altered the identity or character of the plaintiff's cause of action; and it is the rule that:

"Mistakes in the statement of the subject-matter of the action * * * may be corrected by amendment * * * so long as the identity of the claim remains the same." 2 *Abbott's Trial Brief*, 1798; *Third Street Improvement Co. v. McLelland*, 23 Cal. App. 369, 137 Pac. 1089.

The situation in the present case is essentially different from that disclosed in the case of *Norton v. Bassett*, 158 Cal. 425, 111 Pac. 253, where the Supreme Court intimated that it would have been an abuse of discretion to permit an amendment to a complaint which alleged facts directly contrary to those testified to by the plaintiffs upon the first trial of the case. There the amendment was proffered after a reversal on appeal of a judgment in favor of the plaintiffs; and "the amendment was offered nearly six years after the action was begun, after it had been prosecuted and tried upon an entirely different theory, and after all the evidence touching the possession [of the land in controversy] was before the trial court." Under the circumstances the Supreme Court said that:

"Inasmuch as the trial court was satisfied from the evidence adduced upon the first trial that the plaintiffs were not in possession of the land, and could not prove such fact upon a new trial without gross stultification of the evidence which they had previously given, * * * it was not only no abuse of discretion, but it was the duty of the trial court to refuse to allow amendments which would effectuate only a protraction of the litigation without changing the result."

No such situation confronted the trial court in the present case. In the first place, there is nothing in the plaintiff's testimony as given upon the first and partial hearing of the case which is absolutely irreconcilable with the theory of the amended complaint that the obligation of the defendant arose out of an oral agreement. Moreover, before the conclusion of the plaintiff's case, and before the court below was given an opportunity to determine whether or not the obligation of the defendant was founded upon a written or oral agreement, the trial of the case, upon the stipulation of the parties, was halted, all of the evidence which had been received stricken out, and the trial of the case commenced anew. Surely, under these circumstances, it cannot be fairly said that the defendant was surprised or prejudiced by the allowance of the amendment to the complaint.

[2] The fact that the oral agreement pleaded and relied upon for a cause of action in the amended complaint would have been barred by the statute of limitations at the time when the amended complaint was filed did not preclude the lower court in the exercise of its discretion from granting the plaintiff's motion to amend. As previously pointed out, the amended complaint did not present or in any wise involve a new and an entirely different cause of action from that stated in the original complaint. The present case may be distinguished from the case of *Peiser v. Griffin*, 125 Cal. 9, 57 Pac. 690, where the objection "to permitting the amended answer to be filed was that it was not an amendment to the old, but the statement of a new, cause of action, and one that was barred by the provisions of section 164 of the Civil Code."

The facts of the present case are entirely dissimilar from the facts of the case of *Patterson v. Doe*, 130 Cal. 333, 62 Pac. 569. In that case the plaintiff's cause of action was founded upon an understanding or agreement apparently resting in parol, and the defendants by way of answer pleaded the statute of limitations. On the trial the plaintiff was nonsuited upon the ground that, if any agreement had been made between the plaintiff and the defendant, it was not in writing, but by parol, and was therefore barred at the time the action was commenced by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. Our Supreme Court held in that case that the nonsuit was properly granted, and that the plaintiff's motion to amend the complaint by adding a count

on quantum meruit was properly denied, because the plea of the two-year statute of limitations would still be good to the complaint as thus amended. In the case at bar the statute of limitations was not only not pleaded, but could not have been successfully pleaded, to the cause of action stated in the original complaint; and the cause of action stated in the amended complaint, being, in effect, the same as that stated in the original complaint, related back to the date upon which the original complaint was filed, in so far as the plea of the statute of limitations was concerned. *White v. Soto*, 82 Cal. 654, 25 Pac. 210.

[3] The trial court did not err in its ruling permitting secondary evidence of the contents of the plaintiff's letter introducing the defendant to de Castro. It was established in evidence that this letter was written and addressed by the plaintiff to de Castro in Mexico. De Castro testified that the letter, if it was still in existence, was at the time of the trial among his private papers in Mexico; and "a letter that is beyond the territory of the state is, within the meaning of the statute, 'lost,' so as to allow secondary proof of its contents." *Zellerbach v. Allenberg*, 99 Cal. 57, 73, 33 Pac. 786, 791.

[4] The trial court in its findings of fact found, among other things:

"That in the fall of the year 1908 the plaintiff and the defendant entered into an oral contract to divide equally with the plaintiff all commissions which defendant might receive upon sales of any properties located within the republic of the United States of Mexico which should be secured by the defendant from any person having such properties for sale, who might be introduced to the defendant by the plaintiff, and with whom the plaintiff might bring defendant into communication or connection."

It is insisted that the evidence does not show that the agreement in suit was intended to cover and control the commissions which the defendant received for negotiating the sale of the fishing concession. This contention is based upon the assumption that the evidence does not show that in the several conversations between the plaintiff and the defendant, which were primarily the basis of the alleged oral agreement, the fishing concessions of de Castro were mentioned in so many words. Conceding this to be so, the fact remains that all that was said and done by the plaintiff and the defendant, coupled with all of the circumstances of the transaction, warranted a finding that the agreement in controversy was intended to cover and control any and all commissions which the defendant might receive for negotiating the sale of any property of de Castro. The fishing concession was property; it was owned by de Castro, and by him placed in the hands of the defendant for sale through the intercession of the plaintiff. Obviously, therefore, the fishing concession, even though not specifically mentioned, at the time of the making of the agreement, by necessary im-

plication, was covered and controlled by the agreement.

The judgment appealed from is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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GREAT WESTERN POWER CO. v. PILLSBURY et al. (Sac. 2237.)

(Supreme Court of California. May 12, 1915.
Rehearing Denied June 10, 1915.)

1. MASTER AND SERVANT ⚡250¾, New, vol. 16 Key-No. Series—PERSONAL INJURY—WORKMEN'S COMPENSATION ACT—REVIEW—CERTIORARI FROM SUPREME COURT.

In the absence of any special constitutional authorization when Act April 8, 1911 (St. 1911, p. 796), entitled an act to provide for compensation for the accidental injuries to employes, establishing an Industrial Accident Board, etc., and providing that the award or orders of the board may be reviewed by a proceeding in the superior court, and that its determination shall be subject to an appeal to the Supreme Court, was passed, such act was not effective to take away or impair the constitutional jurisdiction of the Supreme Court, so as to prevent application to it to exercise its original jurisdiction by way of certiorari.

2. MASTER AND SERVANT ⚡250¾, New, vol. 16 Key-No. Series—ACTION FOR INJURY—WORKMEN'S COMPENSATION ACT—CERTIORARI—REVIEW OF FINDINGS.

A finding on conflicting evidence by the Industrial Accident Board, acting under the Workmen's Compensation Act (St. 1911, p. 796), made conclusive and reviewable only on certain grounds, cannot be inquired into on writ of review; since that searches only the jurisdiction of the inferior tribunal, and not errors committed within its jurisdiction.

3. APPEAL AND ERROR ⚡842—REVIEW—FINDINGS.

The claim that a finding of a court or jury is without support in evidence presents a question of law, rather than of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. ⚡842.]

4. TRIAL ⚡404—FINDINGS—CONCLUSIVE-NESS—COLLATERAL ATTACK.

Where the jurisdiction of a board depends upon the existence of certain facts, the board has jurisdiction to determine whether or not those facts exist, and its determination that they exist is conclusive on collateral attack.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. ⚡404.]

5. CERTIORARI ⚡64—WRIT OF REVIEW—JURISDICTIONAL FACTS.

"Certiorari" is not a collateral, but a direct, attack, and thereunder the existence of jurisdictional facts may be inquired into, and to this end the evidence itself may in proper cases be brought up for examination.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 174, 175, 183, 184; Dec. Dig. ⚡64.]

For other definitions, see Words and Phrases, First and Second Series, Certiorari.]

6. MASTER AND SERVANT ⚡250¾, New, vol. 16 Key-No. Series—WORKMEN'S COMPENSATION ACT—PERSONAL INJURY—REVIEW—JURISDICTION.

Act April 8, 1911 (St. 1911, p. 796), providing for compensation for accidental injuries of employes, and establishing an Industrial Acci-

dent Board, provides by section 3 that liability for the compensation fixed therein, without regard to negligence, shall exist against any employer for any personal injury accidentally sustained by an employé, or for his death proximately resulting therefrom, where the injury is not caused by the willful misconduct of the employé, and provides that the board shall file findings of facts and its award, and that its findings while acting within its powers shall be conclusive, and that the award may be set aside only on the grounds that the board acted without power or in excess of its powers, that the award was procured by fraud, or that the findings of fact do not support the award. Act June 16, 1913 (St. 1913, p. 950), vested the powers of the board in the commission created by Workmen's Compensation Act (St. 1913, p. 279). *Held*, on certiorari from the Supreme Court, on application of the employer to review an award, that whether a finding that the accident was caused by the "willful misconduct of the employé" was supported by the evidence so as to sustain the award went to the jurisdiction of the board and was reviewable.

7. MASTER AND SERVANT — 250¾, New, vol. 16 Key-No. Series—WORKMEN'S COMPENSATION ACT—PERSONAL INJURY—"WILLFUL MISCONDUCT."

Under Act April 8, 1911 (Stat. 1911, p. 796), providing for compensation for accidental injuries to employés, and establishing an Industrial Accident Board, by section 3 making an employer liable for compensation without regard to negligence for injury or consequent death from accidental injury, unless caused by "the willful misconduct of the employé," a skilled and experienced lineman, killed while working on "hot wires," who disobeyed the employer's known rule against working on such wires without using the rubber gloves provided by it, and which were on hand ready for use, to whom the foreman a few hours before the accident sent up such gloves, was guilty of "willful misconduct," so that an award of the board was not supported by the findings of fact, and would be annulled.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.]

Angellotti, C. J., dissenting in part.

In Bank. Proceeding under the Workmen's Compensation Act (St. 1913, p. 279) by dependents of James Mayfield, employé, to obtain compensation for his death, opposed by Great Western Power Company, employer. Compensation was awarded by the Industrial Accident Commission, and, on application of the employer, certiorari issued from the Supreme Court to review the award. Award annulled.

Guy C. Earl and W. H. Spaulding, both of San Francisco, for petitioner. Christopher M. Bradley and Aaron L. Sapiro, both of San Francisco, for respondents.

SLOSS, J. A writ of certiorari was issued by this court, on the application of Great Western Power Company, to review an award of the Industrial Accident Commission fixing upon said applicant a liability for the death of James Mayfield, one of its employés. The injury to Mayfield, and his resulting death, occurred on October 15, 1913. On that date the "Workmen's Compensation, Insurance, and Safety Act" (Stats. 1913, p. 279) had

been approved, but it was not yet in force; the final section (92) of the act providing that it should take effect on the 1st day of January, 1914. And the preceding section (91) specifically provides that the "compensation provisions of the act shall not apply to any injury sustained prior to the taking effect thereof." The relative rights of the employing company and of Mayfield's dependents must, therefore, find their definition in the provisions of the law in force at the time of the injury and death, i. e., the act of April 8, 1911, entitled "An act relating to the liability of employers for injuries or death sustained by their employés, providing for compensation for the accidental injury of employés, establishing an industrial accident board," etc. Stats. 1911, p. 796. In the interest of brevity we shall refer to the two acts by titles popularly applied to them, designating the earlier statute, that of 1911, as the "Roseberry Act," and the later, that of 1913, as the "Boynton Act." Mention should also be made of an act approved June 16, 1913 (Stats. 1913, p. 950). This statute provided that, upon the organization of the Industrial Accident Commission (provided for by the Boynton Act), the powers vested in the Industrial Accident Board (existing under the Roseberry Act) should be performed by said commission.

In this proceeding we are earnestly urged by petitioner to consider and decide a number of constitutional objections to the validity of the Boynton Act. But such inquiry would manifestly be futile and improper if, as appears to be the case, the rights of the parties are fixed, not by the Boynton Act, but by the Roseberry Act. Recognizing the force of this consideration, the petitioner seeks to bring the validity of the Boynton Act into the field of discussion by the claim that the Industrial Accident Commission, which, as successor to the Industrial Accident Board, undertook to act in this case, owes its existence solely to the terms of the Boynton Act, and can have no legal existence if that act be void.

The attack on the validity of the Boynton Act is based entirely on the compensation provisions of that law. The act contains many other provisions. For example, the commission is given power to make regulations regarding safety devices and other methods of protection, to investigate places of employment, to distribute information regarding the causes and prevention of industrial accidents, and to make annual reports to the Governor. The petitioner has not attacked these parts of the act, and it is difficult to imagine any ground upon which the validity of some of them, at least, could be questioned. They are easily separable from the rest of the act, and, without regard to the saving clause contained in section 86, subd. "b," of the act, could be upheld even if the compensation provisions were bad. We have,

then, a validly constituted commission, empowered to apply the Roseberry Act to cases arising before January 1, 1914. The present case being one of that class, we have here no further concern with the validity of the compensation provisions of the Boynton Act, and will leave the consideration of the constitutional questions presented in that behalf until their determination is called for, as it will be in several cases now pending in this court.

[1] The Roseberry Act is assailed by the petitioner in one particular only. That act provides that awards or orders of the board may be reviewed by a proceeding (in the nature, apparently, of a writ of certiorari) in the superior court; the determination of that court to be subject to an appeal to the Supreme Court. The only purpose of the contention that this provision is invalid is to support the action of the petitioner in seeking relief from this court in the first instance, without prior resort to the superior court. The writ has been issued by us as an exercise of our original jurisdiction, and the respondents do not question our power to review the award of the commission. Under these circumstances, there appears to be no occasion for extended discussion of the constitutional point. Let us say, in a word, that, in the absence of some special constitutional authorization—and there was none such when the Roseberry Act was passed—the constitutional jurisdiction of this court could not be taken away or impaired by legislative act. *Pac. Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 647, 690, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, and cases cited. The Roseberry Act was not, therefore, effective to prevent application to this court to exercise its original jurisdiction by way of certiorari.

We are, then, finally, brought to a consideration of the merits of the case. The Roseberry Act, in providing a system of compensation for accidental injuries to employes, made the application of the system elective, so far as both employers and employes were concerned. The employers who are subject to the liability created by the act are those only who, prior to the accident which gives rise to the claim, "have elected," by written statement filed with the board, and not withdrawn, "to become subject to the provisions of this act." Employes are deemed to have elected to be subject to the act where the employer, at the time of the accident, has so elected, and the employe has not, at one of certain times specified, given notice of his election not to come under the act. In the case at bar both the employer, Great Western Power Company, and the employe, Mayfield, were subject to the provisions of the act. Where liability for compensation exists its amount is fixed according to a schedule set forth in sections 8 and 9 of the act. The conditions determining the liability are stated in section 3, as follows:

"Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against an employer for any personal injury accidentally sustained by his employes, and for his death if the injury shall approximately cause death, in those cases where the following conditions of compensation concur:

"(1) Where, at the time of the accident, both the employer and employe are subject to the provisions of this act according to the succeeding sections hereof.

"(2) Where, at the time of the accident, the employe is performing service growing out of and incidental to his employment and is acting within the line of his duty or course of * * * employment as such.

"(3) Where the injury is approximately caused by accident, either with or without negligence, and is not * * * caused by the willful misconduct of the employe."

The determination of all disputes and controversies concerning compensation under the act is committed to a board of three members, known as the "Industrial Accident Board." This body has now, as we have said above, been superseded by the "Industrial Accident Commission." After hearing the board is required to file: "(1) Its findings upon all facts involved in the controversy; and (2) its award, which shall state its determination as to the rights of the parties." The "findings of fact made by the board acting within its powers" are declared, in the absence of fraud, to be conclusive, and, under the review authorized by the act, the award may be set aside "only upon the following grounds: (1) That the board acted without or in excess of its powers; (2) that the award was procured by fraud; (3) that the findings of fact by the board do not support the award." We are not here concerned with the second and third grounds thus specified, and may dismiss from consideration the question whether either of these grounds may properly be brought within the scope of a writ of review. The contention of the petitioner is that the board acted without or in excess of its powers, or, in other words, that it exceeded its jurisdiction.

In the hearing before the commission it was conceded that Mayfield was, on the 15th day of October, 1913, an employe of the petitioner, and that, on that day, while performing service incidental to his employment, he met with an accidental injury which caused his death. The controversy turned entirely on whether the injury was caused by Mayfield's willful misconduct. The commission made its findings in general terms; the one bearing on the point just mentioned being that "the death of said James W. Mayfield was proximately caused by accident, and was not so caused by the willful misconduct of such deceased employe." The petitioner contends that this finding is absolutely without support in the evidence before the commission, and that the award based upon it cannot stand.

[2] It is, of course, conceded that, in any case in which there is a conflict of evidence, the finding of the commission cannot be in-

quired into here. This results, not only from the provision of the act that the board's findings of fact shall be conclusive, but from the nature of the writ of review, which searches only the jurisdiction of the inferior tribunal, not errors which it may have committed within its jurisdiction. But when the board has power to act only upon given facts, and there is no evidence whatever to show the existence of those facts, a finding that they do exist cannot, it is claimed, foreclose inquiry by a court under a writ of certiorari. This position is, indeed, not questioned by the respondents, who concede that, where the evidence is all one way, and the finding is to the contrary, the question becomes one of law, reviewable in a proceeding like the one before us. And, in thus agreeing, the parties are supported by the general current of authority, including the decisions of this court on the general scope of the writ of certiorari, and, as well, a number of rulings of other courts on cases arising under statutes similar to the Roseberry Act.

[3] To begin with, it is thoroughly settled that the claim that a finding of a court or jury is without support in the evidence presents a question of law, rather than of fact. *Herbert v. S. P. Co.*, 121 Cal. 229, 53 Pac. 651. It is only because this issue is one of law that it could be considered on appeal in criminal cases during the period (prior to the adoption of section 4½ of article 6 of the Constitution) when the appellate jurisdiction, in such cases, was limited to "questions of law alone." Const. art. 6, § 4; *People v. Smallman*, 55 Cal. 185; *People v. Kuches*, 120 Cal. 566, 52 Pac. 1002.

[4] Where the jurisdiction of a board depends upon the existence of certain facts, the board has jurisdiction to determine whether or not those facts exist (*In re Grove Street*, 61 Cal. 438), and its determination that they exist is conclusive on collateral attack (*Id.*; *People v. Los Angeles*, 133 Cal. 338, 65 Pac. 749).

[5] Certiorari, however, is not a collateral, but a direct attack (*Van Fleet*, Coll. Att. § 2), and under this writ the existence of the jurisdictional facts may be a subject of inquiry. To this end the evidence itself may, in proper cases, be brought up for examination.

"While the writ of review is not a writ of error, and is not a means by which, as upon appeal, the mere manner of conducting the proceedings, the rulings of the court upon questions of evidence, and other matters within the jurisdiction, involving the merits, however erroneous they may be, can be reviewed, it is nevertheless, a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends, not only to the whole of the record of the court below, but even to the evidence itself, where necessary to determine the jurisdictional fact." *Schwarz v. Super. Ct.*, 111 Cal. 106, 112, 43 Pac. 580, 582; *People v. Board*, 14 Cal. 479; *Lowe v. Alexander*, 15 Cal. 301; *Blair v. Hamilton*, 32 Cal. 49; *Stumpf v. Board*, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350; *People v. Goodwin*, 5 N. Y. 568.

[6] The provision of the Roseberry Act making findings of fact by the board conclusive should, we think, be taken to include findings of jurisdictional facts as well as others. But a review by a court which shall determine whether the board has acted in excess of its powers is expressly provided for, and it should not be held that a review can be avoided by a mere declaration, unsupported by any evidence, that the jurisdictional facts exist. Such declaration is to be regarded, not as a finding of fact, but as an assumption of jurisdiction, based upon a false or erroneous application of the law.

The question whether the accident was caused by the "willful misconduct of the employé" is one that goes to the jurisdiction of the board, and is therefore open to inquiry on certiorari. Under the terms of the act, the liability exists only where there is a concurrence of certain conditions, one of which is the absence of such willful misconduct. If the injury occurred through the employé's willful misconduct, there is no liability, and no power on the part of the board to assess compensation. This is the view taken by the Supreme Court of Wisconsin, in considering like questions arising under the Workmen's Compensation Law of that state. *Laws Wis. 1911, c. 50*. The Wisconsin statute furnished the model for the Roseberry Act. It contains provisions which are, in substance, identical with the sections of our law defining the conditions of liability, and declaring the conclusive character of the findings of the commission. The Wisconsin court, in *Borgnis v. Falk Co.*, 147 Wis. 327, 360, 133 N. W. 209, 219, 37 L. R. A. (N. S.) 489, said that:

"The jurisdiction of the Industrial Commission to entertain any claim for compensation under the act rests upon two facts which must exist, viz.: (1) That both employer and employé have elected to come under the act; and (2) that the injury was received in service growing out of or incidental to the employment as the result of accident, and not of willful misconduct. The Industrial Commission must, of course, decide these questions in any case where they are raised; but it cannot decide them conclusively, for they are jurisdictional questions on which its right to act at all depends."

Under statutes of like character, the decisions of other courts are uniformly to the effect that, although findings of fact made by the board or commission are generally binding, they may yet be reviewed, as matter of law, where absolutely unsupported by the evidence. *Rakiec v. Del., etc., Co.* (N. J. Sup.) 88 Atl. 953; *George v. Glasgow Coal Co.* (1909) App. Cas. 123; *McCaffrey v. G. N. Ry. Co.*, 36 Ir. L. T. Rep. 27; *Fenton v. Thorley & Co.* (1903) A. C. 443; *Sexton v. N. D. Tel. Co.*, 84 N. J. Law, 85, 86 Atl. 451; *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458; *Rayner v. Sligh Furn. Co.*, 180 Mich. 168, 146 N. W. 665; *Reck v. Whittlesberger* (Mich.) 148 N. W. 247; *Pigeon v. Emp. Liab. Assur. Corp.*, 216 Mass. 51, 102 N. E. 933,

Ann. Cas. 1915A, 737; In re Herrick, 217 Mass. 111, 104 N. E. 432.

[7] There was no substantial conflict in the testimony before the commission. The Great Western Power Company was engaged in the business of generating electricity and distributing it in the city of Sacramento and elsewhere. On November 18, 1911, it filed its election to accept the provisions of the Roseberry Act. James W. Mayfield entered its employ as a lineman in May, 1913. On the date of the accident both the company and Mayfield were subject to the provisions of the act. Mayfield was about 35 years old in October, 1913. He was a journeyman lineman, skilled and experienced at his trade. On October 15, 1913, Mayfield and one Streepy, a fellow lineman in the employ of the power company, were directed by a foreman to ascend a pole situated on Seventh street, in Sacramento, and to remove two transformers from the top of the pole. The pole was carrying wires transmitting a current of 2,300 volts. Tap wires led from the main lines to the transformers, which were used to reduce the voltage to 220. Streepy pulled the plugs connecting the tap wires to the transformer boxes. Thereupon Mayfield, who was standing on a crossarm, called to Streepy, "All right, Bill, I am going to cut her," and reached up with his pliers to cut one of the tap wires connected with the main line. In so doing he received the shock which caused his death. Streepy saw him sink; his body being held to the pole by a safety belt which he was wearing. By the time he was lowered to the ground life was apparently extinct.

The pole and appliances of the power company had been erected in 1912, and were of standard construction. Near by was a telephone pole, and a guy wire ran from the telephone pole to the ground. It had sagged, and thereby come in contact with a metal brace attached to the crossarm of the power pole, but Streepy did not observe this, nor, probably, did Mayfield. It was suggested, in the evidence, that the shock to Mayfield had occurred through a "grounding" of the current through this guy wire. There is no danger in touching a high-power wire unless a "ground" is produced; that is to say, unless a circuit is made through the body of the person touching the wire. This "grounding" may occur through the pole itself, if there be moisture in the pole, or in various other ways. Streepy testified that a man may safely cut a high-power wire (or "hot" wire, as it is called) at certain times and places, "unless he comes in contact with a ground or other hot wire," but that a man is never sure whether he is going to get a ground. The great hazard attending this kind of work (on "hot" wires) may be obviated by the wearing of rubber gloves, which afford a perfect protection to the wearer. Mayfield, it is perhaps unnecessary to say, was not wearing such gloves at the time of the accident. In August, 1912, the company had is-

sued to its division superintendents orders¹ that employes should not work on poles or towers carrying live wires without the use of a safety belt, nor "work on live wires of 500 volts to 5,000 volts, inclusive, without the use of rubber gloves provided by the company." Violations of these rules were declared to be sufficient cause for dismissal, and the division superintendents were directed to give suitable instructions to members of their divisions. Copies of the rules were posted at Sacramento in places where foremen and linemen reported. The foremen were directed to explain these rules to their linemen and to see to their enforcement. The gloves were supplied by the company, and were on hand ready for use. That Mayfield knew of the rules from the time he entered the company's employ is not open to serious question. Nor can it be doubted that he, an experienced lineman, was fully aware of the hazards involved in work on "hot" wires. But, beyond all this, Mayfield had, three days before the fatal accident, and again only an hour and a half before his death, been required by his foreman to wear the rubber gloves. On the latter occasion Mayfield had ascended a pole without his gloves, and the foreman, Cleek, directed his attention to the matter, and had the gloves sent up to him. When Mayfield and Streepy came to the pole on which the accident occurred, they were accompanied by a wagon in charge of a helper. In this wagon were their tools and their rubber gloves. They ascended the pole without taking their gloves.

The failure to use these gloves in working on the hot wires was claimed by the power company to constitute willful misconduct on the part of Mayfield. A majority of the commission decided against this claim. Commissioner Weinstock dissented, filing an opinion which, we think, states clearly and convincingly the reasons why a different result should have been reached. From that opinion we quote:

"The employer had issued and posted rules expressly enjoining the use of rubber gloves by linemen when working with 'hot' wires, and had furnished such rubber gloves as a part of the equipment of linemen. The foremen were familiar with the rule. The foreman in immediate charge of the work in which the deceased lost his life was familiar with the rule. He had instructed the use of the gloves on this sort of work not more than two hours before the deceased lost his life by reason of not using them. It was the duty of the foreman to give this order. It was the duty of the deceased to obey it. It was a deliberate breach of his duty to disobey it. The rule was made and the equipment was supplied to safeguard workmen against unforeseen and hidden dangers such as caused the death of the employe here. Other precautions could be taken, and, under the evidence, would be taken, against obvious dangers.

"The deceased was a lineman of seasoned experience. The risks of his employment were known to him. He was not only recently advised of, but was perfectly familiar with, the necessity of taking the prescribed precaution by using the gloves in the work in which he lost his life. To my mind his misconduct manifested

a wanton indifference and a willful disregard of all caution and precaution."

There is little to add to these expressions, based, as they are, upon evidence which is undisputed. The term "willful misconduct" is found in earlier statutes on the same subject. In some of the enactments, as in England, the phrase used is "serious and willful misconduct." Willful misconduct means something more than negligence. It does not include every violation or disregard of a rule. *Casey v. Humphries*, [1913] 6 B. W. C. C. 520. But it cannot be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that, where the workman deliberately violates the rule, with knowledge of its existence and of the dangers accompanying its violation, he is guilty of willful misconduct. *Brooker v. Warner*, 23 L. T. R. 201. We shall not undertake to review the numerous cases cited by the respective parties. Each turns upon its own peculiar facts, and little would be gained by a recital of circumstances under which it may have been held that willful misconduct was, or was not, shown as matter of law. In this case we are satisfied that there was no substantial evidence which, by itself, or with the aid of fair inference, supports the finding of the commission. The grave character of Mayfield's act in violating the rule is apparent from the nature of the consequences which would be likely to follow, and in this case did follow, its violation. That Mayfield intentionally violated the rule is the only conclusion that can reasonably be drawn from the evidence. He knew the rule, he had very recently been reminded of it, he knew the danger of cutting "hot" wires without rubber gloves, and he knew (and announced) that he was about to cut the wires. The only rational interpretation of the evidence is that he preferred to work without the gloves because (as appears in the testimony) their use is somewhat inconvenient. But he did this with full appreciation of what it involved.

There is no foundation in the evidence for the suggestion that the company had virtually abrogated the rule by failing to enforce it. It is true that no lineman was discharged for failing to wear gloves, but the testimony already outlined shows that the foremen insisted upon compliance when they observed that the rule was disregarded. The fact that the telephone guy wire came in contact with the pole is of no consequence. The very purpose of the rule was to protect against unforeseen dangers arising from unobserved or unobservable contacts and connections. The use of rubber gloves on hot wire work was required, even though no danger was apparent. What Mayfield did was to take the chance of violating the rule. The chance having turned out unfavorably, it cannot be said that he was not guilty of willful misconduct because,

under different conditions, he might have escaped injury.

The award under review is annulled.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.

MELVIN, J. I concur, and I agree in everything in the above opinion the more readily because I believe that it is in perfect harmony with the opinion written by me (but not adopted in its entirety by the majority of this court) in *Del Mar Water, Light & Power Co. v. Eshleman*, 167 Cal. 669, 140 Pac. 591, 948. I endeavored in that opinion to express a belief that the findings of the Railroad Commission upon the facts underlying its own jurisdiction are subject to review when there is no real conflict of evidence; yet the majority of the court held that we might not question the finding (without which admittedly the commission could not act) that the petitioner was a public utility, based merely upon evidence which, as I endeavored to show, was in no real conflict with the uncontradicted fact that the Del Mar Company was only the incorporated agent of a land company for managing its water department. In the present case that same measure is applied to the findings of the Industrial Accident Commission. I believe that there was no real conflict of evidence in the Del Mar Case, and that there is none in this. In the case at bar I believe that an excess of jurisdiction by the commission was shown, just as I was convinced that the Railroad Commission exceeded its jurisdiction in the Del Mar proceeding.

ANGELOTTI, C. J. I concur in the views expressed in the opinion of Mr. Justice SLOSS, except that portion thereof holding that the conclusion of the Industrial Accident Commission that the death of the employé, Mayfield, was not caused by his own "willful misconduct" is without sufficient legal support in the record. It is admitted that the term "willful misconduct" means something different from and more than negligence, however gross. The term "serious and willful misconduct" has been described by the Supreme Court of Massachusetts in *Re Burns*, 218 Mass. 8, 105 N. E. 601, as being something "much more than mere negligence, or even gross or culpable negligence," and as involving "conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences." It may be true that the evidence in this case was of such a nature as to show that the deceased was guilty of contributory negligence, and it may also be true that a finding by the Industrial Commission that he was guilty of willful misconduct would have had sufficient legal support in the evidence. But I do not think that the evidence was such as to warrant us in holding that

there was not sufficient support therein for the contrary finding that was in fact made; in other words, I do not think that we should hold that such evidence compels the conclusion, as matter of law, that the death of deceased was caused by his own "willful misconduct." I therefore dissent from the judgment annulling the award made by the Industrial Commission.

170 Cal. 175

SPALDING CO. v. ROBERTS, State Treasurer. (Sac. 2148.)

(Supreme Court of California. May 12, 1915.)

1. BANKS AND BANKING — 310 — TRUST COMPANIES — REGULATION — DEPOSIT OF BONDS AS SECURITY.

St. 1891, p. 490, § 1, provides that corporations authorized to act as executor, trustee, etc., may be appointed to so act. Sections 2, 3, and 4 authorized the courts to require trust moneys to be deposited with such corporations. Section 7, as amended by St. 1897, p. 424, provides that such a corporation, before accepting any such appointment or trust, shall deposit bonds with the state treasurer for the benefit of its creditors. Section 11 provides that such a corporation cannot accept any trust or deposit without procuring a certificate of authority from the bank commissioners. Section 19 provides that, when it desires to cease doing such business, it shall obtain a discharge of all its obligations, and that thereupon its certificate of authority may be revoked and the bonds returned. These provisions were substantially re-enacted as part of the Bank Act (St. 1909, p. 87). Plaintiff's articles of incorporation authorized it to act as trustee, etc., to do a general commercial bank and trust business. One of its two principal stockholders conveyed property to it in trust, and it was administering such trust, but had not accepted any other trust or carried on the business of receiving deposits and did not intend to do so. Its certificate of authority to do business was unrevoked, and it did not intend to proceed under section 19. Held that, even disregarding the trust which it was administering, it was not entitled to the return of the bonds deposited by it, as it was empowered to do the business to secure which the bonds were deposited, and the law intended that the bonds should remain on deposit until all trusts secured were determined and all deposits paid, and the corporation's powers to take other trusts or deposits were extinguished.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1215; Dec. Dig. 310.]

2. BANKS AND BANKING — 310 — TRUST COMPANIES — REGULATION — DEPOSIT OF BONDS AS SECURITY.

Assuming that the Bank Act is unconstitutional in so far as it attempts to regulate the business of accepting trusts and acting in a fiduciary capacity under the orders of a court, this did not entitle plaintiff to the return of the bonds; it still being liable for the administration of the trust created by the stockholder and accepted by it prior to the date when the Bank Act took effect.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1215; Dec. Dig. 310.]

In Bank. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Spalding Company against E. D. Roberts, State Treasurer. From a

judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

U. S. Webb, Atty. Gen., E. B. Power, Asst. Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for appellant. Chase, Overton & Lyman, of Los Angeles, and George & Hinsdale, of Sacramento, for respondent.

SHAW, J. From the judgment and from the order denying a new trial, the defendant appeals.

The object of the action is to procure a judgment directing the state treasurer to return to the plaintiff certain bonds amounting to \$100,105, face value, theretofore deposited with him by the plaintiff to comply with the provisions of the act of April 6, 1891.

[1] The plaintiff corporation was organized on March 9, 1908. Its articles of incorporation empowered it to "buy, sell, manage, control, and dispose of" almost every kind of property and, specifically, among other things:

"(4) To act as trustee, guardian, executor, administrator, assignee, receiver, and in any fiduciary capacity;" and "(5) to do a general commercial bank and trust business, and to accept and execute trusts of all kinds."

Its capital stock is \$250,000, divided into 2,500 shares, all of which, except two, were subscribed by Z. S. Spalding and Rufus P. Spalding, and which, so far as appears, are still held by them.

The act of 1891 (Stats. 1891, p. 490) provided that any corporation which was authorized by its articles to act as executor, administrator, guardian of estates, assignee, receiver, depository, or trustee, and having a paid-up capital stock of \$250,000, may be appointed to act in any of said specified capacities, in like manner as individuals (section 1). It also provided that the courts could by order require that trust moneys, held by any officer or trustee under its jurisdiction, be deposited with such corporation (sections 2, 3, 4), and that such corporations should not be required to give any special bond to secure the performance of such trusts (section 5), but that "each corporation, before accepting any such appointment or trust, shall deposit with the treasurer of state, for the benefit of the creditors of said corporation," \$100,000 in bonds of specified descriptions, or real estate mortgages, such bonds and mortgages "to be subject to sale and transfer, and to the disposal of the proceeds by said treasurer, only on the order of a court of competent jurisdiction, and as hereinafter provided." Section 7, as amended in 1897, (Stats. 1897, p. 424). The phrase "and as hereinafter provided" seems to have no application, for the statute does not provide a special proceeding in court to determine as to the sale, transfer, or disposal of the bonds or proceeds thereof. Section 11 provided that such corporation

could not accept any trust or deposit, without first procuring from the bank commissioners a certificate of authority to do so. On April 17, 1908, the plaintiff, in order to comply with such statute, deposited with the state treasurer the bonds in controversy, and thereupon the bank commissioners issued to said corporation the certificate as provided in the act, authorizing it to accept trusts and receive deposits of trust funds. This certificate has not been revoked, canceled, or set aside. Immediately thereafter, under the authority thus given to it, the plaintiff accepted from Z. S. Spalding a deed bearing date March 5, 1909, and in November, 1909, upon the same authority, it accepted another deed from said Spalding, bearing date October 5, 1909. These deeds conveyed to the plaintiff a large amount of real and personal property of great value, to be held by plaintiff upon certain trusts therein elaborately set forth. It ever since has been and is now executing and administering said trusts and intends to continue to do so. It has not accepted or received, and does not hold, any other property in trust, nor has it ever sought to do so, or to act in any other fiduciary capacity than as stated. It has never actually carried on the banking business or the business of receiving deposits. It has not endeavored to do so and does not intend to do so, nor to do any business other than that of administering the said Spalding trusts.

By the Bank Act (Stats. 1909, p. 87), which took effect July 1, 1909, the provisions of the act of 1891 were substantially re-enacted as article 4, §§ 90-106, of the Banking Act. It also created the office of superintendent of banks and invested him with the powers and duties formerly exercised by the bank commissioners under the act of 1891. It repeals all acts in conflict with its provisions. It provides that the powers and duties imposed upon any corporation existing and doing business, and embraced within the provisions of the act, are enlarged or modified, as may be required, to conform to the provisions of the act, notwithstanding anything to the contrary in their respective articles of incorporation. Section 145. It places corporations of the character of the plaintiff under the supervision of the superintendent of banks. In January, 1911, the superintendent of banks, upon examining into the affairs of the plaintiff, informed the plaintiff that its business was not within the scope of his powers or duties, and thereupon said officer refused to exercise jurisdiction over it and still refuses so to do. Upon such refusal, the plaintiff, conceiving that it was no longer a trust company doing business under the act of 1891, or the Bank Act of 1909, demanded of the state treasurer the return of said bonds, which being refused, it began this action.

The theory of the plaintiff is that, as it has accepted and is administering no trusts other than the said Spalding trusts and has not

sought and is not seeking any other trusts and does not intend to do so, and has not engaged in the banking business or received deposits of money, it becomes ipso facto a private corporation, not subject to the Bank Act, nor to the act of 1891, nor to the supervision of the superintendent of banks, and therefore that it is entitled to withdraw said bonds into its own custody and control, on demand. This also appears to be the theory of the superintendent of banks, and upon this theory the court below made its judgment directing the return of the bonds.

We cannot agree with this theory of the case. The plaintiff, by incorporating as above stated, brought itself within the scope of the act of 1891 and the subsequently enacted Bank Act. In this manner it became empowered to carry on the business of acting as trustee in any of the capacities mentioned in the act, including, among others, that of a depository of moneys. It is, in character, a quasi public corporation, subject to regulation by the state. It ever since has been, and now is, empowered to accept such trusts and to receive moneys on deposit. It has done nothing to divest itself of any of its powers. It has not changed its articles of incorporation by eliminating the powers to do business as a bank, trust company, or depository of moneys. Section 19 of the act of 1891, and section 102 of the Bank Act, provide that any such corporation which desires to cease doing such business shall first obtain a release and discharge of all of its obligations and trusts, and thereupon its certificate of authority may be revoked, and in that event the bonds so deposited shall be returned to the corporation by the secretary of state. The plaintiff has not complied with this provision, and it has not proposed to do so. It desires to continue in the administration of the Spalding trusts. Therefore, if we assume that the Spalding trusts may be disregarded upon the theory that the creator and beneficiaries thereof are consenting to the withdrawal of the bonds, which, however, does not appear, the plaintiff would be precisely in the situation in which it was immediately after it had deposited the bonds and received its certificate of authority from the bank commissioners. It is now, as it was then, fully empowered to do the business for the security of which the bonds were deposited, although, upon the theory stated, it has not yet begun such business. It may, however, engage therein at any moment. The bonds deposited were required as a condition precedent to the grant of authority to receive deposits and accept trusts, not to secure past deposits or trusts, but to secure those contemplated in the future so long as the plaintiff continues to be lawfully authorized to receive or accept them. The law intends that the bonds shall remain on deposit until the trusts which they secure are lawfully determined and the deposits paid,

and thereafter until the plaintiff's powers to take other trusts or deposits are relinquished and extinguished. Its intention not to do future business of that character is not sufficient, for its intention may be changed. Its powers must cease before the treasurer would be required to return the bonds.

[2] The plaintiff contends that the Bank Act is unconstitutional, in so far as it attempts to regulate the business of accepting trusts and acting in a fiduciary capacity under the orders of a court. We deem it unnecessary to determine this question. Assuming, for the purposes of this decision only, that the bank act is inoperative for that reason and to that extent, the plaintiff would still be liable for the administration of the Spalding trusts accepted by it prior to July 1, 1909, when the Bank Act took effect. The bonds having been deposited as security, and the trusts having been accepted, in contemplation of the law, on the faith of such security, the bonds must remain on deposit as the law requires until the liability which they secure has in some manner become released or terminated.

For these reasons we conclude that the court below erred in its conclusion that the bonds should be returned to plaintiff and in giving judgment accordingly.

The judgment and order are reversed.

We concur: SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

(170 Cal. 160)

In re AMBROSE. (Sac. 2236.)

(Supreme Court of California. May 11, 1915.)

1. MARRIAGE —19—VALIDITY—NECESSITY OF CONSENT OF PARENTS OR GUARDIAN.

Under Civ. Code, § 56, the marriage of a female minor over the age of 15 years, to which she consented, and which was duly solemnized was valid, though not consented to by her guardian or parents, and such marriage with the consent of her guardian pending an appeal from the order appointing him was valid, even though he had no authority to give such consent, as it is only when a marriage is contracted by a minor under the age of consent that the consent of the parents or guardian is essential to its validity.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 10, 11; Dec. Dig. —19.]

2. APPEAL AND ERROR —781—DISMISSAL OF APPEAL—LACK OF ACTUAL CONTROVERSY.

Under Civ. Code, § 204, providing that the authority of a parent ceases upon the marriage of the child, and Code Civ. Proc. § 1760a, providing that the power of a guardian over the person of the ward is superseded by the ward's marriage, where, pending an appeal by the parents of a minor from an order appointing a guardian of her person, she contracted a valid marriage, the appeal will be dismissed as to her marriage, as involving only a moot controversy.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. —781.]

3. APPEAL AND ERROR —781—DISMISSAL OF APPEAL—LACK OF ACTUAL CONTROVERSY.

That the order appointing the guardian appointed him as guardian of both the person and

estate of the minor did not prevent the dismissal of the appeal, where, in fact, she had no estate, there was no question of guardianship of her estate involved, and the order appointing a guardian of her estate was obviously an inadventence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. —781.]

In Bank. Appeal from Superior Court, Butte County; H. M. Alberg, Judge.

In the matter of the guardianship of Angelina Ambrose, a minor. From an order appointing a guardian, the minor's parents appeal. Appeal dismissed.

Martin I. Welsh and C. E. McLaughlin, both of Sacramento, for appellants. Guy R. Kennedy, of Chico, for respondent.

LORIGAN, J. This is an appeal from an order appointing a guardian of the person and estate of said minor.

The petition for letters of guardianship was filed by C. S. Cline, respondent, and probation officer of the county of Butte. The minor, who was of the age of 14 years, filed also her request consenting to his appointment. The appointment of the petitioner as guardian of the person of the minor was sought for the avowed purpose, as stated in the petition, that the guardian might give his consent to the marriage of said minor with one Joseph Freitas, who, under promise to marry the minor when she attained the age of consent, had been sexually intimate with her, as a result of which she was expected soon to become a mother. The parents of the minor opposed the appointment of a guardian. On the hearing in the court below it appeared that Freitas and the father of the girl were engaged together in the dairy business, and that while living on the ranch with her family the relations between himself and the girl commenced. When her condition of pregnancy was well advanced, Freitas confessed to the parents his relations with their daughter and her condition, and asked their consent to her marriage with him. This was refused, and, naturally angered and incensed at the conduct of Freitas towards his daughter, the father immediately filed a complaint before a justice of the peace charging him with the crime of rape. Apart from his conduct with the girl, which was most reprehensible, and which undoubtedly, on account of her being under the age of 16 years, subjected him to prosecution for the crime of rape, Freitas was shown on the hearing to be a man of good character and reputation, honest and industrious, and possessed of some considerable means, and both he and the girl expressed an affection for each other and a desire to be married. The parents of the girl were strongly opposed to her marriage, entertaining and declaring against Freitas a natural and justifiable aversion on account of his conduct towards their daughter. It ap-

peared without question that the parents entertained a deep affection and love for their daughter, were perfectly competent financially and otherwise to take care of her and her child in her misfortune, and desired to retain their paternal custody and control over her for the purpose of doing so, and preferring that an illegitimate child be born to their daughter rather than that she should marry Freitas. Notwithstanding this opposition of the parents, the court was of the opinion that, under all the circumstances disclosed by the evidence, it would be for the best interest of the minor in respect to her temporal, mental, and moral welfare that the said C. S. Cline be appointed her guardian, and accordingly so ordered. The order of the court, of course, said nothing with respect to the guardian consenting to the marriage of his ward, although the obvious purpose of having him appointed guardian was that he might do so. From this order the parents appeal, insisting that there was no evidence whatever in the case to authorize the court in depriving them of their natural rights as parents to the control and custody of their child; nothing to show that they were unfitted or unqualified to exercise such rights; and that hence the order depriving them of such control and custody was unwarranted.

[1] We have made only this brief statement of the matters presented in the record on this appeal, because, in the light of events that have happened since the appeal was taken and called to our attention on the day of its hearing before us, it clearly appears that no practical purpose can be attained by a disposition of the appeal upon its merits. On that day there was presented and filed in this court a certificate of marriage showing that after the appointment and qualification of the guardian of the minor, and after this appeal had been taken, such guardian had filed with the county clerk of Butte county his consent as guardian to the marriage of his ward with Freitas; that a license was accordingly issued; and that they were married. Whether the guardian, pending this appeal, could give consent to the marriage of his ward or not, is immaterial for consideration, though it is claimed by respondent that, under section 963 of the Code of Civil Procedure, the validity of his action in that respect cannot be questioned. As the minor was over the age of 15 years, she was capable of consenting to and consummating marriage (Civ. Code, § 56), and, having consented thereto, and her marriage having been duly solemnized, it was valid whether it was consented to by her guardian or parents or not. It is only when marriage is contracted by a minor who is incapable of consenting to marriage by reason of being under the age of consent, as provided in section 56, supra, that the consent of parents or guardian is essential to its validity, and which renders a marriage solemnized without it subject to annulment by the incapacitated minor or at the in-

stance of the parents or guardian of the minor if an action for that purpose is brought within a certain time. Here, however, as the minor was of the age of consent, and her marriage solemnized, it was a valid marriage without the consent of parents or guardian, and, even if the order here appealed from were reversed, it would still remain valid and invulnerable to any attack which she or her parents might seek to make against it on account of the fact that the consent of the latter had not been obtained.

[2] The minor having therefore contracted a valid marriage pending this appeal, it is quite obvious from the legal results which follow from her present marital status that the question between the parties to this controversy as to who is entitled to the care and custody of her person has become of no practical consequence, and that that matter has been eliminated from the domain of controversy in any court. Through her marriage the parental authority of her parents or their right to her control and custody as their minor child ceased. Civ. Code, § 204. Likewise the power of the guardian respondent over her was superseded by her marriage. Code Civ. Proc. § 1760a. Her marriage emancipated her from all parental control which might otherwise be exercised by reason of her minority, and placed her equally beyond further control of the court over her person in any guardianship proceeding based upon such minority. Under these circumstances the solution of the question whether the superior court acted correctly or not in appointing a guardian would be now of no practical advantage or benefit to either party. The controversy over that matter, which is the only point involved in this appeal, practically ended with the marriage of the minor. This being the situation, this court is not called upon to pass judgment on a question which, when given, can have no practical effect, where a controversy existing at the time the appeal was taken has by reason of matters subsequently transpiring ceased to exist. When this appears, the proper course is to dismiss the appeal, and, as it appears so here, that is the order to be entered.

[3] We are not unmindful of the fact that the order appealed from not only appointed the respondent guardian of the person of the minor but also of her estate, but we do not think this should affect the disposition we think proper to make of this matter. It was obviously an oversight on the part of the court in having its order embrace also the guardianship of the estate of the minor. There was no question of guardianship of her estate involved in the proceeding. As we have said, the petition in its direct recitals shows that the guardianship of the person was all that was sought. It was alleged in the petition specifically that the minor had no estate, and the court expressly found in the order of appointment the truth of this

allegation, and that the minor had no estate whatever. The order appointing the respondent guardian of the estate was obviously an inadvertence.

For the reasons given, we are of the opinion that this appeal should be dismissed; and it is so ordered.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; HENSILAW, J.

170 Cal. 151

MILES v. BALEY et al. (S. F. 6440.)

(Supreme Court of California. May 11, 1915.)

1. PLEADING — COMPLAINT — CONCLUSIONS OF PLAINTIFF.

An averment in a complaint that defendants freely and voluntarily made and entered into a bond is a mere conclusion of the pleader, and affords no assistance in determining whether the instrument was a common-law or statutory bond.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.]

2. EVIDENCE — PRESUMPTIONS — OFFICIAL DUTY.

There is a presumption that a board of school trustees, being public officers, performed their official duty and required contractors to give the bond provided for by statute.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.]

3. BONDS — CONSTRUCTION — STATUTORY BOND.

A bond, though not in the words of the statute requiring it to be given, is a statutory bond if in substance and legal effect it is the same as the form prescribed by statute.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 53; Dec. Dig. § 50.]

4. SCHOOLS AND SCHOOL DISTRICTS — PUBLIC SCHOOLS — CONTRACTORS' BONDS — CONSTRUCTION.

Where the conditions of a bond given by school contractors followed the language of St. 1897, p. 201, § 1, requiring the giving of bonds conditioned upon the contractors' paying all laborers and materialmen, the instrument will be construed as a statutory bond, particularly as it especially referred to the building contract, though it made no reference to the statute.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196, 340; Dec. Dig. § 81.]

5. SCHOOLS AND SCHOOL DISTRICTS — PUBLIC SCHOOLS — CONTRACTS — RIGHTS OF LABORERS AND MATERIALMEN.

Under St. 1897, p. 202, § 2, requiring laborers and materialmen to whom a public contractor is indebted to file their claims within 30 days after the material shall be furnished or the work finished and to commence an action on the bond within 90 days thereafter, such a filing of claims with the board of trustees of a school district is a condition precedent to the maintenance of an action on a bond given by contractors for the construction of school buildings.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 203-205; Dec. Dig. § 86.]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by W. O. Miles against J. H. Baley and another and the Empire State Surety Company. From a judgment against the

first defendants and in favor of the last-named defendant, plaintiff appeals. Affirmed.

Milton M. Dearing, of Fresno, for appellant. Geo. F. Hatton and Hartley F. Peart, both of San Francisco, M. B. Harris and E. M. Harris, both of Fresno, for respondent.

PER CURIAM. A hearing in this court was ordered after judgment by the District Court of Appeal for the Third Appellate District. That court, speaking through Mr. Justice Hart, had rendered the following opinion:

This is an action on a bond, executed and given by the defendants Baley and Simpson, as principals, and the defendant surety company, as surety, to the city of Fresno school district, on a building contract.

It appears from the complaint that, on the 30th day of March, 1910, the defendants, Baley and Simpson, as copartners, entered into a contract with the city of Fresno school district for the erection upon the high school grounds in said city of a certain high school annex and shop building. Said Baley and Simpson, by said contract, agreed to furnish all necessary labor and materials, etc., required for the construction of said building in accordance with certain plans and specifications adopted for that purpose, and for which the said school district agreed to pay them the total sum of \$62,029, payable in certain specified installments. Upon the execution of said contract, Baley and Simpson, as principals, and the Empire State Surety Company (to be hereafter referred to as the "surety company" or "the respondent"), as surety, made and entered into a bond to the said school district in the sum of \$31,015, "conditioned as therein stated for the use and benefit of said school district and also for the use and benefit of all persons furnishing materials or supplies or furnishing or performing work or labor of any kind in the performance of said work contracted to be done by said Baley and Simpson * * * in the erection and construction of said high school annex and shop building, and delivered said bond to said * * * school district." The complaint alleges that said bond was "freely and voluntarily made and entered into" and delivered to the said school district by the parties thereto. The complaint alleges that, after the execution of the building contract above referred to, and in pursuance thereof, Baley and Simpson entered upon the work of constructing said building and received payment for their work as provided by said contract. It is further averred that various persons (naming them in different counts) furnished labor and materials to said contractors, which labor and materials were actually used by the latter in the construction of said building; that said building was completed on or about the 28th day of June, 1911, and was accepted by said school district on June 30, 1911; that the claims of the certain persons named in the complaint for providing said contractors with material and labor were not, at the time of the commencement of this action, paid by said contractors and that the same were, before the filing of the complaint herein, assigned by said persons or claimants to the plaintiff. The respondent interposed a demurrer to the complaint on both general and special grounds, and the same was sustained by the court, with leave to the plaintiff to amend his pleading within 10 days from the time of the making of the order sustaining the demurrer. The plaintiff having failed or refused to amend within the time allowed, judgment was thereupon entered against

Baley and Simpson for the aggregate amount sued for (\$11,913.10) and in favor of the surety company as follows: "And it is further ordered and adjudged that plaintiff take nothing against the defendant, the Empire State Surety Company, and that said defendant, the Empire State Surety Company, have and recover from plaintiff its costs incurred herein." This appeal is by the plaintiff from that portion of said judgment above quoted.

[1-4] The theory of the respondent is that the bond declared upon is a statutory bond, that is, that it was made and given in pursuance of the provisions of an act of the Legislature of 1897, entitled, "An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work," approved March 27, 1897 (Stats. 1897, pp. 201, 202), and that the complaint wholly fails to state a cause of action in favor of the plaintiff as against the respondent because of the absence of a showing therein that the plaintiff or his assignors had complied with the terms of section 2 of said act as provided by section 1 thereof. Said section 2 reads as follows: "Any materialman, person, company, or corporation, furnishing materials or supplies used in the performance of the work contracted to be executed or performed, or any person who performed work or labor upon the same, or any person who supplies both work and materials, and whose claim has not been paid by the contractor, company, or corporation, to whom the contract has been awarded, shall, within thirty days from the time such work is completed, file with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom such contract was awarded, a verified statement of such claims, together with a statement that the same has not been paid. At any time within ninety days after the filing of such claim, the person, company, or corporation filing the same may commence an action against the sureties on the bond, specified and required by section one hereof." (The foregoing section was amended by the Legislature of 1911 [Stats. 1911, p. 1422] so as to extend the time of filing the verified statement, etc., to 90 days from date of the completion of the work and the time of commencing action to six months after the filing of the claim. The transactions involved here were had, however, prior to said amendments.)

That the observance of the provisions of said section of the act of 1897 is an indispensable prerequisite to the vesting of a right of action upon a bond of the character of the one involved here in materialmen, mechanics, and laborers furnishing materials for and bestowing labor upon any public work is not denied by the plaintiff; but his contention is that the instrument sued upon is a common-law bond; hence it was freely and voluntarily made and given by the defendants or, in other words, not made and given in obedience to the compulsory mandate of the statute in question. Obviously, if the instrument must or could, with legal propriety, be held to be a common-law bond, we would be required to hold that, to state a cause of action upon the bond in favor of the plaintiff, it was not essential for him to disclose by his complaint that his assignors had filed their claims with the board of trustees of said school district, as prescribed by section 2 of the act of 1897. And, e converso, if the instrument is a statutory bond, it was manifestly essential for the plaintiff to show that all the requisites of the statute, vital to the support of an action upon the bond by materialmen, etc., had been observed by his assignors, and that the silence of the complaint respecting that vital matter amounts to a total failure to state a cause of action upon the bond in favor of the plaintiff or his assignors.

The important question before us, then, is

whether the instrument in controversy, which is the foundation of the plaintiff's right to a recovery, is a statutory or a common-law bond. The bond itself makes no express reference to the statute or by any language pretends to discover the source from which it comes, and it is therefore manifest that the vital question submitted here must largely be determined upon the wording of the bond or by comparing its language with that of the statute. The averment of the complaint that the defendants "freely and voluntarily made and entered into" said bond can afford no assistance in the solution of the question, since, clearly, said averment involves a mere conclusion of the pleader. The bond reads as follows:

"Know all men by these presents: That we, J. H. Baley & J. G. Simpson, as principals, and the Empire State Surety Company, a New York corporation, duly licensed under the laws of the state of California, as surety, are held and firmly bound in the sum of thirty-one thousand and fifteen (31015) dollars, lawful money of the United States of America, unto the city of Fresno school district, to be paid to said city of Fresno school district, for which payment well and truly to be made, we jointly and severally, bind ourselves, our heirs, executors and administrators, firmly by these presents.

"Sealed with our seals and dated this 30th day of March, A. D. 1910.

"The condition of the above obligation is such that said J. H. Baley and J. G. Simpson, doing a contracting business under the firm name and style of Baley & Simpson did on the 30th day of March, 1910, enter into a contract with said city of Fresno school district, a public corporation, wherein they did promise, covenant and agree to furnish all necessary materials, labor and things whatsoever including tools, implements and appliances of every kind required for the work designated, and to construct and erect an annex to the present high school building, in every particular as set forth in said contract, to which contract reference is hereby expressly made and the same and all of the terms thereof are hereby made a part and portion of this bond.

"Now therefore, if the said J. H. Baley & J. G. Simpson shall well and truly observe, fulfill, perform and keep each and all of the covenants, conditions and terms contained in said contract to the satisfaction of the city of Fresno school district and shall pay for the materials or supplies furnished for the performance of the said work contracted to be done, or for any work or labor done thereon of any kind, then upon all such terms, conditions and agreements being fully complied with, and all labor, materials or supplies therefor being fully paid for, then in and in that event this obligation to be void, otherwise to remain in full force and effect."

Section 1 of the act of 1897, above referred to, provides: "Every contractor, person, company, or corporation, to whom is awarded a contract for the execution or performance of any building, excavating, or other mechanical work, for this state, or by any county, city and county, city, town, or district therein, shall, before entering upon the performance of such work, file with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom such contract was awarded, a good and sufficient bond, to be approved by such contracting body, officers, or board, in a sum not less than one-half of the total amount payable by the terms of the contract; such bond shall be executed by the contractor, and at least two sureties, in an amount not less than the sum specified in the bond, and must provide that if the contractor, person, company, or corporation, fails to pay for any materials or supplies furnished for the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the sureties will pay the same, in an

amount not exceeding the sum specified in the bond; *provided*, that such claims shall be filed as hereafter required."

Comparing the undertaking with the statute, it will readily be noted that that part of the former which specifies the conditions to be fulfilled by the contractors to render the undertaking inoperative or without effect is in the precise language of the statute. It is also to be observed that the amount of the bond is approximately that prescribed and required by the statute. There is no conceivable substantial difference, in substance and legal effect, between the conditions of the bond and those prescribed by the statute. Moreover, the presumption is that the board of trustees, as a public official body, performed every duty imposed upon it by law, and that, therefore, it exacted from the contractors the bond required by the statute in such cases. The language of the statute is that the contractor "*shall* before entering upon the performance of such work" make, give and file the bond, and appears to impose upon the governing board a mandatory duty in that regard. "Furthermore, the bond explicitly refers to the building contract, makes it a part and the consideration for the execution of the bond." *Martin v. McCabe*, 21 Cal. App. 658, 662, 132 Pac. 606. And, it may be remarked, as a circumstance of more or less significance in this connection, that the bond was executed on the same day that the building contract was executed.

It is obviously not necessary that the bond should expressly refer to the statute in order to constitute it a statutory bond. A bond, though not in the words of the statute requiring it to be given, if in substance and legal effect is the same as the form prescribed by such statute, is a statutory bond. *McCracken v. Todd*, 1 Kan. 148; *Brandt on Suretyship and Guaranty* (3d Ed.) § 615. "A recital in such a bond that it was executed by virtue of a given section of the Code, is not controlling or conclusive. It simply furnishes prima facie evidence of the fact. *When the same fact is apparent otherwise than by the recital it is as available for all purposes as if recited.*" *S. F. Lumber Co. v. Bibb*, 139 Cal. 192, 72 Pac. 964; *Martin v. McCabe*, 21 Cal. App. 658, 132 Pac. 606.

Again, in *Republic Iron & Steel Co. v. Patillo et al.*, 19 Cal. App. 316, 125 Pac. 923, it is said: "While it was not alleged in the complaint, nor made the subject of any finding by the court, that the bond was given under authority of the statute, considering that the municipality was only authorized to act under permission of statutory authority in making the street improvement, and, further, that the bond in its terms was phrased according to the statutory requirement, it must be assumed that the contract was so made and the bond given in connection therewith accordingly."

The fact that one of the conditions of the bond is that the contractors will faithfully execute the terms of their contract to the satisfaction of the school district—a requirement which is not prescribed by the statute in question—is not conceived to possess any importance in determining the character of the bond. In other words, the fact referred to cannot be held to be such as to impress the instrument with the character of a common-law bond. "Where a statute provides that an official bond shall be given in a certain penalty and contain certain provisions, if the principal and surety voluntarily enter into a bond in a greater penalty or which contains more onerous conditions, the bond will be binding at least to the extent of the statutory requirements. In such case, the conditions in excess of the statutory requirements may be regarded as surplusage and the bond sustained as to the others." *Brandt on Suretyship and Guaranty* (3d Ed.) § 617; *Board of Education v. Grant*, 107 Mich. 161, 64 N. W. 1050; *Central Irr. Dist. v. Delappe*, 79 Cal. 351, 21 Pac. 825.

The constitutional validity of the act of 1897 is not, as was true of section 1203 of the Code of Civil Procedure in the cases dealing with that section (*Gibbs v. Tally*, 133 Cal. 373, 65 Pac. 970, 60 L. R. A. 815; *Shaughnessy v. American Sur. Co.*, 138 Cal. 543, 69 Pac. 250, 71 Pac. 701, and *Martin v. McCabe*, supra), challenged here. And it could make no difference in the result reached in this case if that question were raised and the point sustained. The proposition presented here, as shown, is simply this: Is the bond here a creature of the statute authorizing and requiring the giving of such an undertaking in cases of this character, and, if so, have the essential requirements of the statute been so complied with by the plaintiff or his assignors as to give them a right of action upon said bond? If, as we hold to be true, the bond here is the one contemplated by said act, then clearly, as the courts have held in the cases last above cited, it would be, if anything at all, a statutory bond, regardless of whether the act requiring it to be given is or is not a valid one. In other words, having been given in compliance with the statute, it could not be converted into a common-law bond by construction.

Our conclusion is, in view of the said act of 1897, and from the phraseology of the bond and the circumstances under which it was given, that said instrument was executed and delivered by the defendants to the school district in obedience to the requirements of said statute, and that it is therefore subject to all the conditions and restrictions prescribed by said act. Indeed, we cannot conceive of any reason (and surely none has been pointed out) why it should be held that the undertaking is a common-law bond.

[5] The plaintiff having failed to show by his complaint that verified statements of the claims upon which he declares were, by him or his assignors, within 30 days, from the time the work contracted for was completed, filed with the board of trustees of said school district, as required by section 2 of said act as a condition precedent to his or their right to commence and maintain an action upon said bond, it necessarily results that no cause of action in favor of the plaintiff is stated in the complaint, and that the demurrer thereto was consequently properly sustained.

The judgment is, accordingly affirmed.

The foregoing opinion, we think, makes a correct disposition of the legal questions presented by the appeal. The principal, if not the only, reason leading us to order a transfer of the cause was that the Court of Appeal did not, in its opinion, make any reference to two decisions of this court (*Union Sheet Metal Works v. Dodge*, 129 Cal. 390, 62 Pac. 41; *People's Lumber Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576, which are strongly relied on by the plaintiff as supporting his contention).

It may be conceded that the opinions filed in these cases do tend to sustain the position that an instrument like the one here in suit may be upheld as a good common-law bond, without regard to the statute requiring the giving of a bond. But this view is contrary to that laid down in the later decisions cited by the District Court of Appeal. In *Shaughnessy v. American Surety Co.*, 138 Cal. 543, 69 Pac. 250, 71 Pac. 701, it was decided that a bond, which recited that it was given in pursuance of section 1203 of the Code of Civil Procedure (an enactment which had theretofore been held to be unconstitutional) could

not be enforced as a common-law bond. This was followed by *S. F. Lumber Co. v. Bibb*, 139 Cal. 192, 72 Pac. 964, which went a step further and held, in effect, that although the bond may not recite that it was given pursuant to the statute, the fact that it was so given may be made to appear otherwise, as by the fact that it complies with the statutory requirements governing its terms and the time and manner of its execution. The opinion in the *Bibb* Case mentions the further circumstance that the complaint referred to the statute, but we do not regard this as a controlling factor. The character of the bond is to be determined by its terms and the facts surrounding its execution, rather than by the conclusion of the pleader. Applying these tests, the bond here involved is, as the opinion of the District Court of Appeal shows, the bond required by the statute of 1897, and a recovery cannot be had upon it without alleging performance of the conditions imposed by the state. If *Union Sheet Metal Works v. Dodge* and *People's Lumber Co. v. Gillard* are in conflict with the views here announced, they must, to the extent of the conflict, be regarded as overruled.

The judgment is affirmed.

(170 Cal. 170)

COREY v. STRUVE et al. (S. F. 6391.)

(Supreme Court of California. May 12, 1915.)

Rehearing Denied June 10, 1915.)

1. ACTION — 27 — CAUSE OF ACTION — COMPLAINT — CONSTRUCTION.

As the forms of action have been abolished, a complaint alleging that plaintiff leased lands to defendants, that, while defendants were in possession of the land, plaintiff was the owner of beet tops grown thereon, that defendants without right converted the tops to their own use, selling them and receiving the sum which was the value thereof, and that such sum had been demanded by plaintiff, but that the demand had been refused, will be treated as one in assumpsit to recover the value of the property wrongfully taken and used, as for goods sold, and not for conversion.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 160-195; Dec. Dig. 139.]

2. LANDLORD AND TENANT — 139 — CONVERSION OF CROPS — DEFENSES.

Civ. Code, § 3336, declares that the detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of the conversion, with interest. Section 3337 declares that the presumption cannot be repelled in favor of one whose possession was wrongful from the beginning by his subsequent application of the property to the benefit of the owner without his consent. A land lease gave the lessor the right to beet tops, and provided that the tenants should plow them under as a fertilizer for the lands. The tenants sold the tops to be used in feeding cattle kept on the land. Held that, as the tenants had possession of the beet tops for only a limited purpose, and it was changed when they sold them, they cannot defeat an action for the value of the tops on the ground that the manure from the cattle kept on the land fertilized it as much as the tops would have, but, being special trustees, having only a limited right in the tops, and having wrongfully

disposed of them, they were bound by Civ. Code, §§ 2223, 2237, to compensate the owner.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 488, 492-506; Dec. Dig. 139.]

Department 2. Appeal from Superior Court, Monterey County; M. T. Dooling, Judge.

Action by Hiram Corey against James P. Struve and another. From a judgment for defendants, plaintiff appeals. Reversed.

See, also, 16 Cal. App. 310, 116 Pac. 975.

Daugherty & Lacey, of Salinas, for appellant. J. H. Andresen and J. A. Barden, both of Salinas, and W. S. White, of Beaumont, for respondents.

MELVIN, J. Plaintiff appeals from an adverse judgment. The complaint contained allegations that plaintiff leased to defendants certain land in Monterey county for a term of years; that, while defendants were in possession of the said land, plaintiff was the owner of certain beet tops which had been cut from beets grown upon said property under said lease; that defendants without right converted said beet tops to their own use, sold said personal property, and received therefor the sum of \$3,271.27, which was the value thereof at the time of conversion; that said amount of money, with interest thereon, had been demanded by plaintiff from defendants; but that the latter had refused to comply with plaintiff's demands. Plaintiff also pleaded a prior judgment in which plaintiff was declared to be the owner of the beet tops.

Defendants by their answer admitted plaintiff's ownership of the beet tops, but alleged that such ownership was limited and special, for the sole purpose of having the beet tops remain upon the ground where they had been grown and cut, defendants being entitled to the possession of said beet tops for the purpose of plowing them under as a fertilizer. They also admitted the existence of the judgment declaring plaintiff's ownership of the personalty in question, but declared that such ownership was the sort of limited one which they had pleaded. They further alleged that, with plaintiff's permission, they had sold the beet tops to be fed to cattle on the premises, and averred that the fertilizing effect of feeding the beet tops upon the ground where they had been grown and cut was greater than that produced by plowing under, and they denied that plaintiff had been injured by their conduct, but asserted that he had been greatly benefited thereby.

The court found that plaintiff had a qualified, special, and limited ownership in the property, "in this, that neither the plaintiff nor the defendants had any right to remove any of said beet tops from said leased lands, but it was the duty of the defendants, as tenants of the plaintiff, to plow said beet

tops under as a fertilizer of said leased lands." There were further findings that defendants had sold the beet tops for the aggregate sum alleged; that the beet tops had been eaten by the cattle of the purchasers upon the leased property; and "that the fertilizing benefit to lands derived from the ordure and urine of cattle while feeding beet tops as said beet tops were fed is equivalent to the fertilizing benefit the lands receive when the beet tops are plowed under, and for this reason the plaintiff was not damaged and sustained no detriment by the conduct of the defendants in selling said beet tops and feeding them to cattle upon said leased premises." It was also found that plaintiff did not consent to the sale of the beet tops. At the trial there was expert testimony which tended to support the finding of the equivalent value of the substituted fertilizer.

The only question to be determined, therefore, is whether or not tenants, bound under the terms of their lease to use a landlord's property in a certain way, may subvert said property to another, and to them a profitable, use, and escape all liability because the benefit to the realty was as great as that which was contemplated by the landlord in covenanting for the disposition of the personal property. At the outset respondents insist that this is an action for conversion.

[1] While the complaint does allege that the property was "converted" by the defendants, we think that the action was in reality one in assumpsit for the value of the property sold, or perhaps it might be more aptly characterized as one in the nature of a suit for money had and received. In this state one whose goods are wrongfully taken and used by another may sue in assumpsit for their value as for goods sold and delivered. *Bechtel v. Chase*, 156 Cal. 711, 106 Pac. 81; *Fountain v. Sacramento*, 1 Cal. App. 462, 82 Pac. 637; *Atkins v. Gamble*, 42 Cal. 100, 10 Am. Rep. 282; *Fratt v. Clark*, 12 Cal. 90. But we are not here greatly concerned about the particular form of the action. In this state we have but one form of action which has no special designation, and it cannot be defeated as at common law because not properly named. *Faulkner v. First National Bank*, 130 Cal. 263, 62 Pac. 463. Such an action as this is governed by equitable principles (*Crocker-Woolworth Bank v. Nevada Bank*, 139 Cal. 571, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169), and, applying such principles, particularly the maxim that "no man shall profit by his own wrong," we cannot agree with respondents in their contention that they are entitled to any "side profit" from the sale of the beet tops.

[2] The learned judge who presided at the trial of the case based his decision upon these propositions: (1) Plaintiff's ownership in the beet tops was qualified, extending only to his right to have them plowed under; (2) the measure of damages would be the value

of the property converted; (3) the manure resulting from keeping the cattle on the land was equivalent as a fertilizer to the beet tops plowed under; (4) defendants could make such defense because their possession was not "wrongful from the beginning." Section 3337, Civ. Code.

The sort of ownership enjoyed by the plaintiff is a false quantity because the defendants were not and did not claim to be owners of any part of the beet tops. So far as they were concerned the plaintiff had full title to the property, and the fact that he was bound by his contract to allow them to apply his property to the enrichment of land from which they were to get a portion of the crops did not make them part owners of the beet tops. The rule that the owners of a special interest in property may recover only to the extent of such interest applies only to cases where the suit is brought against the owner of the remaining interest or his assignee. *California C. F. Ass'n v. Ainsworth*, 134 Cal. 463, 66 Pac. 586. The tops had a value as a fertilizer when plowed under and a value as cattle food. If the owner chose to enter into a contract whereby his tenants were to plow the tops under, surely the tenants' violation of that agreement could not clothe them with proprietorship of the feed. Suppose, instead of beet tops, the property had been horses and plows which under the lease the tenants were bound to use only upon the landlord's acres, delivering the implements and animals to the owner at the end of the season in good condition, and suppose that after doing the plowing on their landlord's fields the tenants had rented the personal property to a neighbor on the theory that the exercise was good for the horses and the extra plowing efficacious for keeping the rust from the plows, would any one contend that the tenants might retain the fruits of the unauthorized exploitation of their landlord's property? So in the case before us the unauthorized profit should belong to the person whose property earned it.

The lower court held that the presumption declared by section 3336 of the Civil Code was repelled by showing an application of the property to the benefit of the owner. It is true that section 3337 of the Civil Code provides that:

"The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent."

But that section was never intended to apply to a case where the owner received a mere consequential benefit. It was only intended to affect cases where the entire beneficial value of the property was applied to the use of the owner. Appellant contends that the possession of the beet tops by respondents may not be characterized as rightful from the beginning because, although they had possession for a special purpose, the

different sort of possession which they took, by means of the cattle, for the purpose of destroying the beet tops, was a trespass, and was wrongful from the beginning; but, assuming that their possession was rightful within the meaning of section 3337, Civil Code, they did not show a subsequent application of plaintiff's property or the selling price thereof to his benefit.

In the absence of an express agreement with the owners, the defendants could by no possibility have any interest in the proceeds of the sale of his property. Their only agreement was not with reference to the proceeds of a sale, but related to their right to have the vegetable matter applied in the form in which it then existed to the land of which they were tenants. This right they waived when they disposed of the beet tops. They then sold another man's property with which they had been intrusted for a special purpose. A trustee who disposes of trust property must replace it with its fruits or account for its proceeds with interest. Section 2237, Civ. Code. One who wrongfully detains a thing is an involuntary trustee thereof for the benefit of the owner. Section 2223, Civ. Code.

It follows from the above discussion that plaintiff was entitled to the proceeds of the sale of his property wrongfully made by defendants, and that the decision to the contrary was erroneous.

The judgment is therefore reversed.

We concur: HENSHAW, J.; LORIGAN, J.

27 Cal. App. 145

START v. HEINZERLING. (Civ. 1476.)

(District Court of Appeal, First District, California. March 31, 1915.)

1. JUDGMENT $\S$ 106—MISJOINDER OF CAUSES—AMENDMENTS.

Where after demurrer for misjoinder was sustained, plaintiff dismissed his cause of action for damages and there remained a good cause of action for money had and received, the complaint cannot be dismissed because plaintiff did not amend; the striking out of the one action being tantamount to an amendment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. $\S$ 106.]

2. JUDGMENT $\S$ 158—DEFAULT—VACATION.

Before a default can be vacated, an affidavit of merits must be made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 311; Dec. Dig. $\S$ 158.]

3. JUDGMENT $\S$ 106—DEFAULT—WHAT CONSTITUTES.

An order granting an extension of time to plead after the expiration of the statutory time is void, and may be disregarded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. $\S$ 106.]

Appeal from Superior Court, City and County of San Francisco.

Action by L. H. Start against Florence

Heinzerling. From the judgment dismissing the complaint and an order opening defendant's default, plaintiff appeals. Reversed, and cause remanded.

Arthur Crane, of San Francisco, for appellant. Cornelius W. Kelly, of San Francisco, for respondent.

PER CURIAM. In this action the plaintiff sought to recover the sum of \$830. Two causes of action were separately pleaded, one for moneys had and received, and the other for damages alleged to have resulted to the plaintiff from a conspiracy claimed to have been entered into by the defendants against the plaintiff. The appeal is by the plaintiff from a judgment of dismissal, entered upon the theory that the plaintiff had failed to amend his complaint within the time granted after an order had been made sustaining the defendant's demurrer.

Incidentally the plaintiff complains of orders made intermediate the judgment, which present a peculiar entanglement of the procedure employed in the attempted adjudication of the subject-matter of the action. In this connection the record shows that service of summons was made upon the defendant, Florence Heinzerling, by publication. After the statutory time allowed her to appear and defend had expired, she procured an order giving her an extension of two days' time within which to plead to the plaintiff's complaint. Thereafter and before the two days' extension of time had expired, her default was entered, apparently upon the theory that the order extending her time to plead had been inadvertently and improvidently made. Subsequently, however, the defendant's default was set aside upon motion, which, although supported by an affidavit which tended to show that her default was due to excusable neglect, was not accompanied by an affidavit of merits.

Upon the opening of the default the defendant interposed a demurrer to the complaint upon the grounds that it did not state a cause of action, and that a cause of action upon a contract was improperly united with a cause of action upon an alleged tort. The demurrer was sustained, and within the time granted the plaintiff's cause of action for damages was upon his motion ordered stricken out and dismissed. The plaintiff, however, deeming it necessary that the court should reconsider its ruling upon the demurrer, a motion to that effect was granted upon the condition that the plaintiff file an amended complaint within a specified time. The plaintiff failed to comply with the condition, and a judgment of dismissal was accordingly entered against him.

[1] The plaintiff now insists that the order striking out and dismissing the cause of action for damages, made upon his motion and with his consent, was tantamount to an

amendment of his complaint, and that therefore the judgment of dismissal must be reversed if it can be said that his complaint as thus amended stated a cause of action. This contention, we think, is well taken. A cause of action for moneys had and received is pleaded in the usual and ordinary form, and apparently is perfectly stated. This being so, and the order striking out and dismissing the cause of action for damages having cured the defect of misjoinder which originally existed in the complaint, the lower court should have reconsidered its order sustaining the demurrer, and, if it had done so, doubtless would have overruled the demurrer, in so far as it applied to the first cause of action. A formal rewriting of the complaint was not necessary to its amendment in order to permit a reconsideration of the demurrer. In any event, treating the complaint as amended to meet the main objection of the demurrer, we find the situation to be that the court in effect sustained the demurrer to a cause of action of the complaint upon the ground of the insufficiency of the facts stated to constitute a cause of action which, upon its face, was not rightfully subject to demurrer upon that or any other ground. Consequently the judgment of dismissal cannot stand.

[2, 3] The motion of the defendant to set aside the default should not have been heard and determined in the absence of an affidavit of merits. The default of the defendant was tantamount to an admission of the material facts pleaded in the plaintiff's complaint (Rowe v. Table Mountain Water Co., 10 Cal. 441; Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176); and it is elementary that before a default, which the court had jurisdiction to enter, may be set aside, it must appear that the defendant has a meritorious defense to the action. Such a showing is ordinarily required to be made by affidavit of merits, and should have been so made in the present case. Perhaps if the court had entered the default before the expiration of the defendant's time to plead, no affidavit of merits would have been required, because the court would then have acted in excess of its jurisdiction; but that is not the case here. The record shows that the defendant procured an extension of time to plead only after the statutory time had fully elapsed; and it is well settled that an order granting an extension of time, made after the expiration of the statutory time, is void, and may be rightfully ignored. In re Clary, 112 Cal. 292, 44 Pac. 569. Consequently the order setting aside the defendant's default must be reversed; but we have no doubt that upon the going down of the remittitur the lower court may, in the exercise of its discretion and in furtherance of justice, permit the defendant upon a further hearing and consideration of the motion to set aside the default, to supplement the showing already made with an affidavit of merits.

For the reasons stated, the judgment and

the order setting aside the default are reversed, and the cause remanded for further proceedings.

27 Cal. App. 149

SPADONI v. GIACOMAZZI. (Civ. 1461.)
(District Court of Appeal, First District, California. April 1, 1915.)

1. WORK AND LABOR ⇨5—COMPENSATION—CONTRACTS.

Where one out of friendship, and without expectation of profit and without any agreement that he should be compensated, rendered services of a minor character on the ranch of another, he could not recover compensation without showing that during the performance of the work he made a contract, express or implied, for compensation.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 8-10; Dec. Dig. ⇨5.]

2. WORK AND LABOR ⇨4—COMPENSATION—CONTRACTS.

An implied promise to pay for services rendered and accepted may be rebutted by proof that the services were intended to be gratuitous or by circumstances from which the law raises the presumption that the services were not intended to be compensated, such as when rendered between members of the same household, or between those closely related by blood; and, to authorize compensation in such cases, the circumstances must warrant the inference that it was the expectation of both parties that compensation should be made.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 3-7; Dec. Dig. ⇨4.]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by B. Spadoni against E. G. Giacomazzi. From a judgment for defendant, plaintiff appeals. Reversed.

Daugherty & Lacey, of Salinas, for appellant. W. S. White, of Beaumont, for respondent.

PER CURIAM. This is an appeal by plaintiff from a judgment in favor of the defendant and from an order denying his motion for a new trial. In the month of September, 1909, the plaintiff was the owner of real and personal property in the county of Monterey; and while he was absent serving a term of imprisonment at San Quentin, the defendant, acting under a power of attorney, looked after and managed his property until his discharge in the month of March, 1912. Subsequently the defendant rendered to the plaintiff a statement of his receipts and disbursements as manager of said property, but plaintiff, being dissatisfied with such statement, commenced this action for an accounting. The defendant, in addition to his answer putting in issue all of the allegations of the complaint, filed a cross-complaint, in which he claimed \$750 for his services in looking after the plaintiff's property and family during the latter's enforced absence. Judgment went for defendant on his cross-complaint in the sum of \$687.81, a balance arrived at after crediting him with the aforesaid item of \$750.

[1, 2] As to this item we agree with the

plaintiff that the evidence does not sustain the finding by the trial court that the defendant is entitled to this sum for services. Defendant admits that there was no agreement that he should be compensated for his services; and he also admits, at least by implication, that when he undertook the work he did not intend to charge therefor. In this connection it is proper to say that if later he found the duties of the undertaking more onerous than he had expected, and therefore changed his mind and decided to charge for the same, it was his duty to have established a contract with the plaintiff, express or implied, to that effect. 15 Am. & Eng. Ency. of Law, 1079. This was not done. The defendant also not only admitted that he might have told the plaintiff's son that he was making no charge for the services in question, but also testified in effect that it had not occurred to him to do so until the plaintiff commenced this action. The defendant was engaged in the saloon business a short distance from the plaintiff's ranch, and was attending to the bar at night. The services rendered on the ranch were of a minor character; and it is quite plain, we think, from the record—the plaintiff being the defendant's father-in-law—that the motive which prompted the services was a desire to help the plaintiff's wife and son, a mere youth, in the management of the small stock farm, springing from friendship, and that there was not even a remote expectation of pecuniary profit.

"That a promise to pay for services rendered and accepted is implied, * * * is liable to be rebutted * * * by proof that the services were intended to be gratuitous, or even by particular circumstances, from which the law would raise the counter presumption that the services were not intended to be a charge against the party who was benefited thereby." * * * When the services are rendered between members of the same household or between those most closely related by blood, "we find other motives than a desire of gain, which may prompt the exchange of mutual benefits between them." * * * Our own decisions appear to support the doctrine that to authorize compensation in such cases the circumstances must be such as to warrant the inference that it was the expectation of both parties that compensation should be made, * * * that it is the expectations of the parties existing while the relation continued that is to control, and * * * no circumstance occurring afterwards can convert into an implied contract, that which was not so before." *Crane v. Derrick*, 157 Cal. 667, 671, 109 Pac. 31, 32.

"The presumption" that services are to be compensated "ceases to exist when it is shown that they were merely such offices as one friend would perform for another in time of sickness or distress." *Dallman v. Frank*, 1 Cal. App. 541, 82 Pac. 564.

Where there was no intent to claim compensation for services rendered, at the time they were rendered, no recovery can be had therefor. *Evans v. Henry*, 66 Ill. App. 144.

A party performing services for another without intending to charge therefor, and under such circumstances as to lead the latter to believe that no charge will be made, can-

not recover therefor. *Jones v. Clark*, 28 Iowa, 593.

"No one is bound to pay for volunteered services rendered under circumstances which do not fairly indicate an expectation of reward." *Covel v. Turner*, 74 Mich. 408, 41 N. W. 1091; *Strother v. Dewitt*, 98 Mo. App. 293, 71 S. W. 1129; *D. Sullivan & Co. v. Owens* (Tex. Civ. App.) 90 S. W. 690.

When the relation of the parties is such as to negative the idea that services were rendered in expectation of payment, compensation cannot be recovered. In *re Cooper*, 6 Misc. Rep. 501, 27 N. Y. Supp. 425.

As to the other items in the record, it might well be deemed that the defendant, having no brief in this court, is unable to answer the contentions of the plaintiff with reference to them. But be that as it may, the record is in such condition that we are unable to intelligently discuss those items; and since from what we have just said it appears that the judgment and order must be reversed, it will be unnecessary to do so.

Judgment and order reversed.

27 Cal. App. 156

SAN FRANCISCO COMMERCIAL AGENCY
v. McKEON et al. (Civ. 1469.)

(District Court of Appeal, First District, California. April 2, 1915.)

PLEADING — 205 — ACTION AGAINST GARNISHEE—COMPLAINT—GENERAL DEMURRER.

A complaint which alleges that on a designated day defendant became indebted to plaintiff in a specified sum by virtue of a writ of garnishment being served on defendant by a sheriff in an action in which plaintiff was plaintiff and a third person defendant, is good in the absence of a special demurrer, though the statute requires the sheriff, in executing the writ, not only to leave a copy of the writ with the garnishee, but also a notice that the debt owing by him to defendant is attached.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. — 491-493, 495, 496, 498-510; Dec. Dig. — 205.]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by the San Francisco Commercial Agency against Neal J. McKeon and another. From a judgment for plaintiff, defendants appeal. Affirmed.

H. M. Anthony and Herbert S. Goold, both of San Francisco, for appellants. Perry & Perry, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of plaintiff and against the defendants, brought to this court upon the judgment roll. The sole point presented for determination is as to whether or not the trial court, in overruling the defendants' general demurrer to the complaint, committed error.

The complaint alleges that:

"On the 14th day of February, 1913, defendants became indebted to the plaintiff in the sum of \$383.90 by virtue of a certain writ of garnishment being served upon said defendants

by the sheriff of the county of Alameda" in that certain action "in which the San Francisco Commercial Agency was the plaintiff, and one Margaret Hall the defendant."

The statute on the subject, it is true, in the case of a garnishment, requires that the sheriff, in executing the writ, shall not only leave a copy of the writ with the person owing the debt to the defendant, but also a notice that the debt owing by him to the defendant is attached in pursuance of such writ. But we think the complaint, in the absence of a special demurrer, states sufficient facts to constitute a cause of action; and it was so held in the recent case of *Midway Five Oil Co. v. Citizens' Nat. Bank of Los Angeles*, 143 Pac. 800.

Judgment affirmed.

27 Cal. App. 139

HABERLY v. HABERLY. (Civ. 1465.)

(District Court of Appeal, First District, California. March 31, 1915.)

1. ACTION — 15 — CAUSE OF ACTION — SAME PERSON PLAINTIFF AND DEFENDANT.

Though ordinarily courts will not entertain jurisdiction of an action where plaintiff and defendant are the same person, the court will take jurisdiction of an action on a claim against a decedent's estate, though the guardian of the insane claimant and the administrator of decedent are the same person, where the action is brought and defended in good faith.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 84; Dec. Dig. 384.]

2. APPEAL AND ERROR — 1040 — HARMLESS ERROR—RULINGS ON PLEADINGS.

Error in overruling a demurrer to a complaint demurrable because of uncertainty is harmless where defendant was not embarrassed thereby in his defense.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. 1040.]

3. CONTRACTS — 175 — INSTRUMENTS IN FOREIGN LANGUAGES — TRANSLATIONS — QUESTIONS FOR COURT.

The court, in interpreting an instrument in a foreign language, is not bound by the translation offered by a party, but may resort to the testimony and translations of other witnesses to determine the meaning and intent thereof.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 766, 978, 1010, 1067-1069, 1786, 1803, 1810; Dec. Dig. 175.]

4. INSURANCE — 775 — FRATERNAL INSURANCE—BY-LAWS—CONSTRUCTION.

Under a by-law of a fraternal society declaring that a married member must leave the money either to his wife or children, and that he need not make a will, because the money belongs to the wife, and, if there is no wife, to the children, and he cannot by will affect the persons to whom the money will be paid, but, if there are no children, and the member does not live with his wife, he can make a will, and that it is only when there are no children and the wife is dead that he can make a will, the money on the death of a member passes without regard to any will to his surviving wife, or, if no surviving wife, to his children.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1941; Dec. Dig. 775.]

5. PLEADING — 384 — ISSUES AND PROOF — ANSWER—SET-OFF AND COUNTERCLAIM.

Where, in an action by the guardian of an insane widow of a member of a fraternal society to recover money paid by the society to her son, whose administrator merely denied lack of information and belief that the money received by the son had not been paid to the widow, evidence that the son had paid or contributed money for the support of the widow was inadmissible; since the subject-matter of a counterclaim is not admissible unless affirmatively pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1296-1298; Dec. Dig. 384.]

6. EXECUTORS AND ADMINISTRATORS — 234 — CLAIMS—REJECTION—ACTS CONSTITUTING.

Under Code Civ. Proc. §§ 1496, 1498, providing that, where the executor or administrator or the judge neglects to indorse allowance or rejection of a claim for ten days after presentation, the neglect is equivalent to a rejection authorizing suit thereon by claimant, failure of an administrator to act on a claim for ten days after presentation is a rejection of the claim, and the claimant may sue thereon.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 832-836½, 842, 842½; Dec. Dig. 234.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Rose Haberly, by E. T. Morton, her guardian ad litem, against William T. Haberly, as administrator of George W. Haberly, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

J. E. White, of San Francisco, for appellant. Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

PER CURIAM. The plaintiff in this action recovered a judgment against the defendant, as the administrator of the estate of George W. Haberly, deceased, in the sum of \$800, with interest thereon from the 29th day of March, 1901. George W. Haberly died in the city and county of San Francisco on the 5th day of December, 1910. Thereafter, on March 11, 1911, his brother, William T. Haberly, was appointed administrator of his estate with the will annexed. Prior thereto, to wit, on the 24th day of January, 1911, William T. Haberly had been appointed as the guardian of the person and estate of his mother, Rose Haberly, an insane person. On August 31, 1911, William T. Haberly, as guardian of Rose Haberly, presented to the judge of the superior court in which the estate of George W. Haberly, deceased, was pending for probate, a claim in the sum sued for, which claim was rejected by the judge. On November 29, 1911, William T. Haberly, as guardian of Rose Haberly, instituted an action on the rejected claim in the estate which he represented as administrator. Demurrers to the complaint and an amended complaint in the action were sustained, and subsequently one E. T. Morton was appointed guardian ad litem of Rose Haberly, who,

for a cause of action in a second amended complaint alleged practically all of the matters and things set forth in the complaint originally filed by William T. Haberly.

At the outset it is insisted that the trial court should not have entertained jurisdiction of the action in the face of the objection that the papers, pleadings, and proof showed that the appointment of the guardian ad litem was suggested by the defendant, William T. Haberly. Because of this fact it is contended that the motion for judgment of dismissal made by the counsel who defended the action, and was the attorney for the residuary legatee under the will of the deceased, should have been granted, because, as was claimed, the action was one, in effect, wherein the same person was appearing as both plaintiff and defendant.

[1] It is the rule ordinarily, and for reasons that are obvious, that courts will not entertain jurisdiction of an action where the plaintiff and defendant are, in fact, one and the same person; but the rule has no application to the facts of the present case. The claim of the plaintiff against the estate of George W. Haberly, deceased, having been rejected by the court in which the estate was pending, relegated her to an action upon the claim; and she could not be deprived of that remedy merely because the guardian of her person and estate happened to be at the same time the administrator of the estate of the deceased. The suggestion that a guardian ad litem be appointed for the purpose of bringing suit was apparently made in good faith, and it does not appear here that the action was instituted for the purpose of procuring a collusive judgment. That the action was defended in good faith is evidenced by the vigorous defense interposed by the counsel, who, nominally representing William T. Haberly, in fact appeared in and defended the action as the attorney for the residuary legatee under the will of the deceased, who was the one person most interested in the defense of the action.

[2] Conceding for the sake of argument that the plaintiff's complaint was demurrable upon the ground of uncertainty in certain particulars, nevertheless the error, if any, in the order overruling the demurrer does not appear to have placed the defendant at a disadvantage, and therefore, after judgment rendered upon the facts, must be held to have been harmless. *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. 424; *Widemann v. Digges*, 21 Cal. App. 342, 131 Pac. 882.

The pleaded and proven facts of the case upon which the claim of the plaintiff was founded are substantially these: The Eintracht Bund, a fraternal society of which Frederick Haberly, deceased, the husband of the plaintiff, was a member, had, after the plaintiff had been declared incompetent, and during the period of her incompetency, paid the sum of \$800 to George W. Haberly, a son, for and on account of the insurance

which became due and payable upon the death of Frederick Haberly. Frederick Haberly left a last will and testament, in which he specifically bequeathed the sum due upon his death for life insurance from the Eintracht Bund to his son, George W. Haberly, who was also nominated and subsequently appointed as the administrator of the father's estate. The trial court, in accord with the allegations of the plaintiff's complaint, found that:

"In his lifetime * * * Frederick Haberly was a member of the Eintracht Bund, a benevolent society of San Francisco, * * * and upon the death of said Frederick Haberly, by reason of his membership in said society, the sum of \$800 became due and payable to his widow, * * * Rose Haberly; that on the 29th day of March, 1901, George W. Haberly, a son of * * * Rose Haberly, received said sum of \$800 from the Eintracht Bund * * * for and on behalf of his mother, * * * who was then, ever since has been, and now is incarcerated in the state hospital for the insane at Stockton."

[3, 4] The principal point made in support of the appeal relates to the insufficiency of the evidence to support the foregoing findings, and deals largely, if not entirely, with the construction which should be placed upon the by-laws of the Eintracht Bund which designated the persons who might become the beneficiaries of its insurance. It is conceded that the by-law in question was a controlling constituent of the contract for insurance entered into between the Eintracht Bund and Frederick Haberly, and that the will of the latter was of no avail if it named as a beneficiary of the insurance a person not entitled thereto under the by-law. The by-law in question was printed and promulgated in the German language; and, although offered and received in evidence upon the trial, the trial court had, as we have, only liberal translations of the same. The translation of Mr. Frederick Huber, a member of the Eintracht Bund, and who participated in the preparation of its by-laws, was that:

"A married member must leave the money either to his wife or children, and it is not necessary for him to make a will, because the money belongs to the widow, and, if there is no such widow, the children. He can make a will if he wants to, but he cannot thereby affect the persons to whom the money will be paid upon his death. If there is no such children, and the member not living with his wife, then he can make a will. It is only when there is no children and the wife is dead [that] he can make a will."

Henry Gumbell, the treasurer of the Eintracht Bund, testified as a witness for the plaintiff for the purpose of translating the by-law in question; and in that behalf was questioned and made answers as follows:

"Q. Would you kindly read those provisions to which I have referred? A. (reading). The insurance of a married member goes to his wife—The Court: Q. A married member must insure to his wife? A. Yes; or to his children if he don't have no wife. Q. Continue reading that paragraph. A. If he has no wife, he makes it to the children; the children is next."

Upon behalf of the defendant a translation, which was accepted by counsel for the plaintiff, was offered and received in evidence reading as follows:

"A married member must leave the insurance either to his wife or his children; and it is not necessary for him to make a will, as the money will be paid to the widow, or, if none outlive him, to the children."

Standing solely upon the last-quoted translation, counsel for the defendant insists that the by-law in question must be construed to mean that, while a married member of the Eintracht Bund need not make a will disposing of his insurance money, yet, if he does make a will, he is privileged to leave the insurance money to either his wife or his children, as he prefers. The correctness of this translation cannot be conceded. True, this construction finds support in the first clause of the defendant's translation, which reads that, "A married member must leave the insurance to either his wife or his children;" but this clause alone falls far short of controlling the intent and purpose of the by-law; and the concluding clause of the by-law as translated by the defendant, which provides that "it is not necessary for him (the member) to make a will, as the money will be paid to the widow, or, if none outlive him, to the children," fortifies the construction contended for by the plaintiff. The trial court was not limited in its interpretation of the by-law in question to the translation thereof offered by the defendant, but it had the right to resort, as it evidently did, to the testimony and translations of the witnesses Gumbel and Huber for the purpose of determining the meaning and intent of the by-law; and, when the translation of the defendant in its entirety is considered and construed in conjunction with the testimony and translations of the witnesses for the plaintiff, we have no doubt but that the evidence adduced upon the whole case warrants and sustains the interpretation, evidently adopted by the trial court, that under the by-laws of the Eintracht Bund the insurance money of a deceased member, without regard to the will of the deceased, will go to and must be paid to the widow of the deceased member, or, if there be no widow, then to his children.

[5] There was no error in the ruling of the trial court sustaining the objection to a question propounded to a witness for the defendant as follows:

"Do you know of your own knowledge whether George W. Haberly ever paid your mother, Rose Haberly, any money or contributed any funds toward her support?"

The answer of the defendant did not purport to plead a set-off against the claim of the plaintiff, but merely denied upon lack of information and belief that the money alleged to have been received by George W. Haberly had not been paid to the plaintiff. Undoubtedly the defendant was entitled un-

der a general denial to show payment, if he could, in whole or in part of the money in suit; but that was not the purpose of the question objected to. Plainly the purpose of the question was to elicit evidence the only tendency of which would be to show that he had paid or contributed money towards the support of his mother, which fact, if established, would not be evidence of payment in the strict sense of the term, but rather would be evidence only of the existence of a counterclaim; and it is a well-settled rule of law in this state that the subject-matter of a counterclaim is not admissible in evidence unless it be affirmatively pleaded. *Bernard v. Mulloy*, 1 Cal. 368; *Hicks v. Green*, 9 Cal. 74; *Quinn v. Smith*, 49 Cal. 163; *Matter of Coutts*, 100 Cal. 400, 34 Pac. 865.

[6] There is no merit in the contention that the action could not be maintained until the claim upon which it was founded was formally rejected by the administrator. The claim was duly presented to the administrator, who failed to act thereon within the prescribed statutory time; and subsequently it was presented to and rejected by the judge presiding over the court in which the estate was pending probate. The rejection of a claim against an estate by either the executor or administrator or a judge of the superior court entitled the claimant to bring suit thereon; and the neglect of the administrator in the present case to act upon the claim within ten days after it had been presented to him was the equivalent of a rejection. *Code Civ. Proc.* §§ 1496, 1498.

This, we think, disposes of all of the points made in support of the appeal which are worthy of serious consideration.

The judgment appealed from is affirmed.

27 Cal. App. 157

SUYDAM v. LOS ANGELES RY. CO.

(Civ. 1497.)

(District Court of Appeal, Second District, California. April 5, 1915.)

1. CARRIERS — 2 — STATUTES — CHARGES — IMPLIED REPEAL.

St. 1877-78, p. 18, § 1, declares that no street railroad in any city or town with more than 100,000 inhabitants shall be allowed to charge more than five cents fare for each passenger for a trip of any distance, and that a violation shall expose the owner to a forfeiture of \$250 in favor of the person so unlawfully charged. *Civ. Code*, § 501, adopted in 1872, was in 1903 (*St. 1903*, p. 172), re-enacted so as to provide that the rates of fare should not exceed ten cents for one fare for any distance under three miles, but that in municipalities of the first class they should not exceed five cents. *Held* that, while implied repeals are not favored, yet section 501, as re-enacted, is apparently a revision of the earlier statute, which was repealed by implication, and so act of 1878 is not applicable to the city of Los Angeles, though it had over a population of 100,000.

[Ed. Note.—For other cases, see *Carriers*, *Cent. Dig.* §§ 4, 5; *Dec. Dig.* ¶ 2.]

2. STATUTES $\S$ 169—REVIVAL OF ACT REPEALED—CARRIERS.

Public Utilities Act (St. Ex. Sess. 1911, p. 62) $\S$ 82, which follows Const. art. 12, $\S$ 23, declares that the act shall not affect the powers of control over a public utility vested in a city or incorporated town which a majority of the qualified electors shall vote to continue unimpaired. St. 1911, p. 2051, confers upon the city of Los Angeles the power to regulate street car rates. The Public Utilities Act generally regulated street car rates. *Held*, in the absence of action by the city, the general statute applied governing the rates, and an earlier statute which had been repealed was not revived.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. $\S\S$ 246, 247, 250; Dec. Dig. $\S$ 169.]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Harry L. Suydam against the Los Angeles Railway Company, a corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

M. O. Graves, of Los Angeles, and Cole & Brown, of Nelson, Neb., for appellant. O'Melveny, Stevens & Millikin and Gibson, Dunn & Crutcher, all of Los Angeles, for respondent.

CONREY, P. J. In this action the plaintiff seeks to recover certain penalties to which he claims to have become entitled under the provisions of "an act to limit and fix the rates of fares on street railroads in cities of more than 100,000 inhabitants," approved January 1, 1878 (Stats. 1877-78, p. 18). Judgment was entered in favor of the defendant after an order sustaining its demurrer to the complaint. From this judgment the plaintiff appeals.

[1] Section 1 of the act of 1878 reads as follows:

"No street railroad in any city or town of this state, with more than 100,000 inhabitants, shall be allowed to charge or collect a higher rate of fare than five cents for each passenger per trip of any distance in one direction, either going or coming, along any part of the whole length of the road or its connections."

The next section provides:

"Every violation of the provisions of section 1 of this act shall subject the owner or owners of the street railroad violating the same to a forfeiture to the person so unlawfully charged, or paying more than is therein allowed to be charged, the sum of two hundred and fifty dollars for each and every instance when such unlawful charge is made or collected, to be recovered by suit in any court of competent jurisdiction; such causes of action shall be assignable, and the action may be maintained by the assignee in his own name, and several causes of action arising out of unlawful charges or collections from different persons may be vested in the assignee and united in the same action."

If this act was in force in May, 1912, when the alleged charges of ten cents per trip were made, the plaintiff's complaint stated a cause of action, and the demurrer was improperly sustained.

Section 501 of the Civil Code, as adopted in 1872, provided as to street railroad corporations that:

"The rates of fare on the cars must not exceed ten cents for one fare for any distance un-

der three miles. * * * A violation of the provisions of this section subjects the corporation to a fine of one hundred dollars for each offense."

Section 504, Civil Code, also enacted in 1872, says:

"Any corporation, or agent or employé thereof, demanding or charging a greater sum of money for fare on the cars of such street railroad than that fixed, as provided in this title, forfeits to the person from whom such sum is received, or who is thus overcharged, the sum of two hundred dollars, to be recovered in a civil action, in any justice's court having jurisdiction thereof, against the corporation."

In the year 1903 (St. 1903, p. 172) section 501 of the Civil Code was re-enacted in amended form, and the amendment, so far as applicable here, consisted in adding certain words to the first sentence of the section so that the same reads as follows:

"The rates of fare on the cars must not exceed ten cents for one fare for any distance under three miles, and in municipal corporations of the first class must not exceed five cents for each passenger per trip of any distance in one direction either going or coming, along any part of the whole length of the road or its connections."

The alleged excessive charges to plaintiff were made in the city of Los Angeles. According to the census of the year 1900, the city of Los Angeles had a population of 102,479; and according to the census of 1910 it had a population of 319,189. In 1901 (Stats. 1901, p. 94) an act was adopted for the classification of cities in California whereby those cities having a population of more than 200,000 constituted the first class, and those having a population of more than 100,000 and not exceeding 200,000 constituted the first and one-half class. By a similar act of 1911 (Stats. 1911, p. 476) all cities having a population of more than 400,000 constitute the first class, and those having a population of more than 250,000 and not exceeding 400,000 are in the first and one-half class. It thus appears that at the time of adoption of the 1903 amendment to section 501 of the Civil Code the city of Los Angeles was, and in May, 1912, it was, and ever since has been, a city of the first and one-half class; and not until the census of 1900 was it established as a city of more than 100,000 inhabitants.

From the foregoing facts it further appears that the above-quoted act of 1878 did not apply to the city of Los Angeles until the year 1900. From that time until the present (except for a few months between the time of taking the 1910 federal census and the time when the reclassification act of 1911 became effective) it has been applicable to that city, if the act itself is still in force.

It should be noted that the words describing the five-cent-fare limit as added to section 501 by the act of 1903 are identical with the corresponding part of section 1 of the act of 1878; that is to say, "five cents for each passenger per trip of any distance in one direction, either going or coming, along any

part of the whole length of the road or its connections." But, whereas the five-cent limit described in the act of 1878 is made applicable to cities "with more than one hundred thousand inhabitants," the words used in the amendment to section 501 are "in municipal corporations of the first class." It is reasonable to assume that the Legislature, in enacting this kind of an amendment to the statutory law, has in view the conditions existing as to population and classification in the several cities of the state. If it had been intended merely to codify the act of 1878 by transferring section 1 thereof into section 501 of the Civil Code, the words, "with more than one hundred thousand inhabitants" would have been transferred, instead of substituting the words "in municipal corporations of the first class." That this amendment was made for the purpose of codifying and at the same time amending the earlier statute is sufficiently clear from the identity of the subject-matter and from the duplication of language as to the rate of fare prescribed and the change in phraseology as to description of the kind of corporation in which the rule prescribed is made applicable. This reasonable view of the matter is further confirmed by the history of the legislation and the fact that section 501, as amended in 1903, is in the same language as the amendment proposed by the Code commissioners, which the Legislature attempted to adopt by an act passed in 1901, which act, however, on account of the insufficiency of its title, was declared to be void. The report of the Code commissioners, whose recommendations were followed by said act of 1901, plainly shows that the purpose of the proposed amendment was to transfer into the Civil Code, with some amendment, the legislation contained in the act of 1878. While this historical matter is not at all conclusive, yet it is somewhat persuasive when it coincides, as it does, with the natural reason of the matter.

Having thus considered the foregoing several steps in legislation, together with the conditions to which they were intended to apply, we are led to the conclusion that section 501 of the Civil Code, as amended in 1903, together with the already existing section 504, Civil Code, was intended as a substitute for the act of 1878, as well as for the original section 501.

"While it is true that repeals by implication are not favored, whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is designed as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or repugnancies between the two." *Mack v. Jastro*, 126 Cal. 130, 132, 58 Pac. 372, 373.

[2] It is further contended by respondent that whatever provisions of law existed by virtue of any of the foregoing statutes were superseded by the public utilities act, which became effective on the 23d day of March,

1912 (Stats. 1911, Ex. Sess. p. 18). Section 27 of that act states a general rule concerning street car fares within the corporate limits of cities. Section 73a provides a rule of damages to be recovered in civil actions on account of violations by any public utility of the provisions of the Constitution or any law of this state or any order or decision of the Railroad Commission. Section 76a provides for penalties to be recovered on account of violations of the provisions of the Constitution of this state or of said public utilities act. Section 87 declares that "all acts or parts of acts inconsistent with the provisions of this act are hereby repealed." Respondent's position as to the result of the public utilities act as affecting earlier statutes is not seriously disputed as to its general effect. But it is claimed by appellant that the provisions of said act are not applicable to the city of Los Angeles, and that therefore the act of 1878 (assuming it to have survived the 1903 amendment of section 501, Civil Code) remains in force within that city.

Section 82 of the public utilities act (closely following section 23 of article 12 of the Constitution as amended October 10, 1911) in part reads as follows:

"This act shall not affect such powers of control over any public utility vested in any city and county or incorporated city or town as, at an election to be held pursuant to laws to be hereafter passed by the Legislature, a majority of the qualified electors voting thereon of such city and county, or incorporated city or town, shall vote to retain, and until such election such powers shall continue unimpaired in such city and county or incorporated city or town."

In March, 1911, the city of Los Angeles, by virtue of charter amendments, became vested with power to regulate street railway fares. Stats. 1911, pt. 2, p. 2051 et seq. If, in the exercise of this power, the city of Los Angeles has enacted its own local regulations, those regulations have superseded the general laws, and any statute in force which otherwise would govern as to the public utility in question is superseded in its operation and effect so long as the city chooses to continue in the exercise of its paramount right of control. The complaint in the case at bar is silent upon the subject of action or nonaction by the city of Los Angeles in the exercise of the power so reserved; and perhaps we would be justified in assuming, against the plaintiff, that the supposed regulations have been made. But, even if the city has remained inactive as to this matter, that does not aid the plaintiff's case. For in this event the public utilities act, rather than the preceding statutes, would apply, and a statutory penalty claimed under the act of 1878 could not be recovered. The public utilities act is a general law, effective throughout the state, except only that its operation within a city having a charter like that of the city of Los Angeles is superseded whenever and so long as such city continues in the exercise of its powers of regulation of the public utility in question. But the provisions of section 82 above quoted

and the provisions of the Constitution (article 12, § 23) go only to the extent of preventing any interference with the municipal right of control where such control exists and is exercised. Such legislation as that of the public utilities act, when enacted, is complete as a law of the state; but it is provided that such law shall not have any such effect as will interfere with a city in the exercise of certain municipal powers which, under the Constitution, are made superior to the general law. The provisions of the Constitution intended to preserve the self-governing powers of certain cities with respect to these matters were not intended to place any limitation upon the power of the state to substitute one general law for another.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

170 Cal. 221

FRANSCIONI v. SOLEDAD LAND & WATER CO. (S. F. 6538.)

(Supreme Court of California. May 20, 1915.
Rehearing Denied June 17, 1915.)

1. WATERS AND WATER COURSES ⇨154 — WATER RIGHT—IRRIGATION—EASEMENT.

The predecessor of a corporation owning a water plant owned land purchased under an agreement binding him as part of the consideration to develop the water, erect a pumping plant, and subdivide the land into suitable farm lots ditched for irrigation. He complied with this agreement, and thereafter agreed to sell two lots with appurtenances to plaintiff's grantor, and a deed reserving the right to maintain ditches was executed to such grantor by the corporation, which in the meantime had been formed and had taken over the water plant. Prior thereto and for several years thereafter water was regularly delivered to such lots and used thereon for irrigation. *Held*, that the irrigation of the lots by the corporation's predecessor and their subsequent sale with the irrigation system in operation created an easement appurtenant to the lots and a corresponding servitude on the water system, whereby plaintiff became entitled to demand from the water system a supply of water for irrigation of the lots purchased, and the corporation became bound to continue the supply as long as the source held out.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 167-173; Dec. Dig. ⇨154.]

2. WATERS AND WATER COURSES ⇨253 — WATER COMPANIES — IRRIGATION — EASEMENT.

Plaintiff, in such case, also became entitled to receive the water from the corporation under Civ. Code, § 552, providing that, when a domestic corporation furnishes water to irrigate lands which it has sold, the right to use the water shall remain a perpetual easement to such land, and that, when any person who is cultivating land on the line and within the flow of any ditch owned by such corporation has been furnished water by it, such person shall be entitled to the continued use of the water.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇨253.]

3. WATERS AND WATER COURSES ⇨247 — WATER COMPANIES — PRIVATE RIGHT — ENFORCEMENT.

The owner of a private right to be supplied with water for irrigation by a water company may sue to enforce such right, regardless of whether the water has been dedicated to a public use by the company.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 314; Dec. Dig. ⇨247.]

4. CONSTITUTIONAL LAW ⇨208 — WATERS AND WATER COURSES ⇨216 — WATER COMPANIES—CLASS LEGISLATION.

In view of Const. art. 12, § 15, requiring foreign corporations doing business in the state to comply with its laws, Civ. Code, § 552, obligating water companies to continue furnishing water for irrigation, is not unconstitutional as class legislation, though it applies only to corporations organized under the laws of California.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. ⇨208; Waters and Water Courses, Cent. Dig. § 305; Dec. Dig. ⇨216.]

5. WATERS AND WATER COURSES ⇨247—IRRIGATION—WATER RIGHT—PUBLIC USE—PETITION.

That a count of a petition apparently based on the theory that plaintiff was a beneficiary of a public use in water in control of defendant did not expressly state that the water was devoted to a public use, or that defendant was in charge of such public use, did not render it insufficient, where the facts alleged showed with sufficient certainty that the water was so dedicated and used.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 314; Dec. Dig. ⇨247.]

6. DEDICATION ⇨16 — WATER COMPANIES — IRRIGATION.

Where a corporation takes over a water plant owned by an individual obligated to furnish water to irrigate lots sold by him, no dedication of water to public use arises from this fact alone.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 15-49; Dec. Dig. ⇨16.]

7. DEDICATION ⇨13 — WATER COMPANIES — IRRIGATION — PRIVATE USE — CONVERSION INTO PUBLIC USE.

A corporation owning a water supply and engaged in distributing it to land for irrigation, pursuant to agreement, on a mere private use, may, with consent of the owners of the right to receive such water, change the use to a public one subject to regulation by public authority.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 5; Dec. Dig. ⇨13.]

8. DEDICATION ⇨16 — WATERS—IRRIGATION—PRIVATE USE — CONVERSION INTO PUBLIC USE.

Where a corporation engaged in furnishing water for irrigation in fulfillment of contracts giving a private use and 25 inhabitants and taxpayers of the county petitioned the board of supervisors, pursuant to Act March 12, 1885 (St. 1885, p. 95) § 3, to regulate the corporation's rates, and where, pursuant to such petition, an ordinance was duly passed fixing the rates, which ordinance remained in force for several years, and was complied with, the prior private use of the water was converted into a public use, entitling landowners to use water on payment of the rates so established.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 15-49; Dec. Dig. ⇨16.]

9. DEDICATION ⇨38 — WATERS—RECONVERSION INTO PRIVATE USE.

Where a private use in water for irrigation was converted into a public use by act of the corporation amounting to a dedication thereof to public use, the corporation could not thereafter revoke the dedication and convert it back into a private use.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 77, 78; Dec. Dig. ⇨38.]

10. DEDICATION ⇨16 — WATERS — PRIVATE USE—CONVERSION INTO PUBLIC USE.

That no resolution of the board of directors authorizing a petition by a water corporation to the county board of supervisors requesting them to regulate water rates appeared on the minute book of the corporation did not prevent the act of the corporation from constituting a converting of a private use into a public use, where the petition was signed by the secretary of the corporation, and its organizer and manager testified that steps were taken by it to have the rates established, and that it conformed to the rates thus established.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 15-49; Dec. Dig. ⇨16.]

11. APPEAL AND ERROR 1170—HARMLESS ERROR—CHANGE OF FORM OF PROCEEDING—AMENDMENT TO COMPLAINT.

While it was irregular to change a proceeding in mandamus under Code Civ. Proc. §§ 1084, 1097, to compel defendant to deliver water to plaintiff's land on payment of the established rates to an action for equitable relief or for damages, by an amendment to the complaint, the allowance of such amendment was not ground for reversal, in view of Code Civ. Proc. § 475, and Const. art. 6, § 4½, requiring that nonprejudicial errors be disregarded, where the facts necessary to support the amendment were alleged in the original complaint, and the case was tried on the theory presented by the amendment, and it did not appear that defendant was prejudiced thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig.  1170.]

In Bank. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by J. A. Andrew Franscioni against the Soledad Land & Water Company. From judgment for plaintiff, defendant appeals. Affirmed.

Wallace M. Pence, of San Miguel, and F. P. Feliz, of Salinas, for appellant. Zabala & Bardin, of Salinas, for respondent.

SHAW, J. This appeal is from the judgment. It was taken within 60 days after entry thereof.

The complaint is in two counts. The first count, in brief, alleges that the plaintiff is the owner of 40 acres of land, being lots 5 and 6 of block 3 of a subdivision of lot 3 of the Rancho Ex-Mission Soledad, made by one McCray in 1895; that the defendant owns and operates a pumping plant established to obtain water to irrigate said subdivision, including the land of plaintiff; that the right to have water from said pumping plant of defendant delivered by the defendant to said lots, on his demand, for the irrigation thereof, upon payment by him of the established rates thereof, is an appurtenance to plaintiff's lots; that he has demanded the delivery of such water by the defendant, and offered payment of the rates; that the defendant refuses to deliver the water, except at higher rates and upon unwarranted conditions, and denies the plaintiff's right thereto, whereby the plaintiff has been damaged by the loss of crops from want of irrigation of the lots in a sum stated, for which he asks judgment. He also asks judgment that he be declared entitled to receive water from said plant on demand and payment of the established rates. The right of the plaintiff, as alleged in this count, is a private right granted to his predecessor in interest under certain agreements and deeds set forth in the complaint. It does not go upon the theory that the water of the defendant is devoted to public use, or that the plaintiff is a beneficiary of such use and as such entitled to the water. The second count, as we understand it, although it is not clear, is based upon the theory that the plaintiff, by

reason of his ownership of said lots, is a beneficiary of a public use in the water in control of the defendant; that the defendant is in charge of such public use, and is bound to deliver water to the defendant for the irrigation of said lots, on his demand and payment of the established rates; and that the defendant refuses to do so, and denies that the plaintiff is a beneficiary of such public use, or that such public use exists, and denies that it is administering a public use, and asserts that it is conducting a private water system and serving private rights only.

[1] It is argued that the first count does not show that the right to receive the water claimed by the plaintiff from the defendant is a right appurtenant to said lots. We think it is sufficient in this respect. The defendant's predecessor in the ownership of the water plant, one Gould, was the owner of 1,675 acres of land, being the said lot 3 of Rancho Ex-Mission Soledad. He had purchased it under an agreement by which he was to develop the water, erect the pumping plant, subdivide the land into suitable farm lots, build ditches from the plant to the several lots for the purpose of carrying the water to each lot for its irrigation, and thereupon sell the lots to purchasers. The development of the water supply and the erection of the plant appears to have been an element of the consideration upon which he bought the land, and the supplying of the water to the lots for irrigation by him was evidently a part of the plan devised to enable him to make sales. In pursuance of this agreement he caused the land to be subdivided into lots, erected the pumping plant, made ditches therefrom leading to the several lots, and began the irrigation of the lots therefrom, including the lots of plaintiff. Thereafter, in 1898, he agreed to sell these two lots, with the appurtenances, to Kelly, plaintiff's immediate grantor, and in 1899, in compliance with the agreement, the same were conveyed to Kelly, with the appurtenances, the deed reserving to the grantor the right to maintain the ditches then in use to carry water to said lots and other lots in the subdivision and all rights of way thereon. In 1905 Kelly conveyed the lots, with the appurtenances, to the plaintiff. From the time of the sale to Kelly, in 1898, until the refusal of the defendant to deliver water, in December, 1910, water from said plant was regularly delivered to said lots on demand of the owner and used thereon for irrigation. It was delivered by Gould until June, 1899. The defendant corporation was formed at that time, and Gould conveyed to it all his property and rights in the water system, upon its agreement to carry out his obligations to the several purchasers of lots regarding the water due them. Thereafter the delivery was made by the defendant. When Gould began irrigating these lots from his water plant through the ditches built by him, and thereafter sold the lots with this ir-

rigation system in operation, an easement appurtenant to the lots and a corresponding servitude upon the water system was created, whereby the purchaser and his successors in ownership became entitled to demand and receive from the water system a supply of water for the irrigation of the lot purchased, and the owner of the plant became bound to continue the supply so long as the source held out. It was an easement annexed to the land by use prior to and at the time of the sale thereof, and it passed with the conveyance of the land, first to Kelly, and then to the plaintiff. *Farmer v. Ukiah Water Co.*, 56 Cal. 11; *Smith v. Corbit*, 116 Cal. 591, 48 Pac. 725.

[2] The plaintiff also became entitled to receive the water from the defendant by virtue of the provisions of section 552 of the Civil Code. That section is as follows:

"Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it, with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation."

Gould conveyed to the defendant the legal title to the plaintiff's lots before he executed his deed therefor to Kelly, and the defendant perfected Kelly's title shortly afterward by a conveyance thereof to him. Under either of the alternatives provided for by the aforesaid section, therefore, the plaintiff is entitled to the water from the defendant, upon payment of the agreed rates, or a reasonable rate, if none was agreed on. The several water rights thus vested in the respective lot owners within the irrigated tract would be separate and private rights pertaining to each lot respectively.

[3] The first count contains no allegation that the defendant or Gould had dedicated the water supply to public use, and it does not state facts from which such public use is necessarily implied. It is therefore to be construed as a cause of action to enforce a private right. Such methods for the private sale and distribution of water have often been recognized as valid by our decisions. *Hildreth v. Montecito, etc., Co.*, 139 Cal. 29, 72 Pac. 395; *Arroyo Ditch, etc., Co. v. Bequette*, 149 Cal. 546, 87 Pac. 10, 9 Ann. Cas. 1141; *Walnut Irr. Dist. v. Burke*, 158 Cal. 170, 110 Pac. 518; *Garrison v. North Pasadena, etc., Co.*, 163 Cal. 239, 124 Pac. 1009; *Thayer v. California Dev. Co.*, 164 Cal. 129, 128 Pac. 21.

[4] We are satisfied that section 552 is constitutional. There is nothing in the claim that it is class legislation, because it applies only to domestic corporations. That difference alone might even justify the classifica-

tion, but we need not so decide, for the Constitution itself requires foreign corporations doing business here to comply with our laws. Const. art. 12, § 15.

[5] The appellant contends that the second count does not show that the water is devoted to public use, or that the defendant is in charge of such public use. These propositions are not explicitly stated therein, but the facts alleged, if true, show with sufficient certainty that the water is so dedicated and used. The findings declare that all the allegations of this count are true so far as they relate to this subject. We need not set out the facts at length.

The court, in the judgment, declared that the defendant was a public service water company in charge of the administration of a public use of water of which plaintiff is a beneficiary, and that the plaintiff is entitled to water therefrom for the irrigation of his lots, upon payment of the rates established by law. The defendant claims that neither the findings nor the evidence support the proposition that the water is devoted to public use, or the proposition that the plaintiff is distributing such water in the character of a purveyor of a public use.

[6] If the system as first established by Gould had continued unchanged, there would have been no public use and the defendant, in selling and distributing the water, would not be a public service corporation, but would be merely engaged in selling water in fulfillment of private contracts with particular persons for the supply of water to specific parcels of land. There would be no general use, no dedication to public use, and no right to the use in any person except the persons owning the lots to which the right to the water had been annexed by the respective agreements. *Thayer v. California Dev. Co.*, supra.

[7] But we perceive no substantial reason why a corporation owning a water supply and engaged in distributing it to persons to whose land it has agreed to deliver it for irrigation, upon a use which is private, and not public or general, may not, with the consent of the owners of the rights to receive such water, change the use from a private and particular use to a public use, so as to make the service and terms of delivery subject to regulation and control by public authority. We think this may lawfully be done, and that, when it is done, all the parties concerned and consenting thereto, including the corporation engaged in the distribution, will thereafter be bound to conform to such rates, rules, and regulations for the service as may be established by the public body thereunto duly authorized.

[8] The evidence shows that this change was made. In June, 1899, Gould and others formed the defendant corporation, and Gould at once transferred to it all his remaining interest in said 1,675-acre tract for the ir-

gation of which the pumping plant was erected, and also all his interest in said irrigation system and works and in the contracts made by Gould with purchasers of lots, in consideration whereof the company undertook to carry on the pumping plant and irrigation system and perform the existing obligations of Gould relating to the land and water rights thereto belonging. This the company thereupon and thereafter proceeded to do. Gould was its manager. At the time of the transfer to the company the water rate fixed by the agreements was, so far as shown, \$1.50 an acre for each irrigation. In August, 1899, at the instance of the defendant, steps were taken to have the company's water rates established by the board of supervisors of the county, as provided in the act of March 12, 1885 (Stats. 1885, p. 95). In pursuance of section 3 of that act, the defendant and 25 persons who were inhabitants and taxpayers of the county signed and filed with the board of supervisors a petition to have the board, to quote the language of the petition, "regulate and control the rates and compensation to be collected by the Soledad Land & Water Company, a corporation, whose works are located about two miles west of the town of Soledad, in said Monterey county, at which place said company has appropriated water for irrigation for sale, rental, and distribution of said water by said corporation." In pursuance of this petition, after due notice, an ordinance was duly passed by the board fixing the rates to be charged and rules of service to be observed by the defendant in the operation of its irrigation system. This ordinance has ever since remained in force. This statute applies only to persons and corporations engaged in the sale, rental, or distribution of water for public use. By applying for this regulation the defendant, in effect, admitted that it was a public service corporation, administering a public use, and that the water it pumped and distributed was dedicated to public use. It immediately conformed to the rates and rules so established, and continued to do so until December, 1905, a period of six years. It appears that the water plant and system was constructed and operated to obtain water for the irrigation of the 47 lots into which said tract of 1,675 acres was subdivided. The plaintiff and Kelly, his grantor, have acquiesced in this change in the character of the use and in the rates and rules established by the board. There is evidence tending to show that all the other owners of lots in said tract likewise acquiesced therein. The judgment herein is, of course, without force as to other lot owners, but the evidence of acquiescence supports the finding that defendant is supplying a public use, instead of the original private rights. There is also evidence that the defendant made sales of water occasionally, when it could be spared, for lands outside of the 1,675-acre tract. This evidence also aids the conclusion that the prior use, whatever its character, has been converted into a public use for the benefit of

all the lands within said tract that are suitable for irrigation and under the flow of the ditches and in convenient distance therefrom, and that plaintiff is entitled to the use of the water on payment of the rates so established.

[9] There is evidence that in December, 1905, the defendant made and entered on its minutes a resolution purporting to fix rates and rules for the sale and delivery of its water different from those fixed by the board of supervisors; that thereafter it did not conform to the rates and rules of the board, and that in 1909 it again attempted to declare its own rates; also that in 1910 it changed its articles of incorporation so as to make them declare that it was organized for the purpose of supplying water "as a private corporation, and not as a public water company, for private use, and not for public use," and that its stockholders should have a preferred right to the water. The original articles declared that the company was formed to supply water and sell the same for irrigation. This would empower it to do this business for either a private use or a public use, at its option. It is claimed that by reason of its conduct it has changed its character, as well as the use, and is not bound to continue the service as for a public use. It is obvious that, if the water had become dedicated to public use in 1905, it was not within the power of the defendant, as purveyor or owner thereof, to revoke the dedication and convert it into a private use. This cannot be done in any case without the consent, express or implied, of all the beneficiaries of the use. Such consent was not shown. The point is settled by the decisions of this court in *Leavitt v. Lasse. Irr. Co.*, 157 Cal. 89, 106 Pac. 404, 29 L. R. A. (N. S.) 213, and *Fellows v. Los Angeles*, 151 Cal. 64, 90 Pac. 137.

[10] The objection is made that it was not shown that the signing or filing of the petition to the board of supervisors was authorized by the defendant company. No resolution of the board of directors authorizing it appeared in its minute book. But the petition was signed by the secretary of the company in his official character as such, and the testimony of Gould, who was the organizer and at the time the manager of the company, was that "steps were taken by the company to have the board of supervisors establish rates for the sale, rental, and disposition of that water," and that when this was done the company conformed to the rates established by the supervisors. As before stated, this continued until 1905. We think this shows that the company authorized the signing and filing of the petition.

[11] The cause was tried upon an amended complaint. The original complaint stated the facts substantially as set forth in the amended complaint, but the prayer thereof was for a writ of mandate. It was, in effect, a proceeding in mandamus, under sections 1084 and 1097 of the Code of Civil Procedure, to compel the defendant to deliver

water to plaintiff's land on payment of the established rates. An alternative writ of mandate was issued and served on the defendant. A demurrer to the complaint was thereafter sustained, and thereupon, on leave of court, the amended complaint was filed, changing the prayer so as to present an action to have it adjudged that plaintiff is entitled to receive water from the defendant from its plant, that defendant is in charge of a public use in the water for plaintiff's benefit, and for damages for the injury from its previous refusal to supply said water. The defendant objected to this change of the character of the case, and moved to strike the amended complaint from the files on the ground that it was a departure and stated an entirely new cause of action. We are of the opinion that, under our system of procedure, it is irregular to change a proceeding in mandamus to an action for equitable relief or for the recovery of damages by an amendment of the complaint. In this case, however, the facts necessary to support the prayer of the amended complaint were alleged in the original complaint. The case has been tried on the theory that it was an action for equitable relief and for damages, and not a special proceeding in mandamus. It does not appear, and it is not asserted, that the defendant was in any manner inconvenienced or hampered in the presentation of the evidence or in the conduct of the case by the change in its character. The difference in the relief sought is slight. Even in mandamus the plaintiff could have recovered the damages here asked. Code Civ. Proc. § 1095. The difference in the form of the action is technical in character, and we cannot perceive that the defendant has suffered substantial injury by the change, or by the conduct of the court below in permitting it. The error is therefore not good cause for reversing the judgment. Code Civ. Proc. § 475; Const. art. 6, § 4½.

The objection that the evidence does not support the judgment for damages is not well taken. We cannot enter into the question of the credibility of the witnesses. The values given by them to the crops of alfalfa which the evidence shows the land would have produced if defendant had supplied water when demanded, after deducting the cost of production, are sufficient to show the damages allowed.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

(170 Cal. 211)

PEOPLE v. OXNAM. (Cr. 1921.)

(Supreme Court of California. May 20, 1915.)

1. CRIMINAL LAW — 48 — CRIMINAL RESPONSIBILITY—MENTAL CAPACITY.

Where a person committing an act criminal in nature had sufficient mental capacity to appreciate the character and quality of his act,

knew and understood that it was a violation of another's rights and wrong in itself, and knew that it was prohibited by law and that its commission would entail punishment to himself, and could appreciate the possible and probable consequences, he is criminally responsible therefor, however mentally deficient he may otherwise have been.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 53-58; Dec. Dig. —48.]

2. CRIMINAL LAW — 570 — MENTAL CAPACITY — SUFFICIENCY OF EVIDENCE.

Evidence in support of the plea of mental incapacity in a homicide case held insufficient to raise any reasonable doubt in defendant's favor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1285-1288; Dec. Dig. —570.]

3. CRIMINAL LAW — 686 — REOPENING OF CASE—DISCRETION.

In a homicide case, the refusal to permit defendant, to reopen his case, to introduce evidence not different in character from that elicited from several witnesses relative to their observations of defendant's conduct as bearing on his mental capacity at various times from shortly after his birth to a few months before the homicide, was not an abuse of discretion, where the only difference suggested between this testimony and the proposed testimony was that the latter referred to a time later than that referred to by any previous testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1619, 1620, 1625, 1626; Dec. Dig. —686.]

4. CRIMINAL LAW — 686 — REOPENING OF CASE—DISCRETION.

Where it appears, on an application to reopen a criminal case to permit the introduction of further testimony, that the proposed testimony is of substantial importance to accused, the application should be granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1619, 1620, 1625, 1626; Dec. Dig. —686.]

5. CRIMINAL LAW — 945 — NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A new trial should be granted in a criminal case for newly discovered evidence only where such evidence renders a different result probable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. —945.]

6. CRIMINAL LAW — 1156 — APPEAL—DENIAL OF NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

The denial of a new trial, sought in a homicide case for newly discovered evidence relative to defendant's mental capacity, could not be disturbed in the absence of a clear abuse of discretion or a showing that such evidence would probably produce a different result on a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. —1156.]

7. INFANTS — 68 — JUVENILE COURT ACT—JURISDICTION.

That the matter has not been submitted to the juvenile court, pursuant to the Juvenile Court Act (St. 1913, p. 1297) § 18, does not deprive the superior court of jurisdiction to try a defendant for murder, though it develops on the trial that he was under 18 years of age when the crime was committed.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 174, 175; Dec. Dig. —68.]

8. CRIMINAL LAW ⇨1033—**APPEAL—OBJECTION BELOW—INVESTIGATION BY JUVENILE COURT.**

On appeal in a homicide case, an objection that no opportunity had been afforded for investigation by the juvenile court, pursuant to the juvenile court act (St. 1913, p. 1285), could not be considered when not presented below.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2629, 2630; Dec. Dig. ⇨1033.]

9. INFANTS ⇨68—**SUBMISSION TO JUVENILE COURT — SUGGESTION OF DEFENDANT—NECESSITY.**

The mere fact, that evidence elicited on the trial of accused tended to show that he was under 18 years of age when the crime was committed, did not require that the superior court on its own motion, without any suggestion being made pursuant to Juvenile Court Act (St. 1913, p. 1297) § 18, cause an investigation to be made under such act.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 174, 175; Dec. Dig. ⇨68.]

In Bank. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Charles E. T. Oxnam was convicted of murder, and appeals. Affirmed.

George A. Hooper, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robt. M. Clarke, Deputy Atty. Gen., for the People.

ANGELLOTTI, C. J. Appellant and one Glenn Witt were jointly informed against for the crime of murder, alleged to have been committed December 22, 1914. They were tried separately, and appellant was convicted of murder in the first degree and adjudged to suffer death. This is an appeal from such judgment and from an order denying a motion for a new trial.

The circumstances attendant upon the commission of the homicide are stated in the opinion of this court in *People v. Witt*, 148 Pac. 928. It appears that it was this appellant who actually shot and killed William M. Alexander, the deceased, while he (appellant) and Witt were in Alexander's home, which they had burglariously entered in the nighttime for the purpose of committing larceny therein. The sole defense was that appellant was "an imbecile, feeble-minded, mentally deficient, and without sufficient reasoning power to understand the nature of his acts."

[1] It is not claimed that the evidence was insufficient to sustain the verdict of the jury on the question of mental capacity. The sole test prescribed by the law in such cases has been stated so many times by this court that it is hardly necessary to restate it here. If appellant, as substantially stated by the trial court to the jury, had sufficient mental capacity to appreciate the character and quality of his act, knew and understood that it was a violation of the rights of another and in itself wrong, knew that it was prohibited by the laws of the land and that its commission would entail punishment and

penalties upon himself, if he had the capacity thus to appreciate the character and comprehend the possible or probable consequence of his act, he is responsible to the law for the act and is to be judged accordingly, however deficient mentally he may otherwise have been.

[2] A review of the record satisfies us that, not only does the evidence elicited in the trial sufficiently support the verdict so far as this question is concerned, but also that no other verdict could properly have been rendered. The testimony of his witnesses covered the whole period of his life from infancy down to a very short time before the commission of the crime, at which time, according to the claims of his counsel, substantiated by certain evidence, he was between 17 and 18 years of age. A careful analysis of the mass of testimony given in support of the claims of mental incapacity when made in the light of the uncontradicted evidence as to the circumstances of the homicide, and the conduct of appellant in regard thereto shows to us no substantial basis for a conclusion that appellant was so mentally deficient that he was incapable of distinguishing between right and wrong with relation to the act with which he was charged. At best, the testimony relied on simply showed substantially that he was not normal mentally; that as a child he was morose, timid, and possessed of a violent temper; that he stole; that he was somewhat peculiar, was not bright, was backward in his studies, was deficient in memory, etc. While some of the witnesses testified that in their opinion he was of unsound mind, or insane, their reasons given were not such as to show the degree of insanity or want of mental capacity necessary under the law to exempt a person from responsibility, and some stated that, in saying they regarded him as of unsound mind, they meant that they did not consider him bright or mentally efficient. Some of the witnesses for appellant on this question freely admitted that they considered him capable of distinguishing between right and wrong with relation to such an act as that here involved, and we find no substantial testimony to the contrary. While Dr. Allen, who had examined appellant somewhat cursorily, said he was defective mentally and that he thought he was an "imbecile," he also testified that he would not pronounce him of unsound mind, and that he was not insane in the ordinary acceptance of the term. According to the uncontradicted evidence, appellant and his companion deliberately planned the commission of the burglary, went to the Alexander home in the nighttime for the purpose of executing their plan, appellant being armed with a pistol, effected entrance through a window which they opened, carefully removed their shoes to prevent detection, and proceeded with their

contemplated work of appropriating such valuables as they could find. When discovered in the bedroom of deceased, appellant still persisted in an effort to accomplish the purpose of the entry, in the struggle that ensued shot the deceased, and finally fled and sought a place of concealment. When found with Witt in the room in which they had taken refuge, he at first sought to explain a wound received by him in the leg while in the house of deceased as one received elsewhere, but finally confessed his guilt of the charge here involved. His recollection of what took place on the night of the homicide was clear and explicit, and his account was substantially in accord with what was testified to by the other witnesses. It would be difficult indeed to reconcile the situation thus presented with any theory of mental incapacity on his part sufficient in degree to exempt him from responsibility under the law. As practically said before, the evidence introduced in support of the plea of mental incapacity was not, to our minds, of such a nature as to raise any serious doubt on the question.

Three points are made for reversal.

[3, 4] 1. It is contended that the trial court erred in refusing to allow defendant to reopen his defense after he had rested, for the purpose of calling and examining one additional witness in support of his claim of mental incapacity. The record shows simply this: The defense rested and a recess was taken. When court reconvened, defendant's attorney said he had been informed of one more witness, not even naming him, whose testimony would be very short. The judge inquired if the proposed testimony was anything different from what had already been given. Defendant's attorney said the witness was one covering a period later on, later than any period already covered, and that the testimony was somewhat different, not much, but covered a period after he left home. The judge said that he anticipated the witness would testify somewhat as the others. Defendant's attorney said that he had not talked with the witness. The judge said he thought the ground had been fully covered and directed the prosecution to proceed with the rebuttal.

While the matter of allowing a party to reopen his case is one committed to the discretion of a trial court, if it had been made to appear to the lower court that the proposed testimony was of any substantial importance to defendant, we should say that in the exercise of that discretion an opportunity should have been given him to introduce it, notwithstanding his previous announcement that he rested. But no such showing was made in the lower court, and there is nothing in the record to warrant an assumption that the testimony could have assisted defendant in the slightest degree. Confessedly the proposed evidence was not different in character from that elicited from a long line of witnesses who had testified as to their ob-

servations of defendant at various times from shortly after his birth to a short time, a few months at most, before the homicide. We have already referred to the character of this testimony. The only difference suggested between this testimony and the proposed testimony was that the latter referred to a time later than that referred to by any previous testimony. It would be most unreasonable to assume that it could possibly have affected the verdict.

[5, 6] 2. The motion for a new trial was based in part on the ground of newly discovered evidence relative to the mental capacity of the defendant. It is the established rule in this state that a new trial should be granted on this ground only where the newly discovered evidence is such as to render a different result probable, and it has been said that the question as to the effect upon the case of newly discovered evidence is from its nature peculiarly one that is addressed to the discretion of the trial court.

"Unless the appellate court can plainly see that this discretion has been abused, that the showing made was of such a character as to make it manifest that the case would or should result differently on a new trial in view of the newly discovered evidence, the order of the trial court refusing a new trial will not be disturbed." *People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235.

The affidavit of the attorney for appellant filed in support of the motion was to the effect that he had information to the effect that a lady in San Diego, naming her, would testify that when a small child appellant had suffered a severe attack of brain fever. Evidence had been introduced on the trial to the effect that when a small child appellant was very ill and had convulsions. The attorney's affidavit further showed that other persons, naming them, would testify that as a boy appellant "was mentally deficient" and "not bright." It is clear that as to all this there was nothing on which any claim of abuse of discretion on the part of the trial court can properly be based. The other affidavits filed were: (1) One of Dr. Ernest Bryant Hoag, simply to the effect that he had on January 19 and 20, 1915, examined appellant, his examination covering some three hours, and that in his opinion, based on Johns Hopkins University revised Binet-Simon Intelligence Scale appellant has a mentality less than that of a normal child of ten years of age; (2) one of Dr. Charles W. Waddle, to the effect that he is head of the department of psychology and education of the California State Normal School, Los Angeles, holds the degree of Ph.D., and has had considerable experience in "mental testing," that he has tested defendant, using the Stanford revision of the Binet-Simon mental tests, and that he is convinced that defendant is feeble-minded and not morally accountable for his acts to any greater degree than a child of corresponding "mental age" may be; (3) one of William T. Root, Jr., to the effect that he is

a member of the department of psychology and education in said normal school, that Dr. Grace M. Fernald and he examined defendant, and that in his opinion, using the Binet-Simon tests, defendant is of the "mental age" of eight years and that he would class him as a "low grade moron"; (4) two of Dr. Grace M. Fernald, psychologist at said normal school and the California State School for Girls at Whittier, having a Ph.D. degree, to the effect that she examined defendant on January 16, 1915, and found him to be a feeble-minded individual of the "moron type," grading eight years "mental age" by the Binet-Simon test, and that she does not consider him morally responsible for his acts any more than a child of eight years of age would be responsible; and (5) one of Dr. Thomas J. Orbison, a physician and surgeon, to the effect that he had examined the defendant by the Binet-Simon method or scale, and concludes therefrom that he is of the "mental age" of eight years, or "one year above the imbecile age," and that the Binet-Simon method is the most satisfactory method in use for determining the mental age of a person. All of the examinations of defendant on which these statements were based were made apparently after the trial. No satisfactory reason was shown by any of the affidavits presented on the motion for the failure to ascertain prior to the trial by such examinations as were had subsequent thereto, the matters stated in these affidavits. But, regardless of this, we are satisfied that we cannot properly hold, in the light of all the evidence given on the trial, that the showing made by the affidavits was such as to make it manifest that a different result would or should be reached on the question of defendant's mental capacity in view of the alleged newly discovered evidence. This being the situation, we are not warranted in reversing the order of the trial court denying the motion for a new trial.

[7] 3. There was evidence given on the trial by appellant's witnesses tending to show that his birth occurred in May, 1897, which would make him only 17 years and 7 months of age at the time of the commission of the crime with which he was charged, and only one month older at the time of his trial in the superior court. Apparently the only evidence to the contrary was the fact that he had represented himself as over 18 years of age some time before the crime when he applied for enlistment in the naval militia, and his appearance; it being testified that physically he appeared older than his real age. Basing his claim upon the assertion that the evidence on the trial was substantially without conflict on the question of age, appellant's counsel insists that the superior court was without jurisdiction to try and sentence appellant in view of the provisions of the act commonly known as the Juvenile Court Act, approved June 16, 1913 (Stats. 1913, p. 1285). In section 19 of that act it is provided that:

"No dependent or delinquent person under eighteen years of age shall be prosecuted for crime until the matter has first been submitted to the juvenile court by petition as herein provided, or by certificate of the lower court as provided in section sixteen (eighteen) hereof."

Within the meaning of said act, the words "delinquent person" include any person who violates any law of the state, or any ordinance of any town, etc., defining crime, and which involves moral turpitude. Section 4. It is assumed, although the record does not affirmatively so show, that the matter of this charge was never submitted to the juvenile court. Apparently no suggestion of the age of appellant as a basis for arresting the prosecution was ever made in the superior court, the evidence on that subject being elicited in the ordinary course of the trial as evidence bearing on the issues being tried by the jury. No request was made of the trial court relative to such matter either before the trial, on the trial or on the motion for new trial. There is no pretense that any suggestion of age was made to the committing magistrate. The claim of any irregularity in this behalf is made for the first time on this appeal, and is based solely on what the evidence given on the trial shows as to appellant's age.

Consideration of the provisions of the juvenile court law satisfies us that the provision relied on is not to be taken as affecting the jurisdiction of the superior court in any criminal prosecution. The design of the various provisions relative to investigation by the juvenile court of the cases of delinquent persons under the age of 18 years is, of course, to afford an opportunity for investigation of the case of any delinquent person by a judge of the superior court specially charged with such work, with a view to ascertain whether the delinquent person is a fit and proper subject to be dealt with under the reformatory provisions of the act, rather than under the laws generally applicable to offenses. With this design in view, it is made the duty of judges, upon proper suggestion and upon the finding of certain facts, to do certain things. By section 18 of the act, whenever a deposition or complaint is filed in any court other than a superior court charging a person with crime, "and it shall be suggested to the judge, etc., that the person charged is under 18 years of age," it is made the duty of the judge to suspend all proceedings and examine into the question of age, and if, "from such examination, it shall appear to the satisfaction of said judge * * * that said person is under the age above specified," he shall certify the matter to the juvenile court, and "immediately thereupon all proceedings against the said person on said charge shall be suspended until said juvenile court shall issue its mandate * * * directing the court * * * to proceed." It will be observed from this that, even in the case of a proceeding in an inferior court, there is no want of jurisdiction

implied as to persons who are in fact under 18 years of age, but simply a suspension of proceedings, when, upon "suggestion" to the judge that the delinquent is under that age, he has satisfied himself that the delinquent is under 18 years of age and has so certified to the juvenile court. There is nothing in the language used in this section to suggest the idea that, in the absence of any suggestion, inquiry, and determination by such judge, there is any want of jurisdiction to proceed under the general law relating to crimes, simply because it may subsequently be developed that the delinquent was in fact under 18 years of age. In fact, the language expressly requires the judge himself to be satisfied on the question of age before he certifies the matter to the juvenile court at all, and unquestionably it was contemplated that in the absence of any such determination by such judge and any proceeding in the juvenile court, the case should proceed in the ordinary way and that the order or judgment of the judge should be valid and immune from any collateral attack based on the juvenile court act. Section 19 of the act, at the end of which is the provision specially relied on here, provides for a proceeding in the juvenile court "whenever it is claimed that any person under the age of twenty-one years is a neglected, dependent or delinquent person"; the same to be commenced by the filing of a verified petition praying that such an adjudication be made. In said proceeding the court is authorized to make such order "as is meet in the premises," including, in the event that it determines that a delinquent minor is not a fit and proper subject to be dealt with under the reformatory provisions of the act, an order that the proceeding be dismissed and the delinquent "prosecuted under the general law." Then follows the provision specially relied on here. We regard this provision as in no way going to the jurisdiction of the superior court to proceed under the general law in the matter of any indictment or information filed therein charging a public offense.

[8] It is certainly clear that no claim based on this provision of the act can be maintained in an appellate court after conviction and judgment under the general law, where no claim under the act was made prior to the appeal, and there has never been any investigation and determination as to the age of the offender. Such is the situation here, according to the record, if we assume in accord with defendant's theory that his case was never presented to the juvenile court. The age of defendant was not an issue tried and determined in the superior court by either the judge presiding or by the jury, was not even suggested to the trial judge for trial and determination, and we have no finding thereon. In other words, we have no judicial determination at all that the defendant was, in fact, under 18 years of age,

and the proceedings in the superior court did not call for any determination on that question. In the absence of such a trial and determination on the question of age, we have no warrant for dealing with this case as subject to the provisions of the juvenile court act upon the assumption that defendant was in fact under 18 years of age, however much evidence as to that matter elicited on the trial from defendant's witnesses may indicate such to be the situation. Nor can it be held in view of the circumstances of this case as shown by the record and already detailed that there was any error committed by the superior court in this matter.

[9] As we have said, action of that court looking to investigation under the juvenile court act upon the theory that defendant was under 18 years of age was never invoked or even suggested, and, whatever might have been the duty of the court in the event of such a suggestion or request—a matter which it is not necessary here to consider—we are satisfied that the mere fact that certain evidence elicited on the trial of a defendant for a crime tended to show that he is under 18 years of age does not require the superior court to take any such action on its own motion.

We find nothing in the record warranting a reversal.

The judgment and order denying a new trial are affirmed.

We concur: MELVIN, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.; SLOSS, J.

170 Cal. 196

BRILES v. PAULSON. (Sac. 2181.)

(Supreme Court of California. May 15, 1915.)

1. APPEAL AND ERROR ⇐1011—FINDINGS—CONCLUSIVENESS.

A finding on evidence substantially conflicting is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ⇐1011.]

2. VENDOR AND PURCHASER ⇐18—OPTION CONTRACT—PERFORMANCE OF CONDITIONS.

An option contract for the sale of real estate gave the privilege of purchasing within a certain time, subject to conditions specified, one of which required the holder of the option to do certain work before a given date, and that on his failure to do so the contract might be terminated, cannot be converted into a binding contract of sale except by acceptance and compliance with the conditions, and, where there is a failure to perform the specified work within the specified time, the option cannot be enforced.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. ⇐18.]

Department 1. Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by Thomas Briles against A. J. Paulson. From a judgment for plaintiff, defendant appeals. Affirmed.

Cornish & Robnett, of Alturas, for appellant. W. Lair Thompson, of Lakeview, Or., and Jamison & Wylie, of Alturas, for respondent.

SLOSS, J. The plaintiff brought this action to obtain a decree declaring that the rights of the defendant under a certain written contract were terminated. The contract was executed by the plaintiff and one J. J. Payseur. The defendant, Paulson, is the assignee and successor in interest of Payseur.

By the terms of the contract, which was dated December 5, 1910, Briles, in consideration of a payment of \$100, granted to Payseur the option of purchasing certain lands in Modoc county for \$17,000, at any time up to December 31, 1915. Payseur was to have a subdivision of the land made, and prices aggregating \$17,000 were then to be put upon the various parcels; such parcels to be subject to separate purchase at the prices thus fixed. Payseur, if he exercised his option to purchase all or any of the land, was to pay one-fourth of the price in cash, and the balance in installments as provided in the agreement. Payseur was given the right to make sales to third parties; he to receive all of the purchase price above the sums (aggregating \$17,000) which were to go to plaintiff.

By the agreement the second party (Payseur) "agrees that he will raise the dam upon the reservoir situated upon the aforesaid lands to a height of 25 feet, and will construct the same of substantial width and of sufficient solidity to withstand water pressure so that the water contained in said reservoir shall not be liable to burst therefrom; said reservoir to be completed on or before November 1, 1911." There was a further provision that if the party of the second part, his heirs or assigns, should fail, neglect, or refuse to carry out and perform each and every agreement contracted to be performed by him, the party of the first part (Briles) might, at his option, declare the agreement terminated and annulled, except as to parcels already contracted to be sold.

In June, 1911, Payseur assigned the contract to the defendant, Paulson, and on October 5, 1911, Briles and Paulson executed a writing modifying the clause of the main contract relative to work on the dam. By the modification it was provided that Paulson should, on or before November 20, 1911, widen the dam "15 feet, and raise said dam, when thus widened, 4 feet higher than present dam."

On March 22, 1912, the plaintiff served on the defendant a notice that he elected to terminate and annul the contract of December 5, 1910, because of the failure of the defendant to comply with his agreement (as modified) to raise and widen the dam by November 20, 1911.

The complaint set up the foregoing facts, and alleged that defendant had not widened the dam more than 8 feet, or raised it to a height greater on the average than 2 feet.

The prayer was for judgment that plaintiff was the owner of the land, that the contract be declared terminated, and that it be surrendered for cancellation. The defendant, in his answer, asserted that he had fully performed, but prayed that, if it should be found that his attempted performance was imperfect, he be allowed a reasonable time to complete the same. The findings of the court were in favor of the plaintiff, and judgment followed as prayed by the complaint. The defendant appeals from the judgment.

[1] It is urged that the evidence does not support the finding that defendant had not widened the dam more than 8 feet, nor raised it more than 2 feet. But the argument made in this behalf is evidently based upon the notion that this court may weigh opposing testimony, and determine that the statements made by the defendant's witnesses, rather than those of the witnesses for plaintiff, should have been given credence. Such determination cannot, of course, be made by an appellate court. Where there is a substantial conflict in the evidence, the finding of the court below must be sustained here. Without question the record in this case discloses such substantial conflict.

[2] The only other point made by appellant is that, even though there had been a failure to do the required work within the time limited, his rights under the contract should not have been forfeited outright, but he should have been allowed a reasonable time to complete performance. It is argued that, since equity abhors forfeitures, the defendant should be relieved from the effect of his failure to perform within the stipulated time. The provision regarding time was not, it is claimed, of the essence. Whatever force this argument might have if the agreement had been one binding the plaintiff to sell and the defendant, or his assignor, to buy, it certainly can have no application to the contract which was, in fact, made. That contract created a mere option, under which the defendant had the privilege of buying (but was not bound to buy), within a certain time, "subject to the conditions herein contained." One of the conditions was that he should do certain work on the dam before a given date, and another was that, if he failed to perform this, or any other thing agreed by him to be done, the plaintiff might terminate the contract. The defendant could not convert the option into an agreement of sale binding upon the plaintiff, except by complying with the conditions upon which the plaintiff had agreed to sell. *Richardson v. Hardwick*, 106 U. S. 254, 1 Sup. Ct. 213, 27 L. Ed. 145; *White v. Bank of Hanford*, 148 Cal. 552, 83 Pac. 698.

"Acceptance must be made and conditions performed within the time, if any, limited by the option, in order to constitute a contract of sale; time being of the essence in such contracts. 39 Cyc. 1241, and cases cited.

A court of equity would not be justified in relieving a party from the effect of his fail-

ure to comply with the conditions on which he had been granted the privilege of buying. This would be making a new contract for the parties, and compelling the owner to sell when he had not agreed to do so.

"The assent or act of acceptance," as the court said in *Steele v. Bond*, 32 Minn. 14, 21, 18 N.W. 830, "whether by payment or the fulfillment of some other condition, was necessarily to be made within the time limited; otherwise no contract could be consummated. * * * Equity cannot vary the terms of such a stipulation by an extension of the privilege. The time limited for acceptance or payment is, in such case, part of the contract or option, and equity cannot interfere, unless in cases where its jurisdiction can be properly invoked on the ground of fraud or mistake, which is not alleged here."

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

170 Cal. 199

DIBBLE v. RELIANCE LIFE INS. CO. OF PITTSBURG, PA. (S. F. 6449.)

(Supreme Court of California. May 15, 1915.
Rehearing Denied June 14, 1915.)

1. INSURANCE ⇨400—LIFE INSURANCE—STIPULATIONS—VALIDITY.

An incontestable clause in a life policy issued to a trusted employé of insurer is as binding on insurer as if the policy had been issued to a stranger, for the parties sustain the same relation as in the ordinary case of life insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1086; Dec. Dig. ⇨400.]

2. INSURANCE ⇨400—LIFE INSURANCE—INCONTESTABLE CLAUSE—APPLICABILITY.

A provision in a life policy that it shall not be contested after one year from its date, except for nonpayment of premiums, prevents insurer from contesting the policy after one year, on the ground that insured, when applying for insurance and at all times thereafter, was seriously ill, though the policy also provides that it shall not take effect until the premium is paid, while insured is in good health, and the policy shall have been duly issued.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1086; Dec. Dig. ⇨400.]

3. PLEADING ⇨264—AMENDMENTS—EFFECT.

An amended answer supersedes the original answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 803-805; Dec. Dig. ⇨264.]

4. PLEADING ⇨93—DEFENSES—INCONSISTENT DEFENSES—RIGHT TO PLEAD.

Inconsistent defenses may be separately pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 189, 190; Dec. Dig. ⇨93.]

5. INSURANCE ⇨400—LIFE INSURANCE—INCONTESTABLE CLAUSE—EFFECT.

A provision in a life policy that it shall be incontestable after one year from its date, except for nonpayment of premiums, precludes any defense after the stipulated period on account of false statements warranted by insured to be true, though the statements were fraudulently made, unless fraud is expressly or impliedly excepted from the effect of the provision.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1086; Dec. Dig. ⇨400.]

6. INSURANCE ⇨400—LIFE INSURANCE—INCONTESTABLE CLAUSE—VALIDITY—"ALL CONTRACTS."

Civ. Code, § 1688, providing that "all contracts" which have for their object the exemption of any one from responsibility for his own fraud are against the policy of the law, includes life insurance policies, but does not render invalid a clause declaring that a policy shall be incontestable after one year from its date, though construed to preclude the defense of fraud by insured, for the object of the clause is only to provide a shorter term for maintaining a claim on the ground of fraud than is prescribed by limitations.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1086; Dec. Dig. ⇨400.]

7. INSURANCE ⇨400—LIFE INSURANCE—INCONTESTABLE CLAUSE—CONSTRUCTION.

A provision in a life policy that it shall be incontestable after one year from its date, except for nonpayment of premiums and except as otherwise provided in the policy, does not expressly or impliedly except an action or defense based on fraud by insured, though the policy provides that, in the absence of fraud, all statements in the application shall be deemed representations and not warranties, and no such statement shall avoid the policy unless contained in the written application.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1086; Dec. Dig. ⇨400.]

8. INSURANCE ⇨640—LIFE INSURANCE—ACTION—DEFENSES.

A count, in an answer in an action on a life policy which denies the issuance of the policy in consideration of an annual premium, is good as against a demurrer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1609-1612, 1614-1624; Dec. Dig. ⇨640.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Mae Dibble against the Reliance Life Insurance Company of Pittsburg, Pa. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

J. C. Campbell, Walter Shelton, and David L. Levy, all of San Francisco, for appellant. Lovett K. Fraser, Casper A. Ornbaun, and Ornbaun & Fraser, all of San Francisco, for respondent.

ANGELLOTTI, C. J. This case was ordered retransferred to this court for hearing and determination, by reason of the inability of the justices of the District Court of Appeal of the Third District to concur in a judgment. While the cause was pending in the last-named court Mr. Justice Burnett prepared an opinion, which was forwarded to this court, as required by the Constitution. That opinion is as follows:

"One of the main points in this controversy growing out of an action for the recovery of a \$5,000 life insurance involves the construction of the following provision in the policy: 'Incontestability—This policy and the application therefor, a copy of which is hereto attached, constitute the entire contract between the parties and shall be incontestable after one year from its date, except for nonpayment of premiums and except as otherwise provided in this policy. All statements made by the insured in said application shall, in the absence of fraud,

be deemed representations and not warranties, and no such statement shall avoid the policy unless it is contained in the written application hereof, a copy of which application is hereto attached.' As a general rule, no doubt, effect will be given to such stipulation and if the time prescribed be reasonable the insurance company will be precluded from urging any defense, including fraud, to an action on the policy if said defense be covered by said agreement. In 25 Cyc. 873, it is stated as follows: 'A clause, now often inserted in policies, that after being in force a specified time they shall not be disputed or shall be incontestable, precludes any defense after the stipulated period on account of false statements which were warranted to be true, even though they were made fraudulently.'

"A great many cases are cited in support of the text, those of which relating to the defense of fraud we will notice specifically.

"In Massachusetts Benefit Life Association v. Robinson [104 Ga. 256] 30 S. E. 918, 42 L. R. A. 261, the Supreme Court of Georgia said: 'As the law may prescribe such a limitation in which actions shall be brought by the party to be affected, it is also within the power of the contracting parties to agree among themselves upon a period of time which would amount to a statute of limitations, either greater or less than the period fixed by the law. * * * Parties interested in the contract may waive the benefit of the statute of limitations fixed by the law, the effect of the waiver being either to make a longer or shorter period than the law prescribes. What is said above would seem, however, to be subject to the qualification that where the effect of the contract would be to vitalize, by the lapse of time fixed in the contract, an undertaking *which would otherwise be void for fraud*, the time fixed in which the party would have a right to rescind the contract on account of the fraud must be such a time as by the exercise of ordinary diligence the same could have been discovered. * * * Where parties enter into a contract which from its nature affords an opportunity to one party to perpetrate a fraud upon another, and it is stipulated therein that the party who is liable to be defrauded shall have a specified time in which to make inquiry as to the acts and conduct of the other party, he is on notice, by the very terms of the contract itself, that fraud may be involved in it, and the duty is upon him to commence at once an investigation into the acts, conduct, and representations of the other party; and if the time fixed is such that the information which would show that the fraud had been perpetrated could have been, by the exercise of ordinary diligence, obtained, then the parties are bound by their contract as to time, and *after the lapse of that time fraud is no longer a defense*. This does not violate in any way the well-settled principle that fraud is to be abhorred, vitiates everything it touches, and the person guilty of it is not to be countenanced in any way by the courts. While all this is true, it is equally well settled that a contract which has for its foundation a willful fraud may become vitalized and enforceable by the negligence of the party who was the victim of the fraud.' And, in considering some other clauses that seemed not to be covered by the noncontestable provision, the court reaffirmed the familiar doctrine that where a policy is fairly susceptible of two different constructions the one more favorable to the insured will be adopted. The court held that those things which were declared to be acts which would vitiate the policy could be made effectual as a defense only if asserted within the said three-year period.

"In Reagan v. Union Mutual Life Insurance Co., 189 Mass. 555, 76 N. E. 217 [2 L. R. A. (N. S.) 821, 109 Am. St. Rep. 659, 4 Ann. Cas. 362] the clause in controversy was, 'This pol-

icy is incontestable *from date of issue* for any cause, except nonpayment of premium.' In holding that this did not preclude the defense of fraud, the court said: 'This is not like the numerous cases in which the policy provides that it shall be incontestable for fraud after the expiration of a specified time, which is not unreasonably short. It has often been held that a provision of that kind is valid because it is in the nature of a limitation of the time within which the defendant may avoid the policy for this cause. Such a provision is reasonable and proper, as it gives the insured a guaranty against possible expensive litigation to defeat his claim after the lapse of many years, and at the same time gives the company time and an opportunity for investigation, to ascertain whether the contract should remain in force. It is not against public policy, as tending to put fraud on a par with honesty' (citing a large number of cases).

"In Murray v. State Mutual Life Ins. Co. [22 R. I. 524] 48 Atl. 800 [53 L. R. A. 742], deceased's policy had been issued two years and all premiums paid, and it contained a stipulation that it should be incontestable after two years from the date of its issue, provided the premiums were paid as agreed. It was held, by the Supreme Court of Rhode Island, that the contention that the defendant company was entitled to plead that the insured made false and fraudulent answers in his application, in bar of an action on the policy, because the incontestability clause was void as condoning fraud, and as against public policy, cannot be sustained, since the clause merely imposed a reasonable limitation on the time in which fraud could be established.

"In Union Cent. Life Ins. Co. v. Fox [106 Tenn. 347] 61 S. W. 62 [82 Am. St. Rep. 885], the Supreme Court of Tennessee could see no force in the declared distinction between policies which are by their terms to become at once incontestable and those to become incontestable only after a certain length of time, and the court declares that: 'If the time may be limited to one year within which the defense of fraud may be made available, it is difficult to see why it may not be limited to six months or one month or such other time less than this as the company may deem it important to stipulate.' The court further held that before the policy is issued the company has abundant opportunity to investigate concerning the representations of the insured, and that it may bind itself not to contest the claim after the contract is executed even upon the ground of fraud.

"As to the defense that the insured falsely represented the state of his health, the Supreme Court of Wisconsin, in Patterson v. National Premium Mut. L. Ins. Co. [100 Wis. 118] 75 N. W. 980 [42 L. R. A. 253, 69 Am. St. Rep. 899] said: 'Besides, the incontestable clause would seem to effectually bar this defense. If this clause be not altogether a glittering generality, put in for no purpose except to induce men to insure, it would seem that it must cover such misstatements or omissions as are here alleged. Such clauses have been upheld by various courts.

* * * We see no reason why an insurance company may not take the risk of ascertaining for itself the condition of health of the insured.'

"The only cases cited holding that a clause providing that the policy shall be incontestable from date is void as against the defense of fraud are Reagan v. Union Mutual Life Ins. Co., supra, and Welch v. Union Cent. L. Ins. Co., 108 Iowa, 224 [78 N. W. 853] 50 L. R. A. 774.

"In the latter it is held that 'a provision in an insurance policy that it shall be incontestable for any cause except misstatement of age "except as hereinbefore provided" will not preclude the insurers from relying on the warranties contained in the application, which is part of the contract and the statements in which are made the basis of the policy, and that

the omission of *fraud* from the specified grounds of contest will not preclude contest on that ground.'

"It may be added that the subject is thoroughly considered in the note to *Clement v. New York Life Insurance Co.*, as reported in 42 L. R. A. 247, and I think the statement is justified that all the recent cases and authorities hold that where a reasonable time is given for investigation, an incontestable clause is valid as against all defenses not excepted from its operation.

"And in this connection it may be said that I can find no warrant for the assertion that by the terms of the policy here *fraud* is withdrawn from the application of said provision.

"There is no contention that *fraud* is expressly excepted and I think there is no such implication. As I understand it, the clause in which the term is used simply implies that in case of fraud the statements made in the application shall be deemed *warranties*, but there is nothing to suggest that a defense on said ground is not barred by the lapse of the time period prescribed.

[1] "Nor can I see that the legal aspect of the situation is changed by the circumstance that the insured was a trusted employé of the company. As far as the policy itself is concerned, the parties sustained the same relation as in the ordinary case of life insurance. The company would certainly have the right to grant to its employés the same favor as to strangers, and it should be bound by the same obligations. Indeed, as far as opportunity for inquiry and investigation to ascertain fraud is involved in the question, there is reason for holding the insurer to a stricter accountability where an employé is the insured.

"A more serious question is presented by the consideration of section 1668 of the Civil Code, providing as follows: 'All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud * * * are against the policy of the law.' It is not disputed that it is within the province of the Legislature to declare such principle of public policy, and that it should be enforced. It is claimed, however, that the section has no application to insurance policies, but I find no warrant for this contention. 'All contracts' certainly include contracts of insurance, but I am inclined to the view that, properly speaking, it was not the object of the parties to said insurance policy to *exempt* the insured from the consequences of his fraud, but the object and effect of said incontestable clause was simply to provide a shorter term for maintaining said claim than is prescribed by the statute of limitations. In other words, in my opinion, by said section the Legislature did not intend to condemn a contract that in the interest of repose and security would fix a reasonable limit for the time in which such defense might be successfully urged, but the intention was to preclude a contract that would altogether relieve either party of the consequences of his own fraud.

[2] "There is another consideration which is worthy of serious attention. It was agreed by the parties that the contract of insurance 'shall not take effect until the first premium shall have been actually paid, while I am in good health, and the policy shall have been signed by the duly authorized officers of the company and issued.' It is urged by appellant, therefore, that these three circumstances, the payment of the first premium, the condition of good health on the part of the insured and the execution of the policy by the company, were conditions precedent to the existence of any contract whatever, and that since in the answer and cross-complaint it appears that the insured, when he made the application and at all times thereafter, was not in good health, but seriously ill, for this reason the demurrer

should have been overruled. It is said by appellant that, in *Gallant v. Metropolitan Life Insurance Co.* [167 Mass. 79] 44 N. E. 1073: 'There was a provision in a purported life insurance contract that no obligation was to be assumed by the company unless the insured was in good health at the date of the policy. It appeared that the insured was in poor health at that date, and the court held that there was no contract, and the company was not liable. This was followed in *Barker v. Metropolitan Life Ins. Co.* [188 Mass. 542] 74 N. E. 945, in regard to a similar state of facts.' Other cases also to the same point are *Volker v. Metropolitan Life Ins. Co.* [1 Misc. Rep. 374] 21 N. Y. Supp. 456; *Carmichael v. John Hancock Life Ins. Co.* [116 App. Div. 291] 101 N. Y. Supp. 602; *Dwight v. Ins. Co.* [103 N. Y. 341] 8 N. E. 654, 57 Am. Rep. 729; *Metropolitan Life Ins. Co. v. Howle* [62 Ohio St. 204] 56 N. E. 908; and *Packard v. Ins. Co.* [72 N. H. 1] 54 Atl. 287.

"It is to be observed, however, that in none of these cases was there an incontestable clause, and this circumstance is claimed by respondent to be a vital distinguishing fact. In support of the contention she cites *Mohr v. Prudential Ins. Co. of America* [32 R. I. 177] 78 Atl. 554; *Mutual Reserve Fund Assoc. v. Austin*, 142 Fed. 398 [73 C. C. A. 498, 6 L. R. A. (N. S.) 1064]; and *Commercial Life Insurance Co. v. McGinnis* [50 Ind. App. 630] 97 N. E. 1018.

"In the first of these it was said: 'The defendant does not dispute that a period of more than one year had elapsed between the date of the policies and the death of the insured. The defendant contends, however, that the policies must have had a legal inception in order to sustain an action thereon, and that before the plaintiff could claim the benefit of the incontestable clause she must show that all the conditions precedent to the issuance of the policies have been complied with. To this contention it should be said that the policies were issued and were delivered; that the premiums due upon said policies were received by the defendant up to the time of the death of the insured; that the policies were treated by the insured and the defendant as subsisting contracts between them. The policies upon their face purport an obligation on the part of the defendant. To an action to enforce this apparent obligation the defendant interposes the defense that the insured was not in good health at the time of the delivery of the policies. Upon this ground the defendant is contesting its liability under the policy. Such a contest is within the scope of that clause which makes the policy incontestable after one year from its date if all due premiums shall have been paid, without by its terms excluding any ground of defense. To hold otherwise would be to permit such a clause in its unqualified form to remain in a policy as a deceptive inducement to the insured.'

"In the *Austin Case* it was held by the United States Circuit Court of Appeals, First Circuit, that as far as the incontestable clause is concerned, there is no distinction between the condition precedent as to the delivery of the policy while in good health and statements in the application which were made warranties, and that unless expressly excluded they were all covered by the agreement not to contest the policy. In the note to this case, as reported in 6 L. R. A. (N. S.) 1064, it is said: 'The contention of the defendant in this case that the incontestable clause was an agreement conditioned upon the insurance having been in force, and that the insurance was not in force because the assured was not in good health when the policy was delivered to him, does not seem to have been thought of before, as an extensive search has failed to discover any case where such a defense was relied on. The reasoning

of the court, however, seems impregnable in spite of the lack of authority upon that specific question, and its position is still further strengthened by a decision of the North Carolina Supreme Court in *Grier v. Mutual L. Ins. Co.*, 132 N. C. 542, 44 S. E. 28.

"The McGinnis Case, supra, was to the same effect, there being a clause in the policy that it was not to go into effect unless the first premium was actually paid during the lifetime and good health of the insured, but it was held that this was covered by the incontestable clause, and that the insurer had waived its right to urge such defense.

"The other cases cited by appellant in this connection do not relate to life insurance, nor do they involve any consideration of an agreement not to contest the action, and therefore, of course, they are clearly distinguishable.

"While there is persuasive force in appellant's reasoning, I am content to follow the authorities upholding respondent's position, there being no case in point to the contrary, and therefore must resolve this contention in favor of plaintiff.

"For the foregoing reasons I conclude that the cross-complaint of defendant, seeking a cancellation and annulment of said insurance policy, is insufficient in its statement of facts, and that the demurrer thereto was properly sustained.

"The amended answer, however, contains this averment: 'Defendant denies that on the 2d day of August, 1910, or at any other time or at all at San Francisco, Cal., or at any place, or at all, in consideration of the payment of the premium of \$64.30 annually during five years, or for any consideration whatever, defendant by its agents duly authorized, or at all, executed its policy of insurance No. 29,268 in writing to one Robert M. Dibble on his life for the term of five years, or any other time, in the sum of \$5,000, or any other sum, or any policy whatever.' There is thus specifically denied one of the vital allegations of the complaint and thereby a material issue is presented.

[3, 4] "It is of no importance as a matter of pleading that no such denial was contained in the first answer, or that said denial is inconsistent with the allegations of the separate defense and also of the cross-complaint. The original was superseded by the amended answer, and inconsistent defenses may be separately pleaded.

"I think, therefore, that the court erred in sustaining the demurrer to the first defense set forth in the amended answer. The said denial may result in no practical benefit to appellant, but, nevertheless, it must be considered apart from the other defenses.

"It would seem to follow that the judgment should be reversed, with directions to the court below to overrule the demurrer to the first count of the answer."

[5] It is stated in the foregoing opinion that "there is no contention that fraud is expressly excepted" from the effect of the incontestability provision. In this respect, as is pointed out by counsel for appellant, the learned justice was in error, as the claim was expressly made in their briefs. With this minor exception, going in no way to the merits of the appeal, we are satisfied that the opinion is in all respects correct, including, of course, the view expressed to the effect that there is no good warrant in fact for the assertion that by the terms of the policy, fraud is withdrawn from the application of the incontestability provision, and we adopt such opinion as a part of the opinion of this court.

[6] As is shown by this opinion, the deci-

sions in other states are practically unanimous in holding that a provision in a life insurance policy, to the effect that, after being in force the specified time, it shall be incontestable, precludes any defense after the stipulated period on account of false statements warranted to be true, even though such statements were fraudulently made, unless by the terms of the policy fraud is expressly or impliedly excepted from the effect of such provision. Learned counsel for appellant do not appear to dispute this, but earnestly claim that section 1668, Civil Code, necessitates a different ruling in this state. We cannot so read the section, and entirely agree with what is said in the opinion of Mr. Justice Burnett in regard thereto. The answer to the claim is the same that has uniformly been made by the courts of other states, to the claim that the well-settled principle that "fraud vitiates everything it touches, and the person guilty of it is not to be countenanced in any way by the courts" voids such a provision as one against public policy. The opinion contains expressions from other courts on this subject. To these may, with propriety, be added the views of the Court of Appeal of New York, expressed in *Wright v. Mutual Benefit Association*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749, as follows:

"It is not a stipulation absolute to waive all defenses and to condone fraud. On the contrary, it recognizes fraud and all other defenses, but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of and serves a similar purpose as statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds. It is exemplified in the statute giving a certain period after the discovery of a fraud in which to apply for redress on account of it and in the law requiring prompt application after its discovery, if one would be relieved from a contract infected with fraud. The parties to a contract may provide for a shorter limitation * * * than that fixed by law and such an agreement is in accord with the policy of statutes of that character."

[7] The incontestability provision cannot be reasonably construed, in our opinion, as either expressly or impliedly excepting an action or defense based on fraud. The entire provision, as we read it, so far as applicable here, is that:

"This policy * * * shall be incontestable after one year from its date, except for nonpayment of premium and except as otherwise provided in this policy."

The language immediately following on which appellant relies, while bearing upon the question of the liability of the insurance company under the policy, obviously has reference to an entirely different matter from that referred to in the preceding sentence. It simply provides that, in the absence of fraud, all statements in the application shall be deemed representations and not warranties, and no such statement shall avoid the policy unless contained in the written appli-

cation. As substantially said in Mr. Justice Burnett's opinion, there is nothing herein to suggest that a defense on the ground of fraudulent statements will not be barred by the lapse of the time prescribed in the preceding provision. See, in this connection, *Clement v. Insurance Co.*, 101 Tenn. 22, 30, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650. Referring to the words in the first sentence "except as otherwise provided in this policy," we find no provision in the policy otherwise providing as to a false statement in the application, unless perhaps the provision under the same heading of "Incontestability" that "If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age" is such a provision. It should be borne in mind, in construing these provisions of the policy, that under well-settled rules all doubts or ambiguities must be resolved against the insurance company.

As to the other points made by defendant, there is no necessity for adding anything to what is said in the opinion of Mr. Justice Burnett.

[8] For the reasons stated in that opinion, we see no escape from the conclusion that the demurrer, while properly sustained as to the further and separate answer and defense, and to the cross-complaint, should have been overruled as to the first count of the answer, in view of the specific denial therein of the execution of the policy. It should perhaps be said, in justice to the learned judge of the lower court, that it is extremely probable that the existence of this denial was not specifically urged on the argument in the lower court. It is true that the denial may result in no practical benefit to defendant, but, of course, it is impossible for us to know what evidence may be obtainable by defendant on the issue thus clearly made. Defendant was certainly entitled to an opportunity to present its proofs on this issue, in view of the condition of the pleadings, and as each defense must be considered separate and apart from all other defenses, no court can hold in advance of a trial that, given such an opportunity, defendant could not show that the policy was not, in fact, ever executed.

The judgment of reversal to be given shall not be taken as affecting the order of the trial court sustaining the demurrers in so far as the further answer and the cross-complaint of defendant are concerned.

The judgment is reversed, with directions to the lower court to overrule the demurrer of plaintiff in so far as the first count of the answer is concerned.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; LAWLOR, J.; HENSHAW, J.

169 Cal. 619

CHRISSINGER v. SOUTHERN PAC. CO.

et al. (Sac. 2171.)

(Supreme Court of California. March 16, 1915.
Rehearing Denied April 15, 1915.)

1. RAILROADS ⚡387—CROSSING ACCIDENTS—DEFENSES.

One injured at a railroad crossing cannot recover notwithstanding the negligence of those in charge of the train, where his own contributory negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1296, 1314-1316; Dec. Dig. ⚡387.]

2. RAILROADS ⚡400—CROSSING ACCIDENTS—ACTIONS.

In an action by one run down by a train, evidence held to show that he did not look or listen and so to warrant nonsuit.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1365-1381; Dec. Dig. ⚡400.]

3. EVIDENCE ⚡588—CROSSING ACCIDENTS—PHYSICAL FACTS.

Testimony by one run down at a crossing that he looked and listened should be disregarded where in conflict with physical facts.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2437; Dec. Dig. ⚡588.]

4. RAILROADS ⚡383—CROSSING ACCIDENTS—LOOK AND LISTEN RULE.

A railway track being a warning, a traveler must take every reasonable opportunity to look and listen for trains.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1305-1310; Dec. Dig. ⚡383.]

5. NEGLIGENCE ⚡136—JURY QUESTION.

While ordinarily contributory negligence is a question for the jury, it need not be submitted where the standard of conduct is so obvious as to be applicable to all persons, and plaintiff has not complied with that standard.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. ⚡136.]

Lawler, J., dissenting.

Department 2. Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by E. P. Chrissinger against the Southern Pacific Company and another. From a judgment for defendants and an order denying new trial, plaintiff appeals. Affirmed.

Ben F. Geis and Duard F. Geis, both of Willows, for appellant. Frank Freeman, of Willows, for respondents.

MELVIN, J. Plaintiff was injured by a north-bound limited train of the defendant corporation while he was crossing the main track of that company's railroad at Willows. Defendant Riley was the engineer of the train which struck plaintiff. In his action for damages after all of the testimony in plaintiff's behalf had been heard the court sustained a motion for nonsuit, and judgment was given accordingly. From the said judgment and from an order denying his motion for a new trial plaintiff appeals.

[1] There was a conflict of evidence upon the subject of warning blasts of the whistle, but for the purposes of this discussion it

must be assumed that the engineer neither sounded the whistle nor caused the bell to be rung. The evidence shows without conflict that the train was moving at a rate of speed of approximately 20 miles an hour. But the fact that the usual precautions were omitted and the defendants were negligent does not require a reversal of the judgment and order if the other circumstances indicate, as matter of law, that from the most favorable view of the facts the court must have concluded that plaintiff's own negligence was the proximate cause of the injury. *Holmes v. South Pacific Coast Ry. Co.*, 97 Cal. 167, 31 Pac. 834; *Green v. Los Angeles, etc., R. R. Co.*, 143 Cal. 37, 76 Pac. 719, 101 Am. St. Rep. 68; *Hutson v. Southern Cal. Ry. Co.*, 150 Cal. 704, 89 Pac. 1093; *Erie Ry. Co. v. Kane*, 118 Fed. 234, 55 C. C. A. 129; *Herbert v. Southern Pacific Co.*, 121 Cal. 232, 53 Pac. 651; *Heitman v. Pacific Electric Ry. Co.*, 10 Cal. App. 398, 102 Pac. 15; *Wilkinson v. Oregon Short Line R. Co.*, 35 Utah, 110, 99 Pac. 466; *Bates v. San Pedro, L. A. & S. L. R. Co.*, 38 Utah, 569, 114 Pac. 527; *Brown v. Pacific Electric Ry. Co.*, 167 Cal. 204, 138 Pac. 1005.

The accident occurred at the intersection of Sycamore street with the railroad tracks, one of the principal crossings from the main portion to the eastern section of the town of Willows. The train which injured plaintiff was proceeding from the south, and he was crossing the main line from the west for the purpose of posting a letter on the mail car of the limited train, which had arrived from the north and was standing on a side track east of the main line. The mail car was in Sycamore street. The railroad station is south of Sycamore street, or rather its northern end projects about four feet upon the southerly part of that street; the station being on the west side of the railroad tracks.

At the place where the accident occurred there are four tracks. The first of these nearest to the station is designated as the "house track," the second is the main line, and the two others are side tracks. The west side of the house track is 12.5 feet from the east line of the station. The distance between the house track and the main track is 26 feet from center to center, and as the width of each track is from 4.8 feet to 4.9 feet, this would leave a space of a little more than 21 feet between the tracks. The sidewalk north of the depot on Sycamore street is 12 feet wide. Extending from the freight shed of the station almost to the house track is a platform for unloading freight. It is about the height of the floor of a freight car. From the north line of the depot to the steps that lead to this platform is 56.5 feet. Sycamore street is 80 feet wide. The side track on which the south-bound train was standing was 14 feet to the east of the main line.

[2, 3] The accident occurred about 4 o'clock in the afternoon. Mr. Chrissinger, a man 39 years of age, in perfect health, with normal

faculties of sight and hearing, rode on his bicycle to the curb near the north end of the station. He jumped off the bicycle and left it against the curb. When he reached the northeast corner of the depot he stopped. "When I got off my wheel," he testified, "I looked for an approaching train that might be coming. I looked both ways, and I saw no train other than the one that was standing there. I did not hear any train. I did not hear the whistle of any train, nor did I hear any bell. Then I stopped and looked both ways to see if I could see any train; then I started in the direction of the mail car; then I again stopped and looked to see if any train was coming and I did not see any train. I then started again for the mail car and I hadn't quite reached the mail car until the other train came and struck me. There was no noise of the train or any indication of the train coming. I never knew it was there until it was right onto me. I knew as soon as I struck the ground where I was. There was a string of box cars loading at the platform that came up almost to the door, and besides that there was two or three baggage trucks, loaded with trunks and sample cases that obstructed the view to the south. I couldn't see beyond the trucks at all. I was 50 or 70 feet north of the trucks. The train that struck me neither whistled nor rang a bell." Witness also said that he was 20 or 25 feet north of the south line of Sycamore street, northeast of the station when the accident occurred. The direction taken by him from the time he dismounted from the bicycle until he was struck was northeast. The baggage trucks, so plaintiff testified, were halfway between the house track and the main line track. Each was 3½ feet wide by 10 or 12 feet long. They were loaded with baggage so that it was 6 or 7 feet from the ground to the top of each load. Mr. Chrissinger is 5 feet 9 inches in height. He testified that in his opinion a car or engine is about 12 feet in height from the ground. The baggage trucks were north of the box cars at the loading platform, the north end of the northerly truck being about even with the door of the waiting room, which is about 22 feet from the north end of the station. Mr. Corbett, another witness, located these trucks at about the same place in which plaintiff said they were situated. He said: "These trucks were standing end to end lengthwise of the track north and south." The plaintiff gave another estimate of the locations of the two trucks, stating that one of them stood quartering, the northeast corner of it being a little in front of the box car and the southwest corner perhaps a foot or a foot and a half from the east rail of the house track, while of the other truck he testified:

"Truck No. 2 was almost all of it east of truck No. 1. I cannot tell you at all whether two-thirds or three-fourths of it or all of it was east of truck No. 1. I can't tell exactly the sit-

uation now. I have given it as well as I know how."

Continuing, he said:

"When I got to the house track I stopped and looked around, like I usually do when crossing the railroad. I couldn't say the exact place, or whether I had got past the house track, was about the time I crossed that track, then I looked again. Q. The box car was still in your way? A. Yes, sir. Q. And the trucks were still in your way? A. Yes, sir. Q. You could not see anything, then? A. No, sir."

We will not discuss the testimony of the other witnesses, as the plaintiff's own version of the accident was quite as favorable to his side of the case as that of any other witness.

The evidence fully justified the court's action in granting the motion for nonsuit. When plaintiff stopped at the northeast corner of the depot, looking south he could see the box cars, and the baggage trucks "and a little farther off the engine of the other train." When he had crossed the "house track" on his way to the mail car he saw the same things. As the engine of the south-bound train was south of the box cars and trucks and east of the main line, either he could look over the trucks or between the trucks and the box cars to the engine on the side track. If the trucks were standing in front of and north of the box cars they did not obstruct his view because he saw the engine of the south-bound train over them. If they were located "about the middle of the space between the first and second tracks" or, as witness Corbett said, "about six feet west of the main line, standing parallel with the track," then he had a clear view of the main line between the box cars and the trucks, and as the track was straight he might have seen an approaching train for a distance of many hundreds of feet. If the trucks were located partly in front of the box cars near the house track he had ample space between them and the main track to observe the approaching engine if he had looked. Respondents' counsel argues that, assuming the trucks with their loads to be 7 feet high, the engine of the north-bound train 12 feet high (these are plaintiff's own figures) and plaintiff's eyes 5 feet 5 inches from the ground (he being 5 feet 9 inches in height), and placing plaintiff 40 feet from the trucks, he could have seen the engine 166 feet away as he looked over the top of the trucks, at 50 feet he could have seen the engine 208 feet away, and at 60 feet he could have seen it 291 feet away. We think these deductions are not only logical, but inevitable from the testimony in the case, if we assume that the trucks would be directly in line between plaintiff and the north-bound train. In any view of the testimony we are forced to conclude that had plaintiff used the slightest care the accident would not have happened. True it is that we have his own statement that he looked and listen-

ed, but did not see or hear the approaching train, but where, as here, the established facts and conditions make it plain that by looking and listening he must have observed the approach of the train, his testimony that he looked and listened, but did not see or hear, is not enough to support a verdict in his favor. *Zibbell v. Southern Pacific Co.*, 160 Cal. 241, 116 Pac. 513.

[4] A person approaching a railway track, which is itself a warning of danger, must take advantage of every reasonable opportunity to look and listen.

[5] Undoubtedly the question of contributory negligence or freedom from it is ordinarily one for the jury, but where, as here, the standard of conduct is so obvious as to be applicable to all persons, and the plaintiff has failed to measure up to that standard under the circumstances shown, he is not entitled to have his case go to the jury. *Hamlin v. Pacific Electric Co.*, 150 Cal. 779, 89 Pac. 1109.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

27 Cal. App. 167

HOFFMAN v. GUY M. RUSH CO.
(Civ. 1633.)

(District Court of Appeal, Second District, California, April 14, 1915. Rehearing Denied May 12, 1915.)

1. TRIAL $\hookrightarrow$ 393 — FINDINGS — PRELIMINARY SERVICE — NECESSITY.

Where the record does not show that any directions were given that findings be prepared by plaintiff, it is not essential that any preliminary service on defendant of proposed findings shall have been made before the findings are signed by the judge even assuming that Code Civ. Proc. § 634, as amended by St. 1913, p. 58, providing that where a party is directed to prepare findings, a copy of same shall be served on all parties five days before the findings are signed is more than directory.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 920-923; Dec. Dig. $\hookrightarrow$ 393.]

2. BROKERS $\hookrightarrow$ 8 — COMMISSION — CONTRACT — GENERAL MANAGER OF CORPORATION'S BUSINESS — SUFFICIENCY OF EVIDENCE.

Evidence, in a broker's action for commission for services performed under contract, held to show that the contract was made with one who was the actual general manager of the defendant corporation's business.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 9; Dec. Dig. $\hookrightarrow$ 8.]

3. CORPORATIONS $\hookrightarrow$ 407 — GENERAL MANAGER — POWER TO CONTRACT.

The president and actual general manager of a corporation engaged in selling land was acting within the scope of his authority in employing a selling agent and agreeing that the corporation would pay for his services, though no resolution had been passed appointing him general manager.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1615-1619; Dec. Dig. $\hookrightarrow$ 407.]

Appeal from Superior Court, Los Angeles County; Charles Welborn, Judge.

Action by F. K. Hoffman against the Guy M. Rush Company. From judgment for plaintiff and denial of new trial, defendant appeals. Affirmed.

Walter L. Bowers, of Los Angeles, for appellant. John F. Poole, of Los Angeles, for respondent.

CONREY, P. J. Appeal by the defendant from the judgment and from an order denying its motion for a new trial.

There was no abuse of discretion by the superior court in refusing a continuance of the trial after denying the defendant's motion for nonsuit. The only witness proposed for defendant was not present. No subpoena had been served upon this witness, and on the showing made the court had legal authority to proceed without delay.

[1] The findings were signed by the judge without any preliminary service upon defendant of proposed findings. Assuming, without deciding, that the new provisions of section 634, Code of Civil Procedure, as amended in 1913, are more than directory, nevertheless the service of proposed findings was not required in this case, since the record does not show that the court gave any direction that findings be prepared by the plaintiff.

[2] The defendant corporation is a broker engaged in selling real property for commissions. The plaintiff's demand for which judgment has been entered was for compensation for services rendered to defendant in the course of its business. These services consisted in exhibiting to prospective purchasers real property which afterwards was sold by defendant to those purchasers. The complaint alleged that the defendant became indebted to the plaintiff for these services in a specified sum, which sum it was alleged that defendant agreed to pay. It is now contended that the evidence is insufficient to justify the findings, and particularly it is urged that there is no evidence to show any agreement made or indebtedness contracted by defendant.

The evidence is all contained in the plaintiff's testimony, including therewith certain papers identified by him. From this evidence it appears that Guy M. Rush, president of the corporation, at the office thereof, told the plaintiff that he did not want any salesmen, but wanted men to go out and advertise for him and solicit prospective buyers, and that he would pay a specified per cent. for people that they would sell to that plaintiff might get as prospects. He introduced the plaintiff to the sales manager, and the plaintiff went to work. Plaintiff showed property to a number of persons to whom sales were made. Mr. Rush kept a book in which reports of sales were set forth, and this book was made accessible to the plaintiff by direction of the president.

[3] As president of the corporation, if he was only that and nothing more, it may be conceded that Mr. Rush was without authority to bind the corporation by the contract pleaded in the complaint. *Pacific Bank v. Stone*, 121 Cal. 202, 53 Pac. 634. But the president of a corporation like the defendant, if he is also its general manager, would be acting within the scope of his authority in employing an agent such as the plaintiff and agreeing for the corporation as to payment for such services. "It is conceded law that in order to bind a corporation by his acts it is not necessary that any resolution should be passed appointing a general manager. It will be sufficient if it be shown that he was manager de facto." *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 386, 89 Pac. 86, 91. The evidence to which we have referred tended to prove that Guy M. Rush was the actual general manager of the defendant's business, and that on behalf of the corporation he employed the plaintiff. This evidence is not contradicted and is sufficient to sustain the finding in question.

The evidence is also sufficient to sustain the finding as to the amount due. The testimony was introduced in a very informal manner, and the witness gave as facts the results of his computations as to the amounts of the several commissions earned; for instance, he would say that the amount of his commission on a certain sale was so many dollars, and did not state the price at which the property was sold. But he had stated the percentages which he was to receive, and no objection was made to either questions or answers.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

27 Cal. App. 180

BENNETT v. DRULLARD et al. (Civ. 1669.)
(District Court of Appeal, First District, California. April 19, 1915.)

1. MUNICIPAL CORPORATIONS §57—POWERS—EXPRESS AND IMPLIED POWERS.

A municipal corporation possesses only the powers expressly conferred and the powers incidental to its existence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 144, 148; Dec. Dig. §57.]

2. MUNICIPAL CORPORATIONS §108—ORDINANCES—INITIATIVE PETITION.

Where a city charter dealing with the adoption of ordinances by initiative, used the singular "ordinance," and an initiative petition set forth an ordinance as an entirety and two alternative provisions, the petition could not be treated as containing three distinct ordinances, the last two being void, and thereby compel the submission to the voters of only the first ordinance, for the inclusion in the petition of the void alternative propositions rendered the entire petition void, there being no duty enjoined on the city council or clerk to eliminate the void portions and submit the balance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. §108.]

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Application for writ of mandate by Elbert R. Bennett against T. W. Drullard and others, the City Council and City Clerk of the City of Santa Cruz, to compel the submission to the electors of the city of a proposed ordinance. From a judgment denying relief, petitioner appeals. Affirmed.

Ralph Smith, of Santa Cruz, for appellant. J. Leslie Johnston, of Santa Cruz, for respondents.

PER CURIAM. This is an appeal from the judgment of the superior court of the county of Santa Cruz, denying the application of the appellant for a writ of mandate, directed to the city council and city clerk of the city of Santa Cruz, commanding them to submit a certain initiative ordinance to the electors of said city, to be voted upon by them at the next municipal election.

The ordinance referred to in the petition relates and purports to make unlawful the sale of alcoholic liquor in said city. Accompanying this proposed ordinance, which consists of several sections, and embraced in the same initiative petition, are two alternative propositions purporting to make certain changes in the form and effect of sections 6 and 7 of the main ordinance, and which the petitioners also seek to have submitted and voted upon at said election. The appellant's application for a writ of mandate to compel the submission of said initiative ordinance and of said alternative propositions was denied by the superior court, and, in the opinion of this court, was properly denied for the reasons which were set forth by the judge of said court in a written opinion accompanying the order denying the same, which opinion is hereby approved and adopted as the opinion of this court, and which reads as follows:

"On March 4, 1915, under the initiative provisions of the freeholders' charter of the city of Santa Cruz a certain petition was presented to and filed with the city clerk of said city, containing proposed legislation to be submitted to the electors of said city at the coming general municipal election on May 4, 1915. The city council and city clerk refuse to allow said proposed legislation to be placed upon the ballots. The petitioner now seeks to compel such action by mandamus.

"The initiative petition in question, after the preamble thereof, sets forth an ordinance in its entirety. The first section of the ordinance prohibits the sale of liquors, the keeping of any establishment for the sale thereof, or the taking of any orders therefor within the city of Santa Cruz. Section 2 enumerates certain exceptions. The sixth exemption is the keeping of liquors on the premises where manufactured, but the same must be sold and delivered outside of the city. The remaining sections of the ordinance pertain to matters incidental to its enforcement. Then follows what is designated as 'Alternative Proposition No. 1,' in the following words: 'You are also requested' and required to submit, to the electors of the city of Santa Cruz at said next general municipal election the question of the adoption of an alternative proposition herein-after stated; that said alternative proposition shall, if approved by a vote of the qualified electors at said election, be submitted for and take the place of paragraph 6 of section 2 of said ordinance; and said alternative proposition shall be submitted to the voters for their approval or rejection in the following form: 'Shall the alternative proposition designated as paragraph 6 of section 2, providing for the sale and delivery of alcoholic liquor by manufacturing establishments take the place of paragraph 6 of section 2 as set forth in the body of the ordinance?'

"Said alternative proposition is as follows: The substance of alternative proposition No. 1 is to exempt the sale of liquors in the city by the manufacturers thereof in quantities of not less than two gallons, and if delivered at the permanent residence of the person so purchasing. Following this is alternative proposition No. 2, with the request substantially in the same wording as the request preceding alternative proposition No. 1, and the substance of alternative proposition No. 2 is to exempt the sale of liquors in hotels and restaurants. The political reasons urged for and against the adoption of the ordinance and the alternative propositions then follow, and thereafter follow the

certificate of the elector and the jurat of the notary.

"It is conceded that the initiative petition has a sufficient number of signatures attached to it, but the refusal of the city authorities to place the same upon the ballot is based upon the following grounds: (1) That the ordinance therein set forth has no title. (2) That in said ordinance it is provided that the same shall not take effect until October 1, 1915, which respondents claim is in conflict with the charter provisions, which provide that initiative measures shall, if carried, go into effect as a valid and binding ordinance 10 days after the official count shall have been determined. (3) That said initiative petition contains matters, to wit, two so-called 'alternative propositions,' which render the whole petition void.

"The objection last above stated is the serious one, and the court will confine its decision to such point alone. The first question arising thereunder is whether or not the two alternative propositions are void, that is, are they in their present form authorized by law to be submitted under the initiative? Counsel for petitioner concedes that there is no provision of law authorizing the submission of such propositions, and he further concedes that they are probably void. There is no doubt of it in the mind of the court, and the same being void neither can go upon the ballot. But it is now claimed that said alternative propositions are in fact ordinances distinct in themselves, and that the initiative petition should be treated as containing three ordinances instead of one, and the last two being void, that the respondents should disregard them as being surplusage, and submit to the voters the part of the petition which might be valid. To allow this to be done would be to establish a precedent, first, that in one initiative petition may be contained several ordinances, even though they might be contradictory to each other; and, secondly, that before submitting to the people the legislation petition for, whether it is one or more ordinances, the municipal authorities must pass upon the petition for its illegal parts, and if in their opinion parts of it are void, that they should eliminate such parts and submit what is left to the voters.

[1, 2] The answer to all of these questions depends almost entirely upon the provisions of the city charter. It is agreed by the parties to this proceeding that the charter is a grant of the powers and not a limitation, so that no act can be legally exercised thereunder unless such act finds express authority in the charter itself, or is implied from some of its express terms. There can be no doubt of this rule. McQuillin on Municipal Corporations, vol. 1, p. 783, announced the rule as follows: 'A corporation being a mere creature of law, possesses only those properties which the charter confers upon it, either expressly or as incidental to its very existence.' The author further states: 'As relates to the exercise of powers it is generally regarded that corporations have none of the elements of sovereignty; that they cannot go beyond the powers granted them, and that they must exercise such granted powers in a reasonable manner. These are legal propositions which cannot be disputed.'

"On the first point, that is, the claim that an initiative petition may contain more than one ordinance, no provision of the city charter to that effect has been shown to the court, and after a somewhat exhaustive search the court has been unable to find any. On the contrary, in every section throughout the article of the charter dealing with the initiative the singular, 'ordinance,' is used, and there is nothing contained in said sections which gives the slightest encouragement to the claim of petitioner. But it makes no difference, so far as this court can see, whether said alternative propositions had a

legal or an illegal place in the initiative petition, because it is conceded, or virtually so, that in their present form they are void. Now the question is: Is there any duty specially enjoined upon the respondents to segregate the parts that are void from the parts that would otherwise be valid, and submit the valid parts to the voters? Indeed, have the respondents any lawful right at all to change the initiative petition in any manner whatsoever? This court believes that for both moral and legal reasons such duty or privilege does not exist.

"Here is a power granted unto the people, to propose their own laws for adoption, provided certain legal procedure be followed to properly place said laws before the voters. Assume, if you please, that certain features are included in such proposed laws or in connection therewith, which appealed to the voter, and in fact served as the controlling influence inducing him to sign the petition. Has he not the right to assume, and should not the law protect him in the assumption, that he will have the opportunity and right to vote for the matters which he has petitioned for? Or, shall the law permit the alteration of the measures which he has proposed and petitioned for, to the extent that he will be unable to recognize the same when he comes to cast his ballot? In fact, is not the whole theory of initiative legislation based upon the security that the legislation proposed and petitioned for by the people shall be voted upon at the polls by them without interference, revision, or mutilation by any official or set of officials? If the scheme of revision of initiative measures by city authorities be correct, as claimed by counsel for the petitioner, where is it going to end? It will undoubtedly result in a premium on fraud, because it will permit unscrupulous persons to secure signatures under false representations and pretenses, based upon matters incorporated in the petition, and it will give to city officials power to raise real or imaginary legal defects in laws about to be submitted to the people, and permit them to alter the same at will. If they have the right to eliminate any part of the proposed law contained in the petition, they also undoubtedly have the right to add to, change or revise them in any particular, and their ideas of the legality of such measures or parts of measures may be right or may be wrong, and they may be honest or they may be dishonest. Where is the limitation to be?"

"The court does not wish to be understood as saying that there has been the slightest misrepresentation or fraud in connection with the initiative petition under consideration. On the contrary, it believes that the utmost good faith and honesty of purpose have actuated every phase in connection therewith; but it desires to point out the dangerous precedent that will be established if it holds that initiative petitions can be altered in any manner after the same have been filed with the municipal authorities. It might be said, as claimed by the petitioner, that while the city officials have the power to eliminate a part of an initiative petition, which part is not an integral part of the ordinance therein set forth, or to strike therefrom a second or third ordinance, on the ground of the invalidity thereof, that they would have no power to alter the integral part of a complete ordinance therein set forth. But the answer to this is that whether they strike out a part of the petition, or make an amendment by revision, elimination or insertion, to a complete ordinance therein set forth, the people will thereafter vote on something that was not petitioned for, and therefore the result is exactly the same.

"In the present case the electors petitioned for and believed that they were going to have placed before the people measures by the terms of which the liquor traffic of the city of Santa Cruz would be regulated in a certain specified manner; and now, because certain parts of the petition are void, it is claimed that the municipality must place before the voters the remaining portion of the petition, which consists of an ordinance which would, if carried, regulate the liquor traffic in an entirely different way. To permit this would, in the opinion of the court, be manifestly unjust and unfair.

"Counsel for the petitioner has rightfully called to the court's attention the fact that the petition of hundreds of voters should not, except for strong legal reasons, be set aside. The court has been guided by this feeling throughout its consideration of these proceedings, and it feels that, were it to grant the writ as prayed for, it would be doing exactly that which counsel for the petitioner has requested the court not to do, because, were it to adopt any other conclusion than the one reached and hereinabove expressed, it would be directing something to be placed on the ballot which the hundreds of voters did not petition for at all, and it would necessarily follow that the court would be doing an unfair and an unjust act toward them.

"If the municipal authorities have the right to alter an initiative petition at all, as claimed by petitioner, they would have the authority, if they felt so inclined, after striking out the alternative propositions mentioned, to insert an amendment in the remaining original ordinance, whereby such ordinance would be given an entirely different character from the one they desired to have placed before the voters, and one which has not been petitioned for at all. Would counsel for petitioner then say that such action on the part of the municipal authorities would be legal or fair? And yet the principle involved is to all intents the same. That it was the intention of the framers of the charter to prevent any change being made in initiative petitions after they were filed with the municipal authorities, is conclusively shown by the provision in the charter which absolutely forbids it in the following words: 'It [the council] must either adopt or enact such measure without alteration, or submit the same to the electorate.'

"Initiated legislation is practically of recent origin, and there have been but few Supreme Court decisions rendered upon it. Therefore, in its consideration of the question here involved the court has had no opportunity to be guided by court precedents; but in the absence of such it has tried to base its decision upon its own ideas of the principles of justice and fairness. As above stated, the whole theory of direct legislation, as the court understands it, is that the people have the right to propose their own laws, and to vote upon them as proposed, without having the same altered in any manner whatever by any person or persons whomsoever. * * *

"The court's conclusions are: (1) That the so-called alternative propositions are void. (2) That their inclusion in the petition renders the entire petition void. (3) That there is no duty specially enjoined by law upon the council or the city clerk to eliminate the parts of the petition that are void and submit to the electorate the remainder of the petition. (4) That the council and the city clerk have no authority whatever to alter the petition."

For the foregoing reasons the judgment is affirmed.

27 Cal. App. 197

STOCK et al. v. THIELE. (Civ. 1455.)

(District Court of Appeal, First District, California. April 20, 1915.)

CONTRACTS $\Leftrightarrow$ 319—BUILDING CONTRACT—DESTRUCTION DURING WORK.

Where a building contract required the owner to pay the contractor 75 per cent. of the contract price as the work progressed and 25 per cent. 35 days after the completion of the work, and provided that in case the work should be destroyed by earthquake the loss should be sustained by the owner to the extent that he had paid installments thereon or that might be due, and by the contractor for the uncompleted portion of the work on which he might be engaged at the time of the loss and for which no payment was yet due, the contractor was entitled to payment for 75 per cent. of the contract price of the work done by him from day to day, and in case of loss by earthquake could recover only 75 per cent. of the value up to that time.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1458, 1476, 1477, 1479, 1493-1507; Dec. Dig. $\Leftrightarrow$ 319.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Frank Stock and another against F. C. Thiele. Judgment for the plaintiffs, and defendant appeals. Reversed.

C. M. Fickert, of San Francisco, for appellant. H. E. Wilcox and D. M. Burnett, of San Jose, for respondents.

PER CURIAM. This is an appeal by the defendant from an order denying his motion for a new trial in an action brought by the plaintiffs in the form of the common count for labor performed and materials furnished, and in which the plaintiffs recovered judgment.

It will be necessary for us to pass upon but one of the points discussed in the briefs. The plaintiffs, being copartners, by a written contract with the defendant, undertook to do the plumbing work on a certain building in Palo Alto, and were engaged upon said work when the building was destroyed by an earthquake, and the question for determination is as to whether or not, under the terms of the contract, they are entitled to recover a judgment against the defendant for the full value of the work already done at the time of said destruction, or only the proportion thereof for which payment was at that time due. The answer to this question depends upon the construction to be given to clauses 5 and 12 of the contract. Those clauses read as follows:

"(5) The owner agrees to pay to the contractor the sum of \$3,495 at the time and in the manner following, to wit: Seventy-five per cent. of said \$3,495 as the work progresses; twenty-five per cent. of the said \$3,495 thirty-five days after acceptance of the work."

"(12) In case said work herein provided for should, before completion, be wholly destroyed by earthquake or other acts of God, then the loss occasioned thereby shall be sustained by the owner to the extent that he has paid installments thereon, or that may be due under the

fifth clause of this contract, and the loss occasioned thereby, and to be sustained by the contractor, shall be for the uncompleted portion of said work upon which he may be engaged at the time of the loss and for which no payment is yet due under said fifth clause of this contract."

While the contract contained no provision for specific periodical payments, no doubt payments were made as the building progressed, although under the terms of the contract the plaintiffs were entitled to be paid 75 per cent. of the value of the work performed as fast as it progressed and from day to day. A contract identically like this one was before this court in the case of Hettinger v. Thiele, 15 Cal. App. 1, 113 Pac. 121, and the court, referring to the paragraph here under review, said:

"It was intended that as the work was performed by the contractor he should be entitled to 75 per cent. of the value of the work so performed, measured by the contract price; that is, for example, when the contractor had placed materials and labor in the building in accordance with the plans and specifications of the value of \$1,000, he should be entitled to a payment of \$750, and so on from time to time. As the work progressed, and as fast as it progressed and from day to day, the contractor was entitled to 75 per cent. of its value. Of course, it would have been unreasonable for the contractor to have claimed and demanded the amount due from day to day, and insisted upon the architect giving him a certificate from day to day as to the amount that had become due. It must be presumed that the parties intended the contract to be reasonably construed, and that with such view the contractor would only require payment to be made at reasonable intervals as the work progressed, so as to enable him to pay for his materials, and to pay the wages of carpenters and artisans employed by him. In fact, this must have been the course pursued, because no question appears to have been made as to the payment of installments up to the time of the earthquake, which payments amounted to \$8,800. The twelfth clause of the contract makes provision for loss in case the building should be wholly destroyed by earthquake. * * * The provision as to the loss shows that in case the building should before completion be wholly destroyed, the parties intended that the owner should lose all payments that he had made to the contractor and all the sums that had become due under the contract. On the other hand, the contractor was to lose all sums that had not become due for the uncompleted portions of the work."

According to testimony offered on behalf of the plaintiffs, there was \$2,021.25 worth of work completed under the contract at the time of the destruction of the building, which would leave the plaintiffs, under the fifth and twelfth clauses of the contract, 75 per cent. of that amount, or \$1,515.94, and deducting the sum of \$1,500, which plaintiffs admit the defendant has paid on account of the work, the former are entitled not, as they claim, to \$515.94, but to \$15.94.

The specification of the particulars wherein the evidence is insufficient to justify the decision are amply sufficient. Nor is there any substantial merit in the attempted distinction between this case and the case above quoted from—which perhaps is the reason

that the point here raised was not made in that case.

The order denying defendant's motion for a new trial is reversed.

27 Cal. App. 191

LEAVELL v. SUPERIOR COURT OF PLACER COUNTY et al. (Civ. 1383.)

(District Court of Appeal, Third District, California. April 19, 1915.)

1. JUSTICES OF THE PEACE ⇨174—TRIAL DE NOVO—DEMURRER—RIGHT TO ANSWER AFTER OVERRULING OF DEMURRER.

Under Code Civ. Proc. § 472, providing that, when the demurrer to a complaint is overruled, and there is no answer filed, the court may upon such terms as may be just allow an answer to be filed, a superior court may deny defendant the privilege of answering after his demurrer has been overruled.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 665-693; Dec. Dig. ⇨174.]

2. JUSTICES OF THE PEACE ⇨188—JUDGMENT—CONFORMITY TO PLEADINGS—FAILURE TO DISPOSE OF ISSUE OF LAW.

On an appeal to the superior court from a justice court, an amended complaint was filed to which a demurrer and a motion to strike was interposed, which came on regularly for hearing and were submitted. The court filed a decision making no mention of the demurrer or motion, but reciting that no reason was apparent why the contract sued on should not be enforced, and directing that judgment be entered in conformity with the prayer of the complaint, and judgment was entered for plaintiff for the amount sued for. *Held* that, if it was the intention of the court to overrule the demurrer and deny defendant the privilege of filing an answer, such intention should have been expressed in the order, and, there being nothing to show any disposition of the issue raised by the demurrer or motion, the judgment should be annulled.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 721-725, 733; Dec. Dig. ⇨188.]

3. PLEADING ⇨222—DEMURRER—RIGHT TO ANSWER AFTER OVERRULING OF DEMURRER.

Where, after a demurrer and a motion to strike are overruled, defendant asks leave to file an answer, and the court has reason to believe that he is acting in good faith, permission to file an answer ought to be granted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 570-574; Dec. Dig. ⇨222.]

Action by the Placer County Growers' Canning Association against Louis L. Leavell. There was a judgment for plaintiff, and defendant brings mandamus to compel its setting aside. Judgment annulled.

Hughes & Bradford, C. B. Harris, and Harry J. Gray, all of Sacramento, for petitioner. W. H. Carlin, of Marysville, and A. E. Clark, of Lincoln, for respondents.

BURNETT, J. An action was originally commenced in the justice court of No. 10 township in Placer county by the Placer County Growers' Canning Association against said Leavell to recover the amount of one call or installment alleged to be due upon a subscription to said association's capital stock, and plaintiff therein recovered judg-

ment for the sum of \$50. Thereafter said defendant appealed to the superior court of said county upon questions of both law and fact. Afterward, by permission of said court, the plaintiff filed an amended complaint. To this a demurrer was interposed, and also a motion to strike out portions of said complaint. The record shows that the demurrer and motion to strike out came on regularly for hearing on April 16, 1914, and were ordered submitted on briefs. The briefs were filed, and on July 21st following the court filed its decision, which, as far as is in point, was as follows:

"No reason is apparent why the contract subscribed by the defendant should not be enforced according to its terms. The contract is plain, distinct, lawful, and in every way enforceable according to its import. Let judgment be entered in conformity with the prayer of the complaint."

On the same day the judgment was entered as follows:

"In accordance with and by virtue of an order made by this court in the above-entitled action on the 21st day of July, 1914, it is hereby ordered and adjudged that plaintiff, Placer County Growers' Canning Association, do have and recover of and from defendant, Louis L. Leavell, the sum of \$50, together with plaintiff's costs and disbursements," etc.

It is the contention of petitioner that respondent had no authority to render judgment on the merits without having disposed of the demurrer. It is not disputed that the demurrer presented an issue of law which it was the duty of the court to determine, and that the adjudication of that issue was a jurisdictional prerequisite to the determination of the cause upon its merits. It is, however, the claim of respondent that the order made by the court was, in effect, an order overruling the demurrer and denying defendant permission to answer, and therefore within its jurisdiction.

[1] That a superior court has legal authority to deny a defendant the privilege to file an answer after he has interposed a demurrer, and it has been overruled, cannot be disputed. Section 472 of the Code of Civil Procedure provides that:

"When the demurrer to a complaint is overruled and there is no answer filed, the court may, upon such terms as may be just, allow an answer to be filed."

In *Borland v. Thornton*, 12 Cal. 440, the court below overruled a demurrer to the complaint, and on proof made rendered judgment in favor of plaintiff, and appellant contended on appeal that he should have been allowed to put in an answer. The Supreme Court, however, Judge Field rendering the opinion, said:

"The reply to the objection is found in the statute" [quoting the corresponding section of the Practice Act]. "The allowance rests in the discretion of the court below, subject to review, of course, in case of its arbitrary or unreasonable exercise."

[2] The trouble here is, though, that said order is entirely silent as to the demurrer.

No reference is made to it, and, although we may suspect that it was the intention of the learned trial judge to overrule said demurrer and withhold from defendant the privilege of filing an answer, such intention, if it existed, should have been expressed, we think, in the formal order. We can, of course, consider only the record as presented, and we look in vain for any mandatory disposition of said issue of law. To hold that the language used was sufficient for the purpose would be to encourage an unwarranted invasion of the right of litigants to demand reasonable certainty in judicial proceedings to the end that prescribed methods of redress may not be obscured or destroyed, and that complete justice may be effected. It is, of course, no answer to say that the result would have been the same if the court had expressly overruled the demurrer and directed the default of defendant. The question is not what the final result would be, but, rather, whether the court has followed the steps required by the law in reaching that result.

While no case directly in point has been called to our attention, *Null v. Superior Court*, 4 Cal. App. 207, 87 Pac. 392, and *Kraker v. Superior Court*, 15 Cal. App. 651, 115 Pac. 663, are instructive as to the general principle involved. In the former it was held that:

"The superior court has no jurisdiction to try a case de novo on appeal from the justice court, where no issues of fact have been tried in the justice's court. If the only question presented is one of law as to the jurisdiction of the justice's court, it is the duty of the superior court to affirm or reverse the decision, and, if reversed, to remand the case for trial upon the issues of fact; and, where it has improperly tried such an appeal de novo and rendered judgment thereon, its judgment will be annulled upon certiorari if it is not made to appear that the judgment rendered was voluntarily paid by the defendant."

In the latter case it was held that:

"Where a judgment rendered in the justice's court against the defendant was appealed by the defendant to the superior court on questions of law and fact, the dismissal of the appeal for want of prosecution by the appellant and the rendition of the judgment appealed from in favor of the respondent without trial, was in excess of the jurisdiction of the superior court, and its action will be annulled on certiorari."

[3] The conclusion we have reached leaves the cause pending in the trial court with the demurrer and motion to strike out undisposed of. If the decision as to these should be against defendant, no doubt the court will carefully consider the propriety of permitting him to file his answer; which, it appears, he sought leave to present after said judgment was rendered against him. If the court has reason to believe that he is acting in good faith, such permission, of course, ought to be granted, that the cause may be fully tried upon its merits.

We think the said judgment should be annulled; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

27 Cal. App. 170

D. H. & M. A. EDWARDS CO. v. BARRY
et al. (Civ. 1470.)

(District Court of Appeal, First District, California. April 19, 1915.)

1. MECHANICS' LIENS ↔ 315—BOND OF CONTRACTOR—LIABILITY OF SURETY.

A bond executed by a contractor, which requires as a condition of liability thereon that liens by the statutes of the state where the contract is to be performed shall be valid liens, does not require, to hold the surety liable, to establish liens by litigation to judgment.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 658; Dec. Dig. ↔ 315.]

2. MECHANICS' LIENS ↔ 315—BOND OF CONTRACTOR—LIABILITY OF SURETY.

Where a surety of a building contractor abandoning the work authorized the owner to complete the building and to settle all claims for labor or material, the surety authorized the owner to adjust all just and legal claims against the property, whether they had ripened into actual liens or not.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 658; Dec. Dig. ↔ 315.]

3. MECHANICS' LIENS ↔ 315—BOND OF CONTRACTOR—LIABILITY OF SURETY.

Where a surety of a building contractor abandoning the work authorized the owner to complete the building and to settle all claims for labor or material approved by the representative of the surety, but the representative refused to co-operate in the settlement of claims, the owner could adjust all claims and hold the surety liable therefor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 658; Dec. Dig. ↔ 315.]

Appeal from Superior Court, City and County of San Francisco; Henry C. Gesford, Judge.

Action by the D. H. and M. A. Edwards Company against W. P. Barry and another. From a judgment for plaintiff, defendant United Surety Company appeals. Affirmed.

Henry A. Jacobs, of San Francisco, for appellant. Marshall Nuckolls, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff and against the defendant and appellant United Surety Company, a corporation. The facts, which are mainly undisputed, are briefly these: One W. P. Barry entered into a contract with plaintiff to construct a certain building in the city and county of San Francisco, for which he was to be paid the sum of \$8,400 in installments as the work proceeded according to the terms of his contract. Barry began the work of constructing the building, but after he had proceeded with such work for some time, and had received payments in accordance with the contract aggregating the sum of \$4,500, he abandoned the construction of the building, and formally notified the plaintiff thereof by letter. Thereupon the plaintiff and the representative of the surety company held several conferences, as the result of which the latter wrote the plaintiff a letter reciting the fact of Barry's abandon-

ment of his contract, waiving its right under its bond to assume said contract and complete said building, and consenting and agreeing that the plaintiff might proceed to complete the structure, and in so doing expend such reasonable sums as were necessary according to the plans and specifications, and no more. The United Surety Company also in this letter agreed to allow the plaintiff the sum of \$500 for its services in completing the building, and for the services of its attorney in connection therewith and in the settlement of claims against it, and further agreed to co-operate with plaintiff and its attorney in the settlement of all such claims for labor and material then filed or thereafter to be filed against the building, on the lowest possible reasonable basis, stipulating that all settlements must be presented to and passed upon and approved by Mr. Nuckolls, the attorney of plaintiff, and Mr. Robinson, the representative of the surety company, it being expressly understood and agreed that in the settlement of such claims for labor and material the surety company should not be held responsible for a sum exceeding \$1,600. Acting upon this letter, plaintiff undertook the completion of the building, and, with its said attorney, entered upon the endeavor to adjust the claims of a considerable number of mechanics and materialmen who had filed their claims of lien against the structure. When the time arrived for the adjustment of these claims, Mr. Nuckolls, acting as the attorney for the plaintiff, notified Mr. Robinson, the representative of the surety company, that he was ready to adjust said claims, and requested his co-operation; but Mr. Robinson refused to co-operate with Mr. Nuckolls in the adjustment and settlement of said claims, and expressly instructed him "to take any action he might deem proper." Thereupon the plaintiff and Mr. Nuckolls proceeded to adjust, compromise, and settle said claims, expending therefor the sum of \$2,500; and, having completed the structure, the plaintiff rendered a report and account of the same to the United Surety Company, showing the items of its expenditure, and that there was a net deficit of \$1,057.42, which it required the surety company to pay. This the latter refused to do, and thereupon the plaintiff commenced this action to recover said sum. The court gave judgment in favor of the plaintiff for the sum of \$939, from which judgment the defendant United Surety Company prosecutes this appeal.

The appellant in its brief upon appeal presents a number of points, in which it is contended that the court erred in the admission of evidence and in its findings of fact. When examined these several contentions refine themselves down to the single substantial point that the plaintiff failed to prove that

the several claims of mechanics and materialmen which it had compromised and settled were in fact valid liens against the property. The contention of the appellant in this regard is that the only way in which the claims of such mechanics and materialmen could be established to be valid liens was by their litigation to judgment, and that under its bond it was only required to pay such liens as had thus been judicially determined to be valid.

[1, 2] An examination of the bond given by the appellant will show that it does not go so far, but only requires as a condition of the obligor's liability that the liens, "by the statutes of the state where the contract is to be performed, are valid liens." In addition to this, however, the court is of the opinion that the United Surety Company, in its agreement authorizing the plaintiff to proceed with the completion of the building, and to settle "all claims for labor or material now filed or hereafter to be filed," expressly authorized said plaintiff to make adjustment of all just and legal claims against the property, whether or not they had ripened into actual liens; for the evident desire of the surety company then was to effectuate an adjustment of their liability as quickly and as economically as possible, rather than to have prolonged an expensive litigation. The fact that its representatives changed their mind in this regard thereafter cannot rob their earlier agreement of its evident purpose and effect.

[3] In respect to the proofs in the case, we think the evidence offered on the part of the plaintiff shows that the only claims and liens settled by plaintiff or its attorney, acting under the surety company's authorization, were valid claims and liens. The appellant's objection that the claims and liens which the plaintiff and its attorney adjusted and settled were not first passed upon and approved by the representative of the surety company as its agreement provides is answered by the plaintiff's proof that, when these claims and liens were in shape for such adjustment and settlement, the representative of the surety company was notified of that fact, and his co-operation requested, but that he declined to act in the premises, or co-operate in any way in the settlement of the claims, but, on the other hand, instructed the attorney for the plaintiff to "take any action he might deem proper." This being its attitude then, the appellant cannot now be heard to complain that this portion of its agreement was not carried into effect.

We discover no error in the record.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

27 Cal. App. 194

OLCOVICH v. DEREMBERG. (Civ. 1500.)
(District Court of Appeal, First District, California. April 20, 1915.)

1. FORCIBLE ENTRY AND DETAINER—24—DESCRIPTION IN LEASE—SUFFICIENCY.

In an action of unlawful detainer, defendant alleged that the lease sued upon was void because it described the premises as a building on the southwesterly line of the two intersecting streets. The building was, in fact, situated on the southwest corner of such streets. *Held*, that the word "line," in the description, was erroneously used for "corner," and that, when correctly read, the lease was valid and sufficient to support the action.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 107-111, 114-120, 146; Dec. Dig. 24.]

2. LANDLORD AND TENANT—291—UNLAWFUL DETAINER—JUDGMENT—RENT.

In unlawful detainer plaintiff is entitled to a judgment not only for the rent due when suit was commenced, but for rent that has accrued up to the time of the judgment.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1217-1241, 1243-1263; Dec. Dig. 291.]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Herman Olcovich against Fredrika Deremberg. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. Hoff Cook, of San Francisco, for appellant. Denson, Cooley & Denson, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal in an action of unlawful detainer, in which judgment was rendered for plaintiff for restitution, cancellation of lease, and \$500 for rent, costs, and \$100 attorney's fees.

The main point relied upon by the defendant for a reversal of the judgment is that the lease sued upon is void by reason of an impossible description therein, and that until it shall have been reformed by an independent equitable action therefor the summary proceeding of unlawful detainer cannot be maintained.

[1] The premises are described as a certain building "on the southwesterly line of California and Larkin streets," in San Francisco. Taking judicial notice, as we may, of the streets in San Francisco, and of the direction in which they run, we know there is no southwesterly line of California and Larkin streets. The defendant, however, was able to find and take possession of the property intended to be covered by the description, and continued in possession until ousted by this proceeding, paying rent therefor during a portion of the time according to the terms of the indenture of lease. It is plain that the description of the premises is marred by a mere clerical error, and, if we substitute the word "corner" for "line," we have a correct description of the premises involved. That the parties intended the word

"line" to be "corner" is too plain to need argument; for the description, when read as a whole, shows the fact to be that the premises dealt with by the parties are situated on two streets, Larkin and California, and on the southwest corner thereof. Following the suggestion contained in the cases, it is apropos to say that, since the description was sufficient to enable the defendant to take possession of the property, and to continue therein and pay rent therefor during six months, it ought to be sufficient to enable him to know what property the plaintiff demanded that he surrender. The description afforded him sufficient information to find his way in, and it certainly ought to be deemed sufficient to enable him to find his way out, and we so hold. *Pierce v. Minturn*, 1 Cal. 470; *Bulkley v. Devine*, 127 Ill. 406, 20 N. E. 16, 3 L. R. A. 330; *McLennan v. Grant*, 8 Wash. 603, 36 Pac. 682; *Whipple v. Shewalter*, 91 Ind. 114; *Hoyle v. Bush*, 14 Mo. App. 408; *Weaver v. Shipley*, 127 Ind. 526, 27 N. E. 146; *Jackson v. Perrine*, 35 N. J. Law, 137; *Richards v. Snider*, 11 Or. 197, 3 Pac. 177.

[2] The record is not very clear as to the next point. Certain it is, however, that in a proceeding of this kind the plaintiff was entitled to a judgment not only for the rent that was due when the suit was commenced, but also for the rent that had accrued up to the time of judgment. Moreover, if the answer may be regarded as putting in issue the question of payment of the rent demanded, it is equally certain that there is nothing in the lease, as appears to be claimed by defendant, to show that the plaintiff had in his hands money belonging to the defendant or any one else which he might apply in payment of the rent for the period covered by the judgment.

The judgment awards to the plaintiff an attorney's fee of \$100, taxed as costs. This was in accordance with an express provision of the lease; hence we see no merit in defendant's objection to the same.

The judgment is affirmed.

We concur: **LENNON, P. J.; RICHARDS, J.**

27 Cal. App. 174

ELSON et al. v. NEFF et ux. (Civ. 1463.)
(District Court of Appeal, First District, California. April 19, 1915.)

1. EVIDENCE—434—PAROL EVIDENCE AFFECTING WRITINGS—FRAUD—MISTAKE.

An answer which alleges that the plaintiff knew of the mortgage on chattels for which defendant gave a bill of sale warranting the title free from incumbrances, that plaintiff prepared the bill of sale, and that defendant did not know that the clause of warranty was therein at the time he signed it, does not allege such fraud or mistake as renders admissible parol evidence to vary the bill of sale.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2005-2020; Dec. Dig. 434.]

2. APPEAL AND ERROR **↪882—INVITED ERROR.**

Where plaintiff, on cross-examination of the defendant, elicited evidence as to the warranty of title contained in a bill of sale after his objection to such evidence had been sustained, he cannot on appeal for the first time object to the court acting on such evidence, even if the defendant's answer was insufficient to show fraud or mistake which rendered it admissible, since he chose to treat the answer as raising that issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. **↪882.**]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Mary A. Elsom and another against W. T. Neff and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

W. Goodwin Williams, of Stockton, and W. M. Gardner, of Santa Cruz, for appellants. C. M. Cassin, of San Jose, and J. L. Johnston and W. P. Netherton, both of Santa Cruz, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants for the sum of \$495.40 upon their cross-complaint in an action brought by the plaintiffs to recover damages for certain alleged breaches of the covenants of certain agreements in writing between the parties in the course of an exchange of properties. The facts attending the execution of these agreements are substantially these:

During the year 1912 plaintiffs, being the owners of certain real property in the county of Santa Cruz, where they resided, and the defendants, being the owners of certain real and personal property in the county of Modoc, where they also resided, undertook to make an exchange of their respective properties, in the course of the consummation of which several written documents were contemporaneously executed. The plaintiffs transferred by grant deeds to the defendants their real properties in Santa Cruz county, and the defendants transferred to plaintiffs by like deeds, which also contained express warranties against incumbrances, their real properties in Modoc county, and also at the same time executed and delivered to the plaintiffs their bill of sale, transferring to the plaintiffs certain personal property, consisting of stock and farming implements, which were to be included in the exchange. They also executed and delivered to plaintiffs a written order upon a mill in Modoc county for lumber to the value of \$350. At the time of the execution of these instruments two mortgages were in existence and of record upon the real property which the defendants were transferring to the plaintiffs, amounting to \$5,500 which mortgages by the terms of the conveyance the plaintiffs assumed and agreed to pay to the extent of said sum. The plaintiffs also paid to the defendants the

sum of \$500, and executed an agreement in the form of a note, by the terms of which the plaintiff William M. Elsom promised to pay the defendant William T. Neff the further sum of \$1,000, less such an amount as would be necessary to reduce all the incumbrances upon the real property deeded by defendants to plaintiffs to the aforesaid amount of \$5,500. At the time of the execution of these several documents there were two chattel mortgages existing and of record upon the stock and farming implements transferred by the defendants to the plaintiffs, and which aggregated the sum of \$1,329.29. No mention of these mortgages is made in the writings by which the exchange of properties was consummated, but in the bill of sale transferring these personal properties to the plaintiffs there is a clause by which the defendants covenant and agree "to warrant and defend the sale of the said property, goods, and chattels unto the said party of the second part against all and every person and persons lawfully claiming or to claim the same."

The exchange of their respective properties having been consummated by the foregoing instruments, the respective parties went into possession of their acquired holdings in May, 1912. About a year later the plaintiffs brought this action to recover damages in the sum of \$3,759.05 for the alleged breach of the written covenants and agreements of the defendants in the aforesaid exchange of properties, setting forth fully in their complaint the several instruments, and averring that the defendants had been guilty of certain fraudulent acts and concealments with respect to the condition of said properties, and particularly of the existence of the chattel mortgages upon the personal property, which facts the plaintiffs aver they did not discover until after the consummation of the exchange, and the existence of which prevented their disposition of the larger portion of the personal property aforesaid. It is alleged that these chattel mortgages were still in existence at the time said action was brought, and that the defendants had failed, refused and neglected to pay off the same. Plaintiffs also alleged that the order for lumber which they had taken in the course of the exchange had been refused at the mill upon which it was drawn, to their detriment in the sum of \$350.

The defendants in their answer admitted the main allegations of the plaintiffs' complaint with reference to the details of the said exchange, but denied that there was any fraud upon their part, and averred that the plaintiffs not only knew and were informed as to the existence and substantial amount of the chattel mortgages upon the personal property, but also that the plaintiffs verbally agreed to assume the same; and as to the clause of warranty in their bill of

sale the defendants averred that the said bill of sale was prepared under the supervision and by the direction of the plaintiff William M. Elsom, and that the defendants did not know of the existence of said clause in that document at the time they signed it, and that the fact of the existence of said clause of warranty therein did not become known to them until the commencement of this action. As to the alleged failure of the mill to accept their order, the defendants denied the fact, and alleged that the said order was without consideration and that it was a mere gratuity to the plaintiffs. They also denied the existence of any defects in the other personal property, and further denied any fraudulent acts or intention on their part throughout the entire transaction. The defendants further presented their cross-complaint, setting up the note which the plaintiffs had given for the sum of \$1,000, and praying judgment for the balance alleged to be due thereon.

Upon the trial of the cause before a jury upon the issues as thus presented, the plaintiffs introduced in evidence the several conveyances and other documents referred to in their complaint; and the plaintiff W. M. Elsom testified quite fully as to the various interviews of the parties leading up to the exchange of their properties, and also testified to the fact that he was unaware of the existence of the mortgages upon the personal property until some time after the transaction was consummated.

When the plaintiffs rested their case the defendants undertook to offer evidence tending to show that the plaintiffs had known of the existence of the chattel mortgages upon the personal property prior to the making of the bill of sale thereof to them, and that they had orally agreed to assume and pay the obligations which these mortgages secured. This testimony was chiefly given by the defendant William T. Neff and was admitted without objection. Thereupon the witness Neff was asked the question on direct examination as to whether he understood that he was warranting that there was no incumbrance upon the personal property at the time he executed the bill of sale, and whether he knew of or noticed the guaranty clause in the bill of sale at the time he signed the same. To these questions the plaintiffs offered an objection, which the court sustained, and the subject was not returned to during the further direct examination of the witness W. T. Neff, nor was it adverted to during the examination of any other witness for the defendants. Upon the cross-examination of the witness W. T. Neff, however, counsel for the plaintiffs took up the subject, and directing the attention of the witness to that portion of the defendants' answer in which they averred that the guaranty clause in the bill of sale was overlooked by and was unknown to them at the time it was signed, undertook to question the said witness W. T. Neff fully

and searchingly as to the truth of that averment, and as to his alleged mistake in supposing that the bill of sale contained no such warranty. In response to the questions asked on this cross-examination the witness W. T. Neff testified as to the existence of such mistake on his part, and as to the fact that no such guaranty was intended by any of the parties to the transaction.

The jury returned a verdict against the plaintiffs upon their several causes of action, and in favor of the defendants upon their cross-complaint. The court adopted the verdict of the jury, and then proceeded to make its findings covering the issues in the case; and in so doing found that the plaintiffs knew of the existence of the chattel mortgages upon the personal property embraced in the bill of sale, and that they had agreed to assume the same, and that the warranty clause in the bill of sale was mistakenly inserted, and that the defendants were unaware of its presence therein at the time of its execution, and hence were not bound by it. The court also found in favor of the defendants upon their cross-complaint, and accordingly rendered judgment in their favor for the sum of \$495.40.

The chief insistence of the plaintiffs and appellants in this court is that the trial court erred in the admission of oral evidence tending to vary the written agreements between the parties effectuating the exchange of their properties, and in making its findings and rendering its judgment in accordance with such oral evidence. This contention of the appellants is explicitly directed at the testimony of the witness W. T. Neff as to the oral understandings of the parties respecting the existence and assumption by the plaintiffs of the chattel mortgages upon the personal property covered by the defendants' bill of sale, and as to the mistake of said defendants in overlooking the guaranty clause in the said bill of sale at the time they signed it, and it is also explicitly directed at the findings and judgment of the court in accordance with such testimony.

[1, 2] Had this oral evidence been elicited by the defendants and admitted by the court over the plaintiffs' objection, their contention as to the court's errors in its admission and adoption would doubtless have been sustained upon this appeal; and this for the reason that the portions of the defendants' answer which refer to the subject are quite insufficient to raise an issue as to whether the clause in the bill of sale guaranteeing the title to the personal property was inserted therein or was signed by the defendants through any such fraud or mistake in law or fact as would have entitled the defendants to offer oral testimony establishing such fraud or mistake, and entitling them to be relieved of the effect of their written guaranty. But the difficulty with appellants' contention is that this entire line of testimony

was elicited by themselves upon their cross-examination of the witness W. T. Neff, and after their own objection to the same testimony sought to be elicited from said Neff upon his direct examination had first been sustained and then withdrawn. Apparently the plaintiffs proceeded upon the theory that the defendants' answer in regard to these matters did raise an issue; and having proceeded upon this theory, and having themselves elicited practically all of the oral evidence which the record contains upon the subject, the plaintiffs are in no position to urge for the first time in this court that either the jury in its verdict or the court in its findings and judgment could not adopt and act upon this evidence, even though its effect was to vary the terms of the bill of sale in respect of the defendants' guaranty of the title to the personal property covered by it. In the case of *Shroeder v. Mauzy*, 16 Cal. App. at page 447, 118 Pac. at page 461, the court says:

"It has been repeatedly held in this state that where the trial court and the parties to an action proceed to a trial of the cause upon the theory that there is a material issue, and the court, upon evidence addressed to that issue and received without objection, finds in accordance with that evidence and upon the theory that an appropriate issue was raised by the pleadings, 'the parties will not, nor will either of them, be allowed here for the first time to say there was no such issue.' *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. 186; *Ortega v. Cordero*, 88 Cal. 221, 26 Pac. 80; *Murdock v. Clarke*, 90 Cal. 427, 27 Pac. 275; *Klopper v. Levy*, 98 Cal. 525, 33 Pac. 444; *Rudel v. Los Angeles Co.*, 118 Cal. 281, 50 Pac. 400; *Barbour v. Flick*, 126 Cal. 628, 59 Pac. 122; *McDougald v. Hulet*, 132 Cal. 154, 163, 64 Pac. 278; *Krasky v. Wollpert*, 134 Cal. 338, 66 Pac. 309; *Carroll v. Briggs*, 138 Cal. 452, 71 Pac. 501; *Roberts v. Sierra R. Co.*, 14 Cal. App. 180, 111 Pac. 519 [27]."

This is practically the only point in the case. The judgment and order denying the motion for a new trial are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

*7 Cal. App. 187

BAILLARGEON v. MYERS. (Civ. 1541.)
(District Court of Appeal, Second District,
California. April 19, 1915.)

1. MUNICIPAL CORPORATIONS ☞705—INJURIES FROM NEGLIGENT DRIVING—PROXIMATE CAUSE.

While it is negligence per se to drive on the left-hand side of a street in violation of a municipal ordinance, a person so driving was not liable for injuries to plaintiff, unless such negligence was the proximate cause of such injury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515-1517; Dec. Dig. ☞705.]

2. MUNICIPAL CORPORATIONS ☞706—INJURIES FROM NEGLIGENT DRIVING—PROXIMATE CAUSE.

Defendant was driving an automobile westerly on the left-hand side of F. street, in violation of an ordinance. Plaintiff, a boy 12 years old, was riding a bicycle southerly towards F

street. As he reached that street, he tried to stop, but discovered that his brakes would not work, and proceeded across to the south side of such street to turn easterly, and as he was completing his turn he collided with the automobile. He had tried his brakes on the same day and they then worked all right, and he did not discover until the moment he reached F. street that they would not work. He had been traveling about eight miles an hour down a grade of about 14 per cent., and did not try to stop the speed of the bicycle until just as he reached F. street. Held that, as no intervening cause existed from which it could be inferred that defendant's negligence was not the proximate cause of the injury, a nonsuit could not properly have been granted, on the ground that there was no testimony that defendant's negligence caused the injury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. ☞706.]

3. MUNICIPAL CORPORATIONS ☞706—INJURIES FROM NEGLIGENT DRIVING—CONTRIBUTORY NEGLIGENCE.

Whether plaintiff was negligent was a question for the jury, in view of his age and experience, the kind of care used by him in controlling his bicycle and its brake, and in keeping it in safe condition, as well as the other facts mentioned.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. ☞706.]

4. MUNICIPAL CORPORATIONS ☞706—INJURIES FROM NEGLIGENT DRIVING—UNAVOIDABLE ACCIDENT.

It could not be said, as a matter of law, that plaintiff's injuries were caused by an unavoidable accident.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. ☞706.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by David Baillargeon, a minor, by Marietta Baillargeon, his guardian ad litem, against J. H. W. Myers. From a judgment for defendant, plaintiff appeals. Reversed.

Isidore B. Dockweiler, Robert B. Murphey, and H. Graham Bockius, all of Los Angeles, for appellant. Morton, Hollzer & Morton and W. W. Butler, all of Los Angeles, for respondent.

CONREY, P. J. The plaintiff appeals from a judgment rendered pursuant to an order granting defendant's motion for a nonsuit. The plaintiff, a boy 12 years old, brought this action to recover damages for personal injuries received in a collision which occurred between an automobile of the defendant and a bicycle on which the plaintiff was riding. At the conclusion of the evidence received on behalf of the plaintiff, the defendant moved for a nonsuit on the following grounds: (1) That the plaintiff was guilty of contributory negligence in coming down Clay street, in the city of Los Angeles, from the crest of Clay street to its intersection with Fourth street, a distance of approximately 150 yards, in the manner and under the circumstances shown by the evidence; (2) that there is no testimony indicating that the defendant was

guilty of any negligence; (3) that, if the plaintiff was not guilty of contributory negligence, then the same evidence necessarily shows that the accident was unavoidable and without fault of either party.

On June 26, 1911, when the accident occurred, there was in force an ordinance of the city of Los Angeles requiring that:

"Every person riding, driving, propelling, or in charge of any vehicle * * * upon any street within the city of Los Angeles * * * shall travel on the right-hand side of such street and as near the right-hand curb thereof as possible."

Violation of any of the provisions of this ordinance was declared to be a misdemeanor. At the time of the accident in question the defendant's automobile was traveling westerly on Fourth street, and was entirely on the south side of the street, which was the left-hand side as the automobile was moving. The plaintiff was riding a bicycle which was equipped with a coaster brake and was traveling southerly on Clay street toward the intersection of Fourth. During the last 150 yards of his passage over Clay street he was going downhill on a grade of approximately 14 per cent. From curb to curb the width of Fourth street in that block is 40 feet, and the width of Clay street is 20 feet. When the plaintiff got to Fourth street he tried to stop his bicycle, and discovered that his coaster brake would not work. He proceeded straight across Fourth street to the south side thereof to make the turn easterly. As he was completing this turn on West Fourth street he collided with the defendant's automobile, which was moving as before stated, and was thereby thrown from the bicycle and received the injuries of which he complains. The plaintiff had tried his brakes before the accident on that same day, and they worked all right; until the moment of his entering Fourth street, as above stated, he did not discover that the brakes would not work. It is not claimed that the defendant's automobile was moving at an excessive rate of speed. The plaintiff's bicycle, just prior to the collision, was going at about 8 miles per hour. The plaintiff did all that he could to stop his bicycle before reaching Fourth street. At the time of the collision he was on the south side of Fourth street, which for him was the right side of the street, and where he was entitled to be. If the defendant's automobile at that time had not been on that side of the street, which for it was the wrong side, this accident could not have occurred.

[1, 2] Respondent's counsel, while conceding that respondent was guilty of negligence per se in operating his automobile on the wrong side of the street in violation of a municipal ordinance, insist that this is not sufficient to make out a case of liability against respondent. They say, and in this we agree, that the law requires it to be shown that the particular negligence in question was the proximate cause of the plaintiff's injury. There must be a causal connection between the unlawful

act and the injury. This rule is stated in *Cary v. Los Angeles Ry. Co.*, 157 Cal. 599, 604, 108 Pac. 682, 684, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1329, where the court further says:

"For example, it is negligence if the whistle of a locomotive engine is not sounded and its bell rung at crossings, but, if the train were derailed by a misplaced switch, an injured passenger could not base his recovery upon the showing that somewhere along the journey the whistle had not been blown or the bell sounded when these things should have been done."

In the case at bar the negligent act of the defendant was not one which preceded and was completed prior to the time of the accident, but was continuing at the very moment of the collision. No intervening cause existed from which it could be inferred that defendant's negligence was not the proximate cause of the injury. It follows that a nonsuit could not properly have been granted upon the ground that there is no testimony indicating that the defendant's negligence caused the injury to the plaintiff. The claim that the accident and injury were not caused proximately by defendant's negligence should not be confused with the defense of contributory negligence. That is another subject which we will now consider.

[3, 4] Respondent's contention that the plaintiff was guilty of contributory negligence is based upon facts shown with regard to the manner in which plaintiff rode his bicycle down Clay street to the intersection of Fourth street. The facts specially relied upon, as stated in the motion when made in the superior court, were that the plaintiff rode down Clay street without a brake or any means upon his wheel to stop or slow the speed of the bicycle; that he did not try to stop the speed of the bicycle at all; that some one called to him as he approached Fourth street, and he was then going so fast that he could not stop the bicycle, and then discovered for the first time that the coaster brake would not work; and that if the plaintiff had used ordinary means to prevent the accident the accident would have been prevented. Conceding that the facts in evidence had some tendency to show negligence on the part of the plaintiff, we cannot say that, as a matter of law, such negligence was conclusively proved. At most, it was sufficient to present a question for the jury to determine. The age and experience of this boy; the kind of care used by him in controlling his bicycle and the attached coaster brake, and in keeping the same in safe condition; the fact that he had tested the brake earlier in the day and found it in good condition; and the fact that after discovering the uselessness of the brake he kept the bicycle on his own side of the road, and was using all means in his power to get out of the difficulty without infringing upon the right of way of the defendant—these and all other details of fact connected with the conduct of the plaintiff at and immediately preceding

the accident were circumstances from which the jury might or might not conclude that the plaintiff was guilty of negligence, and might or might not conclude that such negligence contributed proximately to the collision and injury which occurred. We are further satisfied that it cannot be said, as a matter of law, that the plaintiff's injuries were caused by unavoidable accident.

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

(170 Cal. 263)

DE FREITAS et ux. v. TOWN OF SUISUN.

(Sac. 2156.)

(Supreme Court of California. May 28, 1915.)

1. WATERS AND WATER COURSES ⚭107—DIVERSION OF UNDERGROUND WATER—MEASURE OF DAMAGES.

The measure of damages for the diversion of underground water supplying springs on plaintiff's land was the difference between the value of the land before the diversion and its value after the diversion, determined by its actual market value, as to which net revenue might be considered, but would not generally furnish a conclusive measure of value.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 116, 117; Dec. Dig. ⚭107.]

2. EVIDENCE ⚭113—VALUE OF LAND—INCOME AS BASIS.

In an action for damages for the diversion of underground waters supplying springs on plaintiff's land, the admission of evidence as to the value of the land, based on its gross income capitalized, less one-half for expenditures, was error, since neither gross nor net revenue capitalized afforded a proper basis from an estimate of the actual market value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. ⚭113.]

3. EVIDENCE ⚭543—EXPERT TESTIMONY—VALUE.

A witness who had seen and examined the land, who knew something of its character and condition, or of the market values of land in the vicinity, if such values have been established, or the values of land similarly situated, might give his opinion as to the value of the

land with and without underground water supplying a spring.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2356½-2358; Dec. Dig. ¶543.]

4. EVIDENCE ¶572 — EXPERT TESTIMONY — WEIGHT.

The weight of the testimony of expert witnesses as to the value of land before and after the diversion of underground spring water depends on the knowledge he shows in his answers to the preliminary questions and on cross-examination.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2395-2398; Dec. Dig. ¶572.]

5. EVIDENCE ¶547 — EXPERT WITNESSES — EXAMINATION.

An expert witness should not be asked regarding specific facts in his examination in chief.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2364; Dec. Dig. ¶547.]

6. APPEAL AND ERROR ¶1050 — HARMLESS ERROR — ADMISSION OF EVIDENCE.

In an action for damages for the diversion of underground water supplying springs on plaintiff's land, where the evidence as to its value was unsatisfactory, error in the admission of evidence as to its value, based upon the gross or net revenue from the land, was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. ¶1050.]

Department 1. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Joseph L. de Freitas and wife against the Town of Suisun. Judgment for plaintiffs, motion for new trial denied, and defendant appeals. Judgment and order reversed.

T. T. C. Gregory and C. J. Goodell, both of San Francisco (Theodore W. Chester, of Sacramento, of counsel), for appellant. Frank L. Coombs and E. S. Bell, both of Napa, for respondents.

SHAW, J. The defendant appeals from the judgment and also from an order denying its motion for a new trial.

The complaint alleges that plaintiff Joseph de Freitas is the owner in fee of 50 acres of land in which Marianna de Freitas has a life interest; that Joseph is in possession under lease from Marianna; that the defendant is the owner of an adjoining tract of land containing 171 acres; that upon the plaintiffs' land there were springs the waters of which, for more than 30 years past, plaintiffs have used to irrigate their said land; that in the year 1908 the defendant dug a tunnel on its land near the plaintiffs' line for the purpose of obtaining water therefrom; that by said tunnel it diverted the underground water supplying plaintiffs' springs and caused the same to become dry, thereby depriving plaintiffs of water belonging to their land, to their damage in the sum of \$10,000. The defendant answered, denying the allegations of the complaint. There was a trial by jury, resulting in a verdict in favor of "the plaintiff" in the sum of \$4,000. The court there-

upon entered judgment in favor of Joseph L. de Freitas against the defendant for said sum.

It is claimed that the evidence does not sustain the allegation that the tunnel dug by the defendant intercepted the water sources supplying the plaintiffs' springs. The evidence on this point is not satisfactory, but we cannot say that it is insufficient to warrant the conclusion that the defendant's tunnel intercepted the flow to plaintiffs' springs and diverted the water thereof from plaintiffs' land. We cannot disturb the verdict on that account.

[1, 2] We think the court below erred in overruling defendant's objections to hypothetical questions put to the witness Gordon regarding the value of the land in question and the damages sought by the plaintiffs and in refusing to strike out his answers. The measure of damages caused by the diversion of water from plaintiffs' springs would be the difference between the value of plaintiffs' land before the diversion complained of and its value if it were permanently deprived of the water so diverted. The witness Gordon was produced to give evidence upon this subject. He stated that he was a farmer and fruit grower, and that he had seen the plaintiffs' land a few days before the trial, but had not examined it with any view to estimating its value; that he owned some land and was acquainted with land values in the vicinity and with the market values of the class of land such as that of the plaintiffs'. Thereupon the plaintiffs' counsel put to him a hypothetical question, in substance as follows:

"Conceding that the town of Suisun dug the tunnel and struck the main flow of water at the end of the tunnel about the 8th of September, 1908; that prior to that date there were springs on plaintiffs' land the waters of which the plaintiff had used to irrigate a part of the land; that by reason of such irrigation, Mr. Freitas could and did cultivate strawberries, blackberries, raspberries, and vegetables on that part of said land; that Mr. Freitas took off and received therefrom a gross income of \$1,200 a year, average, and from the unirrigated portions thereof a gross average income of \$600, and taking into consideration that this was outside of the question of having a living from the place, using what was there—now, under these circumstances, what would have been, in your estimation, the value of that whole piece of property, the 50 acres, giving the value of the irrigated and the unirrigated ground separately?"

To this the witness answered:

"Well, from grounds that produced a gross income of \$1,200 a year I should say from \$8,000 to \$10,000; the balance producing a gross income of \$600 I should say it would be worth from \$4,000 to \$5,000."

The witness was then asked what the damage would be to the land if the town tunnel had dried up the springs formerly supplying Freitas' land, and permanently deprived it of the use of all that water for irrigating purposes, whereby the gross annual income of that irrigated land had been reduced to \$200.

The witness answered that the loss would be from \$6,000 to \$8,000. On cross-examination the witness stated that he based his estimates of value on gross income, deducting one-half for expenses of production and allowing 6 per centum interest on the investment. In other words, he capitalized the gross income of \$1,200, less one-half for expenditures. He also testified that he knew nothing of the actual yield of the land or of the expense of growing, harvesting, and marketing the crops produced from it. The defendant moved to strike out all the testimony of Gordon as to value and damage on the ground that he was not qualified to speak as an expert on the value of the Freitas place. The motion was denied.

The facts stated in the question gave no proper basis for an estimate of value. Gross income does not determine value. It might be all used up in expenses, in which case, upon the theory proposed, the land would be worthless, although its actual market value might be considerable. The witness had no knowledge of the expenses of production. His allowance of one-half was purely arbitrary, and there was no evidence to sustain it. Other evidence produced in defense tended to show that such expense was far more than one-half of the gross receipts. Moreover, if it were the law that the value is to be ascertained by the mere capitalization of the net revenue, the evidence should be confined to proof of facts showing the net revenue. That being ascertained, the value would not be a question for an expert, but a mere question of mathematics, a calculation which the court should make or direct the jury to make. The truth is the amount of actual net revenue does not determine the value of land in every case. The revenue would vary according to the industry, skill, and wisdom of the person cultivating the land. Its net revenue, assuming reasonable skill in cultivation and management, would be the criterion, so far as that element alone is concerned. But other elements, such as the state of the market, the demand and supply of land of the character in question, the prospects of advance, and perhaps other things, would ordinarily affect the question of value and fix it at a sum different from that produced by capitalization of net revenue. The actual market value is the thing to be determined, and while net revenue should be considered, it does not, in general, furnish a conclusive measure of such market value. In the present case, however, the questions, both as to value and damage, were framed upon the erroneous theory that value may be determined from gross revenue alone, and neither of them should have been allowed.

[3] It should not be difficult to prove value and damage in a legal manner by competent witnesses. By preliminary questions the examiner should elicit the facts relating to the qualifications of the witnesses; for example,

that he has seen and examined the land, or that he knows something of its character and condition, or the market values of land in that vicinity, if such values have been established, or the values of land similarly situated, and the like. He may, thereupon, be asked to give his opinion of its respective values with and without the use of the water in question. From such evidence the court or jury can estimate the amount of damage caused by the deprivation of the water, if they shall find that there is such and that it is produced by defendant's tunnel.

[4, 5] The weight of the testimony of such witnesses will, of course, depend upon the knowledge he shows in his answers to the preliminary questions and on cross-examination. He should not be asked regarding specific facts in the examination in chief. The rules controlling such examinations are well established. See *C. P. R. Co. v. Pearson*, 35 Cal. 262; *Clark v. Willett*, 35 Cal. 544.

[6] One witness for plaintiff testified properly to the value of the land. Taking the evidence as a whole, however, it was not satisfactory on this subject, and we cannot say that the erroneous admission of this evidence did not affect the minds of the jury in their deliberations. On the contrary, we believe that it probably did influence them. Under these circumstances the court cannot say that the error was without prejudice.

The judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.

170 Cal. 254

In re YATES' ESTATE.

YATES v. KEYS et al.

(S. F. 6877.)

(Supreme Court of California. May 27, 1915.)

1. PERPETUITIES ⚡7—SUSPENDING POWER OF ALIENATION—DURATION.

Power of alienation is not suspended for a longer period than the lives of persons in being, in contravention of Civ. Code, §§ 715, 716, by a bequest to, or in trust for, one, to be paid to him on arriving at a certain age.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 48, 54, 55; Dec. Dig. ⚡7.]

2. WILLS ⚡733—VESTED LEGACIES.

A bequest to, or in trust for, one, to be paid to him on his arriving at a certain age, is a vested legacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1819-1846; Dec. Dig. ⚡733.]

3. PERPETUITIES ⚡9—ACCUMULATIONS.

While the direction in a bequest in trust, to be paid with interest when the legatee is 25 years old, is, under Civ. Code §§ 725, 724, void as to accumulation beyond the legatee's minority, this under section 725 results merely in his being entitled, after majority, to receive the income.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 67-73; Dec. Dig. ⚡9.]

4. WILLS ⚡733—LEGACIES—TIME OF PAYMENT.

Though a bequest in trust to be paid when the legatee is 25 years old is a vested legacy,

and the legatee has a disposable interest in the corpus, he is not entitled to have it paid to him on reaching his majority.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1819-1846; Dec. Dig. ☞ 733.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Charles M. Yates, deceased. From a decree in favor of Lizzie Imogene Keys and other legatees, Eugene Adolph Yates, a residuary legatee, appeals. Modified.

Gerald C. Halsey, of San Francisco (Halsey L. Rixford, of San Francisco, of counsel), for appellant. M. W. McIntosh, T. A. Perkins, and Stratton, Kaufman & Torchiana, all of San Francisco, for respondents.

HENSHAW, J. By his will Charles M. Yates bequeathed three specific legacies in the following language:

"4th. I bequeath to Jessie Maud Stephens one thousand dollars, same to be held in trust and the principal and interest to be paid to Bartlett Stephens when he arrives at the age of twenty-five years.

"5th. I bequeath to Roscoe Smith of Santa Clara, Cal., one thousand dollars. The same to be paid to him when he arrives at the age of twenty-five years.

"6th. I bequeath to Ruth Keys of Santa Clara, Cal., the sum of five thousand dollars, said sum to be held in trust by her mother, Lizzie Imogene Keys. The principal and interest to be paid to Ruth Keys when she arrives at the age of twenty-five years."

As to the fourth legacy the court in its decree of distribution declared as follows:

"And it further appearing to the satisfaction of the court that the \$1,000 legacy bequeathed to Jessie Maud Stephens to be held in trust to be paid to said Bartlett Stephens when he arrives at the age of 25 years is, to the extent of 4 years invalid, but is valid to the extent of holding the same in trust until he arrives at the age of 21."

As to the fifth legacy it found that the term of 25 years was void to the excess of 4 years after Roscoe Smith attained majority, and that at the time of the decree he had passed his majority. As to the sixth legacy it found, in like manner, that the limitation in the trust of 7 years after Ruth Keys attained her majority was void, and that at the time of distribution she was over the age of 18 years. The decree then proceeded to distribute these legacies directly to the beneficiaries. Eugene Adolph Yates, one of the residuary legatees under the will, has appealed from this decree, attacking only the construction which the court has put upon these legacies in trust.

[1] While the language of these legacies differs somewhat, it is apparent that there was no difference in the trusts sought to be declared by the testator. In the fifth and sixth legacies he bequeathed the money directly to the legatees, declaring, in effect, that the legacies should be paid only when the legatees reached a designated age. In

the fourth the bequest was in terms to a trustee, to hold the principal and accumulate the interest and pay it to the beneficiary when he reached the age of 25 years. This legacy contains a similar provision for the retention and accumulation of income. The fifth is silent upon the matter. These trusts do no violence to the rule against perpetuities and the undue suspension of the power of alienation. Civ. Code, §§ 715, 716. While a limitation of years is fixed by the terms of the trust, the ultimate duration of each trust is manifestly based upon a life in being. In each one of these cases, should the beneficiary die, the trust absolutely determines for lack of a beneficiary. Trusts such as this have received elaborate consideration by this court in *Estate of Hendy*, 118 Cal. 656, 50 Pac. 753, and *Estate of Steele*, 124 Cal. 533, 57 Pac. 564, and it is sufficient upon this point to refer to those cases.

[2] The legacies were vested. Notwithstanding the unimportant differences in their phraseology, each and all manifest a clear intent upon the part of the testator to give the sums named to the beneficiaries. The time of payment only was postponed, and trusts for accumulations created to cover the time of the deferred payment. There was no bequest over in the event of death. Under all of the authorities the legacies vested in the legatees an absolute, indefeasible and disposable interest. *Estate of Young*, 123 Cal. 337, 55 Pac. 1011; *Estate of Budd*, 166 Cal. 286, 135 Pac. 1131; *Wardwell v. Hale*, 161 Mass. 396, 37 N. E. 196, 42 Am. St. Rep. 413; *Furness v. Fox*, 1 Cush. (Mass.) 134, 48 Am. Dec. 593; *Claffin v. Claffin*, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393; 1 *Jarman on Wills*, Bigelow's Edition, 794.

[3] The direction in these trusts for accumulations beyond the age of the minority of the legatees is unquestionably void. Civ. Code, §§ 723, 724. But this fact does not in law operate to destroy the trust in its creation, but merely to avoid the provision for the illegal accumulations (Civ. Code, § 725), with the result that the legatees after maturity would be entitled to receive the incomes of the trust funds.

[4] We come to the final consideration, that of the immediate payability of the corpus of these legacies in trust to the legatees upon their attaining majority. The court decreed such payment, following the English rule of *Saunders v. Vautier*, 4 Beav. 115. In that case the testator bequeathed to trustees certain stock—

"upon trust to accumulate the interest and dividends which should accrue thereon until Daniel Wright Vautier should attain his age of twenty-five years, and then to pay or transfer the principal of such stock, together with such accumulated interest and dividends unto the said Daniel Wright Vautier, his executors, administrators and assigns absolutely."

Notwithstanding the provision for accumulation the Master of the Rolls, upon applica-

tion, ordered the payment of £100 a year out of the dividends of the stock to be paid to the legatee during his minority, an equitable rule recognized and adopted in this state by section 726 of the Civil Code. When the legatee attained his majority, application was made by him for the payment in full of the legacy and its accumulations. The application was opposed. It was held that the legatee took under the terms of the will a vested interest. The Master of the Rolls decided that it had been repeatedly declared in the English courts that:

"Where the payment is postponed, the legatee, if he has an absolute, indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge."

Indisputably, if this rule of construction is to be here adopted and applied to the legacies under consideration, the court's decree was in all respects correct. We are not, however, disposed thus to do violence to the language of a trust which is unquestionably valid. There is nothing in our law to forbid a man from declaring a trust either by will or by deed, whereby the income of certain property shall be paid to a son until he attains the age of 25 years when the corpus of the trust property shall be, made over to him. True, under such a trust the beneficiary would take a vested interest which would fall into his estate upon his death, and which he even might dispose of by gift or sale during his lifetime. But, upon the other hand, the fact that these important property rights vest in the beneficiary should not, we think, be regarded as so controlling as to justify a violence done to the plain intent of the trustor. The trustor may have had good reason, as in the case of a spendthrift son, for desiring that the principal sum of his bounty should not go absolutely to the legatee upon his attaining majority. Because the legatee himself might circumvent this purpose by making a sale of his vested interest is not, we think, a sufficient ground for destroying the legal intent of a trustor in creating such a trust. The fact that because of the particular wording of a valid trust the legatee himself may impair its efficacy is not a justification for equity so to do. We conclude, therefore, that these trusts still continue for the period of time in them specified; that as each of the legatees attains his majority he is entitled to the accumulations and to the later accruing income of the trust fund; that each legatee has a disposable interest in the corpus of the trust, but that that corpus is to be given over to him when and only when he reaches the years named in the trust.

For these reasons the decree appealed from is ordered modified in the indicated particulars, that is to say, it will be decreed that Ruth Keys, upon attaining majority, is entitled to the accumulated income of her leg-

acy in trust, and thereafter until she arrives at the age of 25 years is entitled to the income of the trust fund, and upon attaining the age of 25 years is immediately entitled to receive the corpus of the fund, and mutatis mutandis the same decree will be entered as to the legacies of \$1,000 to Roscoe Smith and Bartlett Stephens.

We concur: MELVIN, J.; LORIGAN, J.

170 Cal. 250

SAN JOAQUIN VALLEY BANK v. GATE CITY OIL CO. et al. (Sac. 2147.)

(Supreme Court of California. May 27, 1915.
Rehearing Denied June 24, 1915.)

1. CORPORATIONS ⇐414 — EXECUTION OF NOTES—LIABILITY.

A note, signed by the president and secretary of a corporation and individuals, but without the name of the corporation as maker, or the corporate seal, or anything to indicate that the note is the obligation of the corporation, is a valid obligation of the corporation, where it negotiated a loan evidenced by the note, received the money thereon, expended the same for its own purposes, and the president and secretary signed the note intending to execute it as the note of the corporation, and it was accepted on that understanding, and the board of directors and stockholders approved the action of the officers as binding the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1640-1646; Dec. Dig. ⇐414.]

2. PLEADING ⇐246 — COMPLAINT—AMENDMENTS—ALLOWANCE.

It is proper to allow an amendment to the complaint which does not prejudice defendant, except by depriving him of an opportunity to defeat a just claim on technical grounds.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 673-683; Dec. Dig. ⇐246.]

3. EVIDENCE ⇐459 — PAROL EVIDENCE — VARYING NEGOTIABLE INSTRUMENTS.

Where a note was signed by the president and secretary of a corporation, who intended to bind the corporation thereby, though it did not appear in the note that it was a party thereto, evidence of the conversations at the time of the negotiation of the loan, evidenced by the note and the delivery of the note, and that the money was loaned to the corporation and used by it, was admissible, for it did not alter or vary the note, but only showed its execution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906-1910, 2109-2114; Dec. Dig. ⇐459.]

Department 1. Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by the San Joaquin Valley Bank against the Gate City Oil Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. R. Jacobs and A. H. Carpenter, both of Stockton, for appellants. R. C. Minor and Nutter & Orr, all of Stockton, for respondents.

SHAW, J. This was an action to recover \$6,000 upon a promissory note alleged to have been executed by the defendants to the

plaintiff. The defendants answered, denying the execution of the note. The court made findings and gave judgment in favor of the plaintiff against all the defendants. The Gate City Oil Company and J. F. Lynch appealed from the judgment within 60 days after its entry. They claim, in support of their appeal, that they did not execute the note set out in the complaint, and that there is a variance between the allegations and the proof concerning the note. The merits of these objections can best be shown by a chronological statement of the case.

In 1907 the Gate City Oil Company was in need of the sum of \$6,000. Its directors passed a resolution authorizing its officers to negotiate a loan for that amount. Upon this authority certain of its officers, including Lynch, appeared at the plaintiff's banking house, and it was there agreed between them and the plaintiff that the plaintiff would loan \$6,000 upon the joint note of the Gate City Oil Company and the three defendants, Smith, Lynch, and Giottonini. A printed form of note was handed to these officers for execution. They presently returned with the note. Its opening clause was as follows:

"Stockton, Cal., Sept. 20th, 1907. One day after date, for value received, we or each of us promise to pay to the San Joaquin Valley Bank, or order," etc.

The closing sentence and the signatures were as follows:

"All payments which become due by virtue hereof are to be paid in United States gold coin.

"J. W. Mosher, Pres.

"Ira E. Smith, Secy.

"J. Jerome Smith.

"J. F. Lynch.

"F. F. Giottonini."

The genuineness of these signatures is conceded. This note, thus executed, was offered to the plaintiff, in pursuance of the previous negotiations, as the note of the Gate City Oil Company and the three other defendants, it was accepted as such, and the \$6,000 was delivered to that company. There was nothing in the body of the note to show that the Gate City Oil Company was one of the makers thereof. Some three years later it was discovered that the name of the corporation was not subscribed as one of the makers, and that the corporate seal was not attached. Thereupon, at the request of the plaintiff, the corporate seal, which showed an imprint of its name, was placed upon the note at the proper place. The directors of the Gate City Oil Company thereupon passed a resolution, which was entered on its minutes, declaring that the act of giving the said note by the Gate City Oil Company was approved and ratified as the act of the corporation. A meeting of the stockholders was also duly called and was attended by members holding more than four-fifths of the shares. At this meeting a resolution was unanimously adopted ratifying and approving the act of the corporation in giving the note in question as the note of the corporation. The Gate City Oil Company paid interest on the note

quarterly until March 20, 1912, which was some six months after this action was begun. The complaint, as first filed, set forth the note in full. The signatures were given as follows:

"Gate City Oil Co. [Seal.]

"J. W. Mosher, Pres.

"Ira E. Smith, Secy.

"J. Jerome Smith.

"J. F. Lynch.

"F. F. Giottonini."

At the trial it appeared that the name "Gate City Oil Co." had never been written in the signature of the note, but that the seal, with the name imprinted in it, had been attached prior to the beginning of the action. Objections being made on this ground, the plaintiff, by leave of court, amended its complaint to conform to the proof. This complaint alleged the execution of the note as the note of the Gate City Oil Company and the other parties defendant, but without the seal affixed or the name "Gate City Oil Co." appearing among the signatures. It then proceeded to allege the subsequent affixing of the corporate seal and the resolutions of the board of directors and stockholders, ratifying and approving the note as the note of said company. The court thereupon made its finding, setting forth the facts substantially as above recited, and stating that the words "Gate City Oil Co." as the signature of said company, and the seal of said company, were omitted from the note, at the time of its first execution, by inadvertence, and that it was intended that the note should be, and that it actually was and is, the note of the corporation and the other defendants.

[1] The objection is now made that the note is not the obligation of the Gate City Oil Company. There is evidence showing that the company negotiated the loan; that it received the money thereon and expended the same for its own purposes; that its president and secretary signed the note, intending thereby to execute it as the note of the corporation; and that it was accepted upon that understanding. The subsequent actions of the board of directors and stockholders of the company approving the action of the officers, as above stated, were also proven by sufficient evidence. These acts and resolutions constituted a sufficient execution of the note by the corporation. They all occurred before the action was begun. At that time, therefore, the note had been executed by the Gate City Oil Company, and it was properly declared on as an obligation of that company. There was no substantial variance between the allegations of the amended complaint and the proof.

[2] The amendment was properly allowed. It caused no prejudice to the appellants, unless the deprivation of an opportunity to defeat a just claim on unsubstantial and technical grounds can be said to be prejudicial. The rule is to the contrary.

[3] There was no error in allowing evidence of the conversations at the time the

loan was negotiated and the note delivered, or of the fact that the money was loaned to the defendant company and was used by it. This evidence was not offered to alter or vary the terms of the note, but to show its execution.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.

(170 Cal. 258)

COFFEY v. CITY OF BERKELEY.

(S. F. 6533.)

(Supreme Court of California. May 27, 1915.)

1. BRIDGES — DUTY TO BUILD.

A city is under no common-law duty to build bridges.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 9-13, 15, 16; Dec. Dig. § 7.]

2. MUNICIPAL CORPORATIONS — FAILURE TO BUILD BRIDGES—LIABILITY.

A statute imposing no duty on a city to build bridges, but at most giving it discretionary power, any right of action against a city for defective condition of a highway, given by St. 1911, p. 1115, imposes no liability on it for nonaction with respect to building a bridge where a street intersects a creek.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1587, 1589, 1590; Dec. Dig. § 755.]

3. MUNICIPAL CORPORATIONS — DANGEROUS STREETS—GUARDING AGAINST ACCIDENTS—COMPLAINT.

The sort of a safeguard against accidents where a street intersected a creek with steep banks and no bridge, being largely in the city's discretion, a complaint for injury to a traveler is insufficient in alleging failure to maintain signals, lights, or other warning, but should state that the city totally failed to guard against accidents.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1716, 1718, 1720-1723; Dec. Dig. § 816.]

4. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—ACCIDENTS—COMPLAINT.

St. 1911, p. 1115, declaring a city liable for injury from a defective street only if the officer charged with the duty of repairing be innocent of knowledge or notice of the condition, a complaint to charge a city should exonerate such officer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1716, 1718, 1720-1723; Dec. Dig. § 816.]

Department 2. Appeal from Superior Court, Alameda County; W. H. Waste, Judge.

Action by James Coffey against the City of Berkeley. Judgment for defendant, and plaintiff appeals. Affirmed.

Keogh & Olds, of San Francisco, and Reed, Black, Reed & Bingham, and De Lancey C. Smith, all of Oakland, for appellant. Redmond C. Staats, City Atty., of Berkeley (Geo. L. Hughes, of Berkeley, of counsel), for respondent.

MELVIN, J. Plaintiff appeals from a judgment entered as a consequence of the sustaining of a demurrer to his complaint.

The action was for damages due, as alleged, on account of injuries sustained by

plaintiff in an accident which resulted from the fall into Cordonices creek of an automobile in which he was a passenger. The plaintiff in his complaint alleged that Cornell avenue "at its point of intersection with Cordonices creek, within the boundaries and limits of said city of Berkeley, was in a dangerous and defective condition, in this, that said defendant with full knowledge of the condition of said Cornell avenue had failed and neglected to erect or maintain any bridge or other structure over said Cordonices creek, at said point of intersection with Cornell avenue over and along which the public might travel; that said Cordonices creek at the said point aforesaid, has a deep channel, to wit, about 15 feet below the grade of said Cornell avenue, and the banks thereof are steep and dangerous; that said defendant at all of the time herein mentioned failed to keep or maintain any signals, lights, or other warnings to notify the public or persons traveling over and along said Cornell avenue of the dangerous and defective condition thereof at the point above mentioned." It is further alleged that on a certain date, after dark, when the dangerous and defective condition of the street was not visible to persons passing along and over it, plaintiff and his companions in an automobile were, by reason of the dangerous and defective condition of said Cornell avenue where it intersects Cordonices creek, precipitated over the bank into the bottom of the creek; and that at the time of the accident Cornell avenue was being carefully used by plaintiff.

The demurrer was both general and special. Respondent insists that no duty rests upon the defendant or its officers to build or maintain bridges either within its own municipal boundaries, or across a stream which is a boundary between it and another political subdivision of the state; and that it is not required by any law to maintain signals, lights, or other warnings of the natural dangers existing at the intersection of the avenue with the creek.

We are asked by respondent at the outset to take judicial cognizance of the fact that Cordonices creek is not wholly within its municipal territory, but is the boundary line between the city of Berkeley and the city of Albany at the point of intersection with Cornell avenue. Stats. 1909, p. 1212. We find no necessity for exercising the right invoked by respondent, because, even assuming that the allegations of the complaint bring the entire crossing of the street with the creek within the limits of the city of Berkeley, and treating the creek as a waterway intersecting the street within the city, we are compelled to agree with the views taken by the court below.

[1, 2] A city was under no duty at common law to build bridges within its limits or across bordering streams. 5 Cyc. 1054. Under the charter of Berkeley that municipal

corporation is given authority and dominion over its streets and doubtless that authority would extend to the erection of bridges wholly within the corporate limits of the city, but in no instance is the city obligated by law to build or to maintain any such structure. Judge Dillon in his work on Municipal Corporations says that the duties and the powers of cities with reference to bridges are entirely statutory, there being no common-law liability with respect to the repair of bridges. In *Barnett v. Contra Costa County*, 67 Cal. 78, 7 Pac. 177, it was held that a county is not responsible in damages even for its failure to keep in repair an existing bridge, and in *Winbigler v. Los Angeles*, 45 Cal. 37, it was decided that, even conceding that a correlative duty to keep the streets in repair arose from the authority to repair them, nevertheless the duty rested upon the city council and not upon the city. But appellant pins his faith upon an act relating to the liability of public officers for damages resulting from defects or dangers in streets, etc. Stats. 1911, p. 1115. This statute provides that if, in consequence of the dangerous or defective condition of any street, any one shall suffer injury to his person, no officer who has charge of or whose duty it is to care for or repair such street shall be liable for such injury unless such officer shall have had actual notice of the defective condition of the street and shall have failed for a reasonable time after notice to repair the same (provided he had authority to remedy the condition and funds were available for that purpose), and provided further that the damage was sustained while the street was being carefully used and due caution exercised to avoid the danger; but in all such cases (to quote directly from the statute) "damage may be recovered against the county, city, or city and county as in ordinary actions for damages." Appellant insists that this statute gives a right of action against any municipality for any injury received by reason of the defective condition of a highway within the limits thereof, and that the authorities cited have ceased to be of any value. But even if we concede that position, appellant's pleading is not aided because he does not count upon a defective condition of the highway, but a failure to bridge a creek and a further failure to light the place where the street ends and the creek exists. In deciding to erect a bridge a public corporation is exercising discretionary power. Action or non-action in that regard can lead to no liability. 3 *Abbott, Mun. Corp.* § 1024. The complaint alleges no duty upon the part of the defendant to erect or maintain a bridge, and we find no such duty imposed by law; therefore in the allegations with reference to the absence of a bridge at the intersection of the street with Cordonices creek, the complaint fails to state a cause of action.

[3] Nor does it appear from the pleading

that defendant is liable for failure to maintain signals, lights, or other warnings at the intersection of Cornell avenue and Cordonices creek. The manner and extent of protection against possible accidents within its borders and upon its streets are both confided so largely to the discretion of a municipal corporation that courts will seldom hold such a corporation responsible for failing to supply more elaborate and complete protection. 4 *Dillon, Mun. Corp.* (5th Ed.) § 1696. In Iowa it has been held that it is not left to the courts to say in what particular manner a city may exercise its power to provide for the illumination of its streets. *Blain v. Town of Montezuma*, 150 Iowa, 142, 129 N. W. 808, 32 L. R. A. (N. S.) 543, Ann. Cas. 1912D, 430. It is true that the pleading here under consideration does contain the averment that at the place where the accident occurred the banks of the creek were steep and dangerous, but it does not contain any allegation either that the street was an improved, much used highway, or that no protection whatever was provided for the traveling public. It may even be that some physical barrier was maintained, so far as anything in the complaint is concerned. The pleader predicated negligence upon the failure of the city to maintain signals, lights, or other warnings. As the sort of safeguard lay largely within the discretion of the defendant, the complaint to be sufficient should have contained a statement that defendant totally failed to guard against accidents.

[4] Thus far we have discussed the complaint upon the assumption that the statute of 1911 gave full authority to any one injured on a public street to sue the municipality. An examination of that enactment will show at once, however, that the city was to be liable only in the event that the officer charged with the duty of repairing a street should be innocent of knowledge or notice of the condition of that street from which the accident became possible. In order, therefore, to state the city's liability the complaint should aver facts exonerating the officer or board charged with the care and repair of the street in question. No such allegations appear in the pleadings, and for that reason also the demurrer was properly sustained.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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BARBER ASPHALT PAVING CO. v.
JURGENS. (S. F. 6460.)

(Supreme Court of California. May 28, 1915.
Rehearing Denied June 26, 1915.)

1. MUNICIPAL CORPORATIONS — 122 — ORDINANCES — PUBLICATION — CHARTER PROVISIONS.

Oakland City Charter (St. 1862, p. 353) § 53, provides that all ordinances shall be publish-

ed by written advertisements posted at the mayor's office and at three other public places, or in a newspaper published in the city, and that every ordinance shall be presented to the mayor for approval and signature, and that, if he disapproves of it, he shall return it within five days, and that the city council shall reconsider it, and, if approved by two-thirds of its members, it shall take effect as an ordinance. Code Civ. Proc. § 459, declares that in pleading a private statute or a right derived therefrom it is sufficient to refer to such statute by its title and the day of its passage. *Held*, that proof of the usual formalities of the passage of an ordinance over the mayor's veto, though there was no written entry of its publication, was a sufficient showing of the publication to admit the ordinance in evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 281-289; Dec. Dig. ☞122.]

2. MUNICIPAL CORPORATIONS ☞122—PUBLIC IMPROVEMENTS—BURDEN OF PROOF.

Proceedings for the assessment of property for street improvements being in invitum, defendant's proof, in the usual manner, of the existence of an ordinance preserved in the city's official records, as the true act of its common council purporting to cast upon the city the burden of paying for the work, casts upon the city or the person seeking to deny its liability, the burden of showing facts invalidating the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 281-289; Dec. Dig. ☞122.]

3. MUNICIPAL CORPORATIONS ☞365—PUBLIC IMPROVEMENTS—ACCEPTANCE OF STREET—SUFFICIENCY OF ORDINANCE.

Under Vrooman Act (St. 1885, p. 160) § 20, providing that whenever any street has been fully constructed to the satisfaction of the superintendent of streets and of the city council, and is in good condition throughout, it shall be accepted by the city council by ordinance, and thereafter be kept in repair and improved by the city, the expense thereof to be paid out of the fund to be provided therefor, and that the council shall not accept any part of the street less than the entire width of the roadway, including the curbing, an ordinance providing for the acceptance of a roadway as a public street, reciting the construction of the street to the satisfaction of the superintendent of streets and the city council, was not invalid because it omitted the word "fully" before "constructed," or the phrase "in good condition throughout"; and, where it did not specifically mention the curbing as a part of the roadway accepted, the omission did not make the ordinance invalid, as the curbing, for the purpose of acceptance, was included within the definition of the term "roadway," and the exception of part of the street which, under Civ. Code, § 498, a railroad was bound to keep in order, did not invalidate the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 898; Dec. Dig. ☞365.]

4. MUNICIPAL CORPORATIONS ☞365—ACCEPTANCE OF STREET—VALIDITY OF ORDINANCE—DATUM PLANE.

The fact that no datum plane had been established and officially adopted by the city of Oakland prior to its adoption of an ordinance accepting an avenue as a public street, with the liability of thereafter keeping it in repair and improved, was immaterial to the force and validity of the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 898; Dec. Dig. ☞365.]

5. MUNICIPAL CORPORATIONS ☞488, 489—STREET IMPROVEMENTS—OBJECTION TO ASSESSMENT—ESTOPPEL.

Where a city by ordinance had accepted an avenue as a public street, and had the right to order its improvement, an abutting owner who remained silent when the work was being done and presented no objection was not estopped from contesting the contractor's right to collect from him after the work was completed; and, further, the doctrine of estoppel has no application in proceedings to enforce liens for street work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1147-1152; Dec. Dig. ☞488, 489.]

6. MUNICIPAL CORPORATIONS ☞266—STREET IMPROVEMENTS — LIENS — CONSTITUTIONAL AND STATUTORY PROVISIONS—REPEAL.

Vrooman Act, § 20, providing that, whenever any street has been fully constructed to the satisfaction of the superintendent of streets and of the city council and is in good condition throughout, it shall be accepted by ordinance, and thereafter be kept in repair and improved by the city, in respect to the exemption of property owners from liability for improvements, was not repealed by Const. art. 11, § 6, as amended in November, 1896, freeing cities and towns in all "municipal affairs" from any further subjection to or control by general laws, since without words indicating a retroactive operation the statute was not thereby repealed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 712; Dec. Dig. ☞266.]

Department 2. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by the Barber Asphalt Paving Company against Charles Jurgens. Judgment for defendant, new trial denied, and plaintiff appeals. Judgment and order affirmed.

Snook & Church, of Oakland (J. A. Cooper, of San Francisco, of counsel), for appellant. R. M. F. Soto, of San Francisco, amicus curiae. Mortimer Smith, of Oakland (Chapman & Trefethen, of Oakland, of counsel), for respondent.

MELVIN, J. Plaintiff appeals from a judgment in favor of defendant and from an order denying plaintiff's motion for a new trial. The action was to foreclose the lien of a street assessment for work on San Pablo avenue, in the city of Oakland. The findings of the court were in substantial compliance with the defendant's answer, and, in brief, were to the effect that the contract between the superintendent of streets and the plaintiff was made before the expiration of ten days after the posting and publication of the notice of award of contract; that the contract as recorded was different from the one actually signed, the lands within the district described in the recorded contract never having been subjected to an estimate as required by law; and that San Pablo avenue was an accepted street when the contract for the work was let. If the finding last mentioned be correct, and if the force and effect attributed to it by the court be warranted, we need not consider the other findings which are questioned by the appellant, because in

that event we must hold that land of defendant abutting on San Pablo avenue was not subject to assessment for street work. The finding with reference to the ordinance accepting San Pablo avenue is as follows:

"That on the 4th day of February, A. D. 1889, the said city council of the said city of Oakland, by Ordinance No. 1071, entitled 'An ordinance providing for the acceptance of the roadway of San Pablo avenue from its intersection with the westerly line of Broadway to the northern boundary line of the city of Oakland,' duly accepted said San Pablo avenue as a public street, and that ever since said 4th day of February, A. D. 1889, the said San Pablo avenue was and now is an accepted public street of the said city of Oakland."

Appellant attacks the ordinance mentioned in the finding quoted above upon several grounds. Certain informalities in the adoption of the ordinance are discussed in the briefs and are said by appellant to be fatal to its validity. By the terms of the by-law that portion of the roadway "required by law to be kept in order or repair by any person or company having railroad tracks thereon" is excepted from the city's acceptance. This, according to appellant's views, was an unlawful deviation from the powers of the city. The ordinance purports to accept the "roadway" of San Pablo avenue, and the alleged failure to include the curbing in that designation is relied upon by plaintiff as a fatal defect therein. The ordinance is also attacked because it contains no recital that the part of San Pablo avenue sought to be accepted had been fully constructed to the satisfaction of the superintendent of streets and of the city council. Appellant also condemns the ordinance because at the time of its adoption no datum plane had been officially adopted by the city of Oakland, and no official grade had been established thereon. As a consequence, it is argued, the work approved and adopted was, in contemplation of law, no improvement at all. The argument is also advanced that by the change in the Constitution giving cities full control over "municipal affairs" the status of San Pablo avenue, established by the mandate of a general statute, ceased to be of any avail as against the city of Oakland, which was not bound by a condition which by a declaratory ordinance the city had recognized as being in existence; and, furthermore, that the city after the said amendment to the Constitution was not bound, under the law, to refrain from assessing property abutting on San Pablo avenue for the improvement of that street. It was also urged against the position of respondent that by failing to appeal to the city council for relief because of the existence of "Ordinance No. 1071" he waived his defense based thereon, and is estopped upon principles of equity from setting it up in this action.

Section 20 of the general street law (St. 1885, p. 160) is substantially as follows:

"Whenever any street * * * has been or shall hereafter be fully constructed to the satisfaction of the superintendent of streets and of

the city council, and is in good condition throughout, and a sewer, gas pipes and water pipes are laid therein, under such regulations the city council shall adopt, the same shall be accepted by the city council, by ordinance, and thereafter shall be kept in repair and improved by the said municipality; the expense thereof, together with the assessment for street work done in front of city property, to be paid out of a fund to be provided by said council for that purpose: Provided, that the city council shall not accept of any portion of the street less than the entire width of the roadway (including the curbing), and one block in length, or one entire crossing. * * * The superintendent of streets shall keep in his office a register of all streets accepted by the city council under this section, which register shall be indexed for easy reference thereto."

The court found the history of the passage of the ordinance as follows:

"Said ordinance was passed on the 7th day of January, 1889, and from the minutes of the city council of said city it appears that on the 21st day of January, 1889, the mayor of said city vetoed said ordinance, whereupon the consideration of the same was made a special order for the next regular meeting of said city council, to wit, February 4, 1889, upon which last-named date the city council of said city of Oakland, by a vote, did not sustain said veto of said mayor, but at that time and place said city council of said city passed said ordinance, six councilmen voting in the affirmative, and one councilman voting in the negative, and that at said time seven members constituted the city council of the said city of Oakland."

Appellant makes the point that the ordinance was not "reconsidered" and passed over the mayor's veto, but we think the records of the city council do show that the action of the council was substantially a reconsideration and passage of the by-law.

[1] There was no formal proof of the publication of the ordinance as required by law (St. 1862, p. 353, § 53) but there was proof of all of the usual formalities of the passage of an ordinance over the mayor's veto. Mr. Thompson, the city clerk, testified that the exhibit which was received in evidence was the original record. Evidently there was no written entry of the publication of the ordinance. Respondent's counsel contend that formal proof of publication was not a prerequisite to the admission of the ordinance in evidence. In this behalf he quotes from the opinion written by Mr. Justice Van Fleet in *Santa Rosa City R. Co. v. Central Street Ry. Co.*, 4 Cal. Unrep. Cas. 950, 38 Pac. 988. That opinion is not authoritative, for the reason that the case was reheard and the judgment was affirmed by reason of a failure of the court to agree. Originally Justices McFarland and Fitzgerald concurred in the opinion of Justice Van Fleet, and Justice Garoutte concurred in the judgment, while Justices Harrison and De Haven dissented. After a change in the personnel of the court, Justices Van Fleet, Garoutte, and McFarland adhered to their belief that the judgment should be reversed for the reasons given in Justice Van Fleet's opinion, while Justices Henshaw, Harrison, and Temple were of the opinion that it should be affirmed. As the Chief Justice was disqualified,

the judgment stood affirmed by reason of the failure of a majority of the Associate Justices to agree. It does not appear, however, that the matter of failure to prove publication of the ordinance and Justice Van Fleet's discussion of that phase of the case caused the diversity of views. *Santa Rosa City Railroad v. Central Street Railway Co.*, 112 Cal. 436, 44 Pac. 733. In the opinion of the dissenting Justices (4 Cal. Unrep. Cas. 964, 38 Pac. 992) their dissent is based solely upon their belief that a forfeiture of plaintiff's franchise occurred by reason of its failure to complete its road within the prescribed time. Therefore, while the opinion published in the *Pacific Reporter* does not stand as an authoritative declaration of the law on this subject, we think it is worthy of adoption upon the point here involved. Before quoting from said opinion it may be well to refer to the provisions of the charter of Oakland existing at the time of the passage of the ordinance. It was provided that:

"All ordinances shall be published by written advertisements posted up at the mayor's office and at three other public places in the city or in a newspaper published in the city." St. 1862, p. 353.

Also that:

"Every ordinance passed by the city council shall be presented to the mayor for his approval; if he approve, he shall sign it; if not, he shall return it within five days thereafter, or if the city council be not then in session, at its next meeting, when said city council shall reconsider said ordinance; and if approved by two-thirds of all the members elected to such board, it shall take effect and stand as an ordinance of the city." Stats. 1862, p. 342, § 8.

There was no provision as in the *Santa Rosa* charter that proof of the passage and publication of ordinances might be made in "the usual way," but section 61 of the *Practice Act* (the predecessor of section 459, *Code Civ. Proc.*) was then in force, and under it one seeking the advantage of an ordinance might plead it (and consequently prove it *prima facie*) by referring to it by its title and the day of its passage. This was "the usual way"; consequently, the language of the learned justice in the *Santa Rosa* Case, which we quote below, is entirely applicable to the condition presented by this record. He said:

"There can be no doubt that publication in a newspaper or by posting is made by that statute a condition precedent to the taking effect of any ordinance; but it does not follow that direct proof of that fact is essential in any case. The statute expressly allows the passage and publication of ordinances to be proved 'in the usual way'; that is, by such proof as would be sufficient to prove such facts in any other case. * * * As was said in *City of Atchison v. King*, 9 Kan. 550, 556: 'The city having passed the ordinance four or five years before it was offered in evidence, and, having acted upon it as valid, will not now be allowed in such an action to deny its publication. Such a rule would be a great inducement to cities to disobey the law. They get the benefits and escape the inconveniences of the law by such a course, as it would in most cases be impossible for a stranger to prove a publication four or five years after the passage of the ordinance, when the publication

is by posted notices. Nor would the difficulty be much less where it was published in a newspaper, in a country where newspaper changes are as frequent as they are in this state. It was the duty of the city authorities to publish the ordinance. As they acted on it, the presumption is that it was duly published; and at least this presumption is sufficient till the contrary appears.'"

In *Van Buren v. Wells*, 53 Ark. 377, 14 S. W. 38, 22 Am. St. Rep. 214, it was held that the burden of proving publication was not placed upon the person asserting a right under the statute, but upon the one denying its validity. See, also, *Muir's Adm'rs v. City of Bardstown*, 120 Ky. 750, 87 S. W. 1093; *Missouri Pacific Ry. Co. v. Chick*, 6 Kan. App. 482, 50 Pac. 605; *McQuillin, Municipal Corporations*, § 864.

[2] Proceedings for the assessment of property for street improvements being in invitum, it follows that after the defendant has proven, in the usual manner, the existence of an ordinance preserved in the city's official records as the true and genuine act of its common council, purporting to cast upon the city the burden of paying for the work, facts tending to invalidate such ordinance must be proven by the city or the person seeking to deny the city's liability.

[3] But appellant attacks the ordinance on ground that it fails to recite that the work on San Pablo avenue had been fully constructed to the satisfaction of the superintendent of streets and of the city council, or that the street was in good condition throughout. The ordinance does recite the construction of the roadway to the satisfaction of the superintendent of streets and the city council. The omission of the word "fully" before "constructed" we deem not important. Satisfaction sufficient to cause the councilmen to vote to accept the street must be regarded as full satisfaction for all practical purposes. There was no recital that at the date of the passage of the ordinance the street was "in good condition throughout." It is argued that, where the jurisdiction of an inferior tribunal depends upon facts to be ascertained by such tribunal, its records must affirmatively show the existence and determination of such facts. *Bedell v. Scott*, 126 Cal. 675, 59 Pac. 210, and similar cases are cited in support of this position, and appellant asserts that a finding of the good condition of the road was not only a prerequisite to acceptance, but that such finding must be recited in the ordinance in order to give validity to that enactment. The doctrine announced in *Bedell v. Scott* has been somewhat modified by the later decision in *Gardella v. County of Amador*, 164 Cal. 561, 129 Pac. 993. This court said in *Chase v. Trout*, 146 Cal. 369, 80 Pac. 81:

"Where a legislative body is given power to act whenever it shall find a given fact to exist, it is not necessary, as a condition to the exercise of the power, that such body should previously or contemporaneously make a declaration that the fact exists. The fact that it takes

the action raises the presumption that it had upon inquiry ascertained the existence of the fact, unless the statute giving the power explicitly requires an express finding or declaration of the conditions precedent."

Section 20 of the Vrooman Act (St. 1885, p. 160) does not require that an ordinance accepting a street should show upon its face that the street was "in good condition throughout." Therefore the omission of that recital from the ordinance did not nullify its force and effect.

In the ordinance in question that part of the street which, according to law, was required to be kept in order by a railroad company was excepted from the operation of the by-law, and the curbing was not specifically mentioned as a part of the "roadway" which the city accepted. Both of these omissions are specified by appellant as fatal to the efficacy of the ordinance. *Beaudry v. Valdez*, 32 Cal. 276, is cited as authority for the proposition that curbing may not be considered a part of the "roadway." That case merely holds that the term "macadamizing" does not include "curbing." Section 20 of the Vrooman Act was evidently drawn with the intention of specifying curbing as a part of the roadway, because the city is therein inhibited from accepting any portion of the street "less than the entire width of the roadway (including the curbing)." The curbing is therefore, for the purposes of the act, included within the definition of the term "roadway," and an acceptance of a "roadway" in compliance with that section is an acceptance of the whole of the roadway, including the curbing. Nor did the exception from the ordinance of that part of the street which the railroad company is bound to repair make the ordinance a nullity. It is consistent and proper to read section 20 of the Vrooman Act in connection with section 498 of the Civil Code. While it is true that the former statute requires the council to accept the entire roadway, if any part, it is equally true that for the purposes of street assessment the zone which the railroad company is bound to keep in repair is not a part of the roadway. In *San Francisco Paving Co. v. Egan*, 146 Cal. 638, 80 Pac. 1076, which was an action to foreclose the lien of a street assessment, the board of supervisors had in the resolution of intention specifically excepted "that portion required by law to be kept in order by the railroad company having tracks thereon," although the statute only authorized the omission of those portions of the street on which work previously had been performed by owners of land fronting thereon. It was held that the board of supervisors had the right to except in its resolution that part of the street which the railroad company was bound under its franchise to keep in order. While *Oakland Paving Co. v. Rier*, 52 Cal. 276, is in seeming conflict with this conclusion, we are not favored with the text of the resolution of the council

there reviewed. The opinion merely says that the council did not accept the full width of the street. The resolution was also held of no effect under section 20 of the Vrooman Act, because it sought to express acceptance of work done, rather than of the street upon which the material and labor had been bestowed.

[4] Because no datum plane had been established and officially adopted by the city of Oakland prior to the adoption of Ordinance No. 1071, appellant insists that the attempted acceptance of San Pablo avenue was beyond the power of the city council. It is true that without a datum or basis fixed for the grade of a street a contractor may not know how far he may be compelled to go in filling or grading, and therefore it is proper that a grade should be fixed before the letting of public contracts for street work. But this is not a question between the city and a contractor or a prospective bidder whose rights are in danger of being violated because of the nonexistence of an official grade. When a municipality engages with the owners of property to keep the roadway of a street in repair, it makes such engagement in view of the existing facts, and the existence or nonexistence of an official datum plane is entirely immaterial to the force and validity of its ordinance of acceptance.

[5] It is also suggested that respondent's failure to appeal to the council for relief estopped him from maintaining this defense, that, being presumed to know of the existence of the ordinance, he remained silent while the work was being done, and the failure to present his objections and his defense to the city council precluded him from an assertion of such defense before any other tribunal. But the presumption of knowledge did not attach to the respondent with any greater strength than it applied to the city or to the contractor. What could the council have done to remedy the situation? It could not have removed the effect of the ordinance. The council had the right to order the improvement, and the property owner could not question that right, but he could contest the contractor's right to collect from him after the work was completed. In *Flickinger v. Fay*, 119 Cal. 590, 51 Pac. 855, the facts were these: The common council of the city of San Jose had ordered certain work done on a street, and had entered into a contract with the respondent, but the appellant, who owned property abutting on the street, sought by injunction to restrain prosecution of the improvement on the ground that he would be charged with a proportion of the cost in violation of a resolution of the council by which the street had been accepted in accordance with the provisions of the street improvement act. This court held that the injunction was properly denied and said, among other things:

"Whether the cost of that work shall be borne by the city, or be assessed upon the adjacent

lands, will be determined after the work under the contract has been completed. If, for any reason, an assessment therefor cannot be legally made upon the lands of the plaintiffs, they will then be entitled to relief against such procedure, or can successfully defend any proceeding to enforce the assessment."

Besides, it has been held that the doctrine of estoppel has no application in proceedings to enforce liens for street work. *Heft v. Payne*, 97 Cal. 110, 31 Pac. 844; *Union Paving & Contracting Co. v. McGovern*, 127 Cal. 639, 60 Pac. 169.

[6] In opposition to the superior court's conclusion that no lien could attach upon the property for the improvement made, for the reason that at the time the contract was made San Pablo avenue was an accepted street, we are favored with an elaborate brief by one of the amici curiae wherein it is argued that no exemption existed by reason of the ordinance provisions. In support of this contention counsel insists that section 20 of the Vrooman Act, before its repeal in 1911 (which was subsequent to the completion of the work here considered), created no vested or contractual right when it was complied with, and that the exemption therein provided for was a mere gratuity, revocable at the will and pleasure of the power bestowing the gratuity. The question whether or not exemptions of this sort create a contractual relation has been twice before this court, but it was not decided either time. *San Francisco v. Certain Real Estate*, 42 Cal. 521; *Oakland Paving Co. v. Rier*, supra. Generally speaking, however, the principles of taxation are not those of contract, and it has frequently been decided in other jurisdictions that payment by a property owner for improvements to a street in no wise constitutes a consideration moving from him to the city which would support a contractual obligation. See *Ladd v. City of Portland*, 32 Or. 271, 51 Pac. 654, 67 Am. St. Rep. 526, and cases cited. On the other hand, there are authorities which hold that, where an assessment has been made under powers properly exercised, and has been duly paid, a second assessment should be borne by the general public for the reason that the benefits to the owner of abutting property of such second improvement is reduced to a minimum, and that, the real benefit being to the community generally, the municipal treasury should bear the burden. *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615. The principle upon which owners of abutting property are charged with the cost of street improvements, in the first instance, is that their property is benefited in a special manner. In recognition of this doctrine, statutory provision is often made for exempting property from the operation of an assessment where a prior improvement has been ordered and constructed, or for the giving of some credit for the value of such prior improvement, and when such exemption or credit has been ordered in conformity with statute or ordinance, it has usually been

sustained. The policy of the Legislature of this state has been to recognize that the special benefit which an abutting owner has received by reason of street improvements has been satisfied by the payment of one assessment, and that under a second improvement an owner of property abutting thereon does not derive any advantage beyond that enjoyed by all other citizens. Section 20 of the Vrooman Act is a legislative recognition of a right to exemption which ought to exist under all conditions of fairness and justice. Irrespective of the question of what rights might or might not accrue under the exemption, it is admitted that the section provides for the creation of a certain status by the adoption of an ordinance of acceptance, and that the moment this status is brought into existence the sovereign power of the state operates, through the act, to create an exemption. It is contended, however, that while this exemption continued to exist after the adoption of a freeholders' charter, the provisions of which were consistent with the Vrooman Act, this situation was changed in November, 1896, by the amendment to section 6 of article 11 of the Constitution, under which cities and towns theretofore or thereafter organized, and the charters of such cities and towns, were freed in all "municipal affairs" from any further subjection to or control by general laws, and that upon the adoption of the amendment the freeholders' charter became exclusively operative in matters of street improvements and acceptance, and that accordingly any exemption created under general laws became extinguished. In support of this theory it is argued that to hold otherwise would have the effect of interfering with the power of taxation by the city, by increasing the burden on the general taxpayers by reason of the fact that the exemption would augment the area of land relieved from assessment for street purposes by acceptances under section 20 of the Vrooman Act. This contention cannot be maintained. The delegation of exclusive authority by constitutional provision to municipalities in municipal affairs does not of itself have the effect of repealing all general laws with reference to such affairs. Rights existing under a statute in force when a constitutional amendment is adopted are not affected by it, unless it contains some provision which specifically abrogates such pre-existing rights. 1 Page & Jones on Taxation, § 166. Unless intent to repeal the terms of a special law is evident from the language of a constitutional provision, courts should assume as a rule of construction that only a prospective operation of the constitutional provision was contemplated. *State ex rel. Harrison v. Frazier*, 98 Mo. 426, 11 S. W. 973. Constitutional provisions do not affect laws in existence unless the words employed show a clear intention that the provisions shall have a retroactive effect. *Mest-*

as v. Diamond Coal & Coke Co., 12 Wyo. 414, 76 Pac. 567; Hamilton on Assessments, §§ 196, 201, note. The constitutional amendment here invoked to defeat the asserted exemption contains no such provision, nor was any ordinance ever adopted, under this grant, so far as this record discloses, attempting to revoke the exemption provided for in the Vrooman Act and declared by the ordinance of the city of Oakland which we have been here reviewing. Both the act and the ordinance having been in force at the time of the improvement for which plaintiff seeks payment from defendant, it follows that, as the street had been duly accepted, the assessment was void.

Our conclusion with reference to this branch of the case makes it unnecessary for us to discuss the other alleged errors.

The judgment and order from which plaintiff has appealed are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

170 Cal. 230

Ex parte McDONOUGH. (Cr. 1918.)

(Supreme Court of California. May 24, 1915.
Dissenting Opinion June 3, 1915.)

1. WITNESSES ⇌ 201—PRIVILEGE—ATTORNEY AND CLIENT—"COMMUNICATION."

An attorney who had been employed by certain clients to represent them in matters connected with the investigation of election frauds, and who appeared to defend three other individuals who were indicted for such frauds and put up a cash bail for one of the indicted men, cannot be compelled to state to the grand jury the names of the clients who employed him to represent the three indicted men, and who furnished the cash for the bail, under Code Civ. Proc. § 282, subd. 5, requiring an attorney to maintain inviolate the secrets of his client, and section 1881, providing that an attorney cannot, without the consent of his clients, be examined as to any communication made by the client, "communication" in that section not being restricted to mere words but including acts as well.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 754, 755; Dec. Dig. ⇌ 201.

For other definitions, see Words and Phrases, First and Second Series, Communications.]

2. WITNESSES ⇌ 201—PRIVILEGE—ATTORNEY AND CLIENT—FUTURE ILLEGAL ACT.

A communication to an attorney concerning an intention on the part of the client to do some illegal act in the future is not privileged.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 754, 755; Dec. Dig. ⇌ 201.]

Lawlor, J., dissenting.

In bank. Application by George McDonough for a writ of habeas corpus for his discharge from custody on the sentence for contempt of court. Petitioner discharged.

A. L. Frick and Burton Jackson Wyman, both of Oakland, for petitioner. W. H. L. Hynes, Dist. Atty., and Walter J. Burpee, Chief Deputy Dist. Atty., both of Oakland, for respondent.

ANGELLOTTI, C. J. Petitioner, an attorney at law, was retained by one Woolley and one Gorman to represent them as their attorney in connection with any and all investigations that were being made, or that might be made as to their participation in certain alleged election frauds and violations of the election laws in Alameda county, claimed to have been committed in connection with the general primary election of August 25, 1914, and he has ever since been acting as their attorney in pursuance of such employment. Subsequent to such employment one Higgins, one Gale, and one Wiles were indicted by the grand jury of that county, charged with participation in said crimes alleged to have been committed in connection with such election. Petitioner appeared as the attorney of each of such men, and has ever since acted for them, having admittedly been employed to represent them. He deposited \$10,000 cash bail for the release of Higgins. Subsequently the grand jury of Alameda county, in the further investigation of said frauds and crimes, procured the attendance of petitioner as a witness, and while he has finally answered many questions put to him, he has steadily refused to answer such questions as these, viz:

Q. Who employed you to represent Higgins et al.? Q. Did Jack Woolley or Grant Gorman employ you to represent Higgins et al.? Q. Did Jack Woolley or Grant Gorman furnish the \$10,000 which you deposited as bail for Higgins? Q. Who furnished the \$10,000 deposited as bail for Higgins?

For his refusal to answer these questions after being ordered to do so by the superior court, petitioner has been adjudged guilty of contempt of court, and ordered confined in the county jail of Alameda county until he does answer them. Admittedly the purpose of the questions is to obtain evidence against Woolley and Gorman, by which they can be implicated as principals in the commission of the crimes for which Higgins et al. had been indicted, and to implicate them in the commission of the election frauds.

The court below found that all the allegations of petitioner's affidavits filed in the contempt proceedings are true. These affidavits averred substantially, among other things, the following: Each and every communication, either verbal, written, or by signs, which he had received from either Woolley or Gorman in any way, relating to or concerning or about the said frauds, or the charges on which Higgins et al. were indicted, or with reference to the defense or bail of either said Higgins or said Wiles or said Gale, were received by him as the attorney for said Woolley, and as the attorney for said Gorman, and not otherwise. That the \$10,000 deposited as bail for Higgins was delivered to him by a client of his, which client had previously employed him to represent him, said client, in all investigations

which were being or might be made of said client's conduct in connection with said alleged election frauds and in connection with Higgins et al., and to represent him in all matters and things growing out of the alleged election frauds in which it was or might be claimed that said client was implicated, and in any proceedings whereby it might be sought to ascertain whether the said client was connected with the commission of these crimes or not. That clients employed him to represent Higgins et al., and that these clients had previously employed him to represent them in connection with all charges which might be brought against them in connection with said frauds, and in reference to any claim that might be made that these clients had in any way been connected with these frauds, and that it was in connection with such employment by said clients to act as their attorney, and not otherwise, that these clients employed him to represent Higgins et al. That neither the unnamed clients nor Woolley nor Gorman consented to his testifying.

[1] The question presented is whether the employment of petitioner by his clients to defend Higgins et al. and the furnishing by his clients of the sum of \$10,000 to bail out Higgins were matters concerning which he cannot testify without the consent of such clients. Section 1881 of the Code of Civil Procedure provides:

"There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: * * * 2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment."

However desirable it may be to obtain proofs sufficient to insure the conviction of all persons who commit crimes of the character of those under investigation, and it will readily be conceded that it is most desirable, such proofs may not be obtained from those who are forbidden by our law to give them. In regard to the obligations of an attorney to his client in this respect, our statutes are very explicit, making it his duty "to maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client" (Code Civ. Proc. § 282, subd. 5), and, in the section above quoted, prohibiting his examination as a witness, as therein stated. As said in *People v. Atkinson*, 40 Cal. 284:

"On principles of public policy, communications from a client to his attorney, touching the subject-matter under investigation are privileged, and will not be allowed to be disclosed by the attorney, even though he be willing to do so."

It is obvious, of course, that the sole purpose of the questions was to obtain from petitioner proof of admissions by a client to him, tending in some degree to show complicity on his part in the alleged crimes for

which Higgins et al. had been indicted, made while he was acting as the attorney of such client in the very matter of said alleged crimes. Under the circumstances shown here, the questions could have no other purpose, and the answers no other effect. It will at once be conceded that if this client had said to such attorney that he had aided and abetted Higgins et al. in the commission of the acts for which they had been indicted, under such circumstances of course as to preclude the idea that his statement was not confidential, the attorney could not be examined as a witness regarding such statement, in view of our law, without the consent of the client. To our minds there is absolutely no distinction in principle between such a case and that presented by the questions which it is here sought to compel petitioner to answer. The only difference is in the weight of the testimony as going to show such complicity on the part of the client, in the one case being a direct admission of such complicity, and in the other being an admission of interest from which, in the light of other circumstances, such complicity might reasonably be inferred.

It has been said that the word "communication" as used in such provisions as our section 1881, Code of Civil Procedure, is not to be restricted to mere words uttered by the client, that looking back at the reason of the privilege it is seen to secure the client's freedom of mind in committing his affairs to the attorney's knowledge, and that acts, as well as words, may fall within the privilege. See *Wigmore on Evidence*, § 2306; *State v. Dawson*, 90 Mo. 149, 1 S. W. 827; *Holden v. State*, 44 Tex. Crim. 382, 71 S. W. 600. These statements, we are satisfied, are in accord with the reason of the rule, and we cannot doubt their correctness. The questions here called for "communications" from petitioner's client or clients to him. In view of the facts found by the lower court, it cannot here be doubted either that whatever information was conveyed to petitioner thereby came to him from his clients in the ordinary course of his professional employment as such clients' attorney, or that there was nothing in the nature of the transaction, or in matters extraneous thereto, to rebut the presumption that the communications were confidential. See *Hager v. Shindler*, 29 Cal. 67.

[2] And there was nothing in the facts to warrant a conclusion that the evidence proposed to be thus adduced bore at all upon any intention or arrangement on the part of the client to perform some illegal act in the future, or the then actual doing of any such illegal act, as to which, it may be conceded, the rule would not apply, however injurious to the client the evidence might be. See *United States v. Lee* (C. C.) 107 Fed. 702. There was nothing illegal or contrary to public policy in what it was proposed to show

petitioner's clients had done in the way of employing petitioner to defend Higgins et al., or in furnishing the money to be used for the purpose of obtaining the release of Higgins on bail. As before suggested, it was simply being attempted to show by petitioner's testimony that the clients had made to him admissions from which, in the light of other circumstances, their guilt in the matter as to which petitioner was defending them, might be inferred.

We are unable to perceive any sufficient ground upon which it may be held that petitioner may be compelled, without his client's consent, to answer any of these questions. Counsel for the people rely, as to the questions directed to the identity of the persons who employed petitioner to defend Higgins et al., upon what has frequently been said to the effect that an attorney is not privileged from disclosing by whom he was employed. Ordinarily this is doubtless true. As is said by Wigmore in his work on Evidence (section 2313), the identity of the attorney's client, or the name of the real party in interest, will seldom be a matter that can be held, under the law, to have been communicated in confidence. The mere fact of retaining an attorney to act as such is not ordinarily a matter occurring in the course of the confidential relation of attorney and client, but is something that precedes the establishment of that relation. *Eickman v. Troll*, 29 Minn. 124, 12 N. W. 347. Frequently, too, the fact of employment of an attorney by a certain person for a specific purpose is an element of the cause of action being asserted against such person in the matter under investigation. This is illustrated in the case of *White v. State*, 86 Ala. 69, 5 South. 674, and *Stanley v. Stanley*, 27 Wash. 570, 68 Pac. 187, cited by counsel for the people. In the first of these cases, White was charged with making a false claim against a railroad company for lost baggage, and evidence of an attorney, employed to present the claim and who presented it, as to his employment, was held admissible. The other case was an action for damages by a wife against her husband's parents for alienation of her husband's affection, and the testimony of an attorney that he was employed by the parents to bring an action for divorce on the part of the husband against the wife was held to be proper. As Mr. Wigmore says, much ought to depend on the circumstances of each case. The matter was discussed in *In re Shawmut Min. Co.*, 94 App. Div. 156, 87 N. Y. Supp. 1059, and it was substantially said that many cases holding that an attorney may be compelled to testify to his representation of some person as an attorney are based and decided upon the principle that the employment and communications were made for the purpose of enabling the attorney to perform acts which involved the rights of third parties, who act-

ed upon the faith of his attorneyship, and that under such circumstances it was entirely proper that the fact of attorneyship should be established. Of course, we have nothing of this kind here. The case of *United States v. Lee* (C. C.) 107 Fed. 702, perhaps comes nearer to sustaining the claim of the attorneys for the people than any other case cited, but even that case is distinguishable in a material way. The grand jury was investigating the matter of the disappearance of Lee, who had become a fugitive from justice while under indictment and awaiting trial, and his attorney, who had appeared for him on the indictment, was compelled to testify as to the name of the person who had employed him to defend Lee; it appearing that some one other than Lee himself had employed him. As suggested, the grand jury was investigating the matter of his disappearance, and not the question of his guilt of the charge against him—was endeavoring to ascertain who, if anybody, was guilty of complicity in the flight of Lee, an illegal act occurring after the commission of the crime charged against Lee. Even as to this the district judge said that a question asked the attorney relative to the interest which his client had in the defense of Lee might involve a confidential communication from his client to himself, and might therefore be improper. He further said:

"If the client did have an interest and stated it to his counsel, the latter is not called upon to reveal it."

But the judge thought that counsel could not state that he gained the information called for from a client and then leave that client mysterious, unknown, and undefined, and that the court had a right to know that the client was actual flesh and blood, and—"to demand identification for the purpose at least of testing the statement which has been made by the attorney who places before him the shield of this privilege."

Of course, in view of the facts found by the trial court here, no such reason exists in this case. It is clear enough that none of the various reasons advanced in the authorities for the disclosure of the name of the client who employed the attorney is applicable here, in view of the circumstances of this case. We cannot escape the conclusion that, in view of the findings of the lower court, to require the petitioner to answer any of the questions as to the name of the client who employed him to defend Higgins et al. would be to require him to divulge a confidential communication made to him by a client in the course of his employment—a communication tending to show, and, under the circumstances of this case, material only for the purpose of showing, an acknowledgment of guilt on the part of such client of the very offenses on account of which the attorney had been employed to defend him.

What we have said is also true as to the

questions relative to the furnishing of the money deposited as bail for Higgins.

The petitioner is discharged from custody.

We concur: SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.; SHAW, J.

LAWLOR, J. I dissent. I will file an opinion later.

LAWLOR, J. I dissent. In my opinion the judgment of contempt should be upheld.

There is in the commitment, and made a part thereof, a full record of the proceedings before the grand jury, and the superior court, which includes the two affidavits each of A. K. P. Harmon, foreman of the grand jury, and the petitioner. This record merits a critical examination. I will consider the questions relating to employment and bail separately.

On the question of employment I will examine, first, whether the superior court found that before petitioner was employed to represent Higgins, Gale, and Wiles, he had already been retained on behalf of the party or parties who so employed him, and in this connection the inquiry is apart from the question of the identity of such party or parties.

It was, of course, necessary for petitioner to show such order in the respective employments as a foundation for the claims of privilege, and he sought to show it in an indirect and, as I think, ineffective way.

In respect to Higgins and Gale it is alleged that he was employed prior to October 19th, and Wiles prior to November 16th, but there is a striking absence of any averment covering the exact date of his employment on behalf of the three men.

In regard to the date that he was retained by those who employed him to represent Higgins et al., it is plainly averred that Woolley and Gorman engaged him separately as their individual attorney on October 17th. There is, however, no allegation in terms that before petitioner was employed to act for Higgins et al., he had been retained by Woolley and Gorman on their own account. But such prior employment is attempted to be established by several indirect averments. For instance, it is alleged that anything "which may have been said" to petitioner by either Woolley or Gorman about the cases against Higgins, Gale, and Wiles, or representing them, was communicated while the relation of attorney and client existed between Woolley and Gorman and petitioner, and not otherwise.

It is elsewhere averred that petitioner had been employed by "clients" of his, without stating their names or how many such clients there were. Then follows the direct allegation (which is absent from the averments wherein Woolley and Gorman are mentioned by name) that before the "clients" employed him on behalf of Higgins, Gale, and Wiles they employed him to represent them. And in

succeeding paragraphs it is averred in sequence that Woolley and Gorman were and are "clients" of petitioner. It was apparently intended to further supplement the suggestion of prior employment by Woolley and Gorman for themselves personally by the averments that ever since October 19th and November 16th, respectively, petitioner has represented the three men. No liability of disclosure touching the question as to who employed him on behalf of Higgins et al., would have been incurred by stating when he was so employed. Such jugglery with facts should not be tolerated, and especially as the direct averment on the point of time would not, as has been shown, have impaired the asserted claims of privilege so far as the identity of either Woolley or Gorman or the unnamed "clients" is concerned.

As to the legal effect of all the averments on this point, it is proper to state that before pronouncing the judgment of contempt the superior court made the following general findings:

"The court finds that each and every averment in the affidavits filed with this court by A. K. P. Harmon and the said George McDonough, and made a part of this commitment, and each and every recital in the orders made thereon by this court, and made a part of this commitment, is and are true. * * *"

It is the established law of this state that on habeas corpus the findings of fact of the superior court are binding on this court. Ex parte Clark, 110 Cal. 405, 42 Pac. 905; Ex parte Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266; Ex parte Sternes, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251; and Ex parte Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263.

The court made no findings of any specific fact otherwise than as above expressed or implied, and in the involved state of the evidentiary record it cannot even be conjectured what conclusion, if any, was reached on the question whether the relation of attorney and client existed between Woolley and Gorman and petitioner before he was employed to represent Higgins et al., and this question was vital to the claims of privilege; for, I repeat, if the relation had not been previously formed, there could be no privilege.

It must be shown that the relation of attorney and client actually existed before any communication can have the sanctity of privilege. 40 Cyc. 2363b; Churchill v. Corker, 25 Ga. 479; Jennings v. Sturdevant, 140 Ind. 641, 40 N. E. 61; State v. Smith, 138 N. C. 700, 50 S. E. 859; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; George v. Silva, 68 Cal. 272, 9 Pac. 257. In State v. Smith, supra, the prisoner had made communications prior to the employment to one whom he claimed to be his attorney in fact. But the court overruled the objection and held that, even if it had been shown that the recipient of the communication was an attorney at law at

the time, "the prisoner could not deprive the state of such important evidence by 'retaining' the witness." The fact of employment is preliminary in its nature and is not involved by the rule of privilege.

It is clear that the petitioner had primary knowledge of the precise date of his employment on behalf of the three men, and his failure to allege the fact, and relying on ambiguous and indirect averments instead, may have led the court, under a familiar rule of evidence (subsections 6 and 7, § 2061, Code Civ. Proc.), to find that there had been no such prior employment, for, in strictness, prior to October 19th or November 16th may be prior to October 17th. And, as already pointed out, fixing the exact date of the employment did not involve the main question as to who employed him. The allegation that "anything which may have been said" of course is not the equivalent of a statement that anything was said. In this behalf I think the reference in the majority opinion to the subject that any communication petitioner "had received" is too strongly expressed. Nor has any attempt been made, except by suggestion, to establish identity between Woolley and Gorman and the unnamed "clients," notwithstanding the direct averment that Woolley and Gorman were "clients" of petitioner. Indeed, the court may have decided that there was no such identity. Nor, again, does the averment that ever since the indicated dates petitioner has represented Higgins et al. preclude the idea that he may have represented them prior to October 17th. Evidence of such equivocal import should have been ignored for every purpose, and in my opinion, it cannot be availed of to annul the judgment of the superior court. It seems to me there is an evidentiary gap between the set of averments which refer to Woolley and Gorman by name and the allegations touching the unnamed "clients," and as neither is sufficient, in itself, by reason of vagueness, to cover the point of time, it cannot be held here that the superior court found the fact in favor of petitioner.

Tested by the averments of priority of employment, the crime of perjury could not be supported if, as a matter of fact, petitioner was employed to represent Higgins et al. before October 17th.

Finally if petitioner intended by circumlocutory averments to have the superior court assume or find that Woolley and Gorman were the "clients" referred to, then his assertions of privilege should not be further considered.

In my view, the superior court did not intend by its findings to hold that the petitioner met the burden of showing that the relation of attorney and client had previously existed between himself and those who employed him at the time he was retained to represent Higgins, Gale, and Wiles. But even if it must be held here that under the findings of the superior court the employment

on behalf of Higgins et al. was after, instead of before, October 17th, the fact of the employment itself should have been divulged by the petitioner.

Following the findings, the superior court concludes:

"That none of the averments contained in any of the affidavits, or answer, filed by George McDonough, and made a part hereof, state facts sufficient to justify the refusal of the said George McDonough to answer the questions hereinafter referred to, and no reason appears why the said George McDonough should not be compelled to answer such questions before the grand jury of Alameda county, and why he should not be punished for refusing to do so in contempt of an order of this court issued on the 8th day of December, A. D. 1914, and made a part thereof."

The grand jury was organized on November 2d. Prior to October 19th the preceding grand jury had returned indictments against Free S. Beach and James Higgins for the crimes of forgery and violating section 113 of the Penal Code, Edward C. Wiles for perjury, false registration, fraudulent voting, and falsification of a public record, and Charles L. Gale for forgery and violating the provisions of sections 46 and 113 of the Penal Code. What remained to investigate called for the faithful and diligent efforts of the grand jury and the district attorney. The initiatory affidavit of the foreman, referring to the first appearance of the petitioner before the grand jury, enumerates the foregoing indictments, and avers:

"That said matters and said criminal action and actions grew out of and were based upon certain fraudulent registration, voting, falsification of records, and impersonation of voters that had been committed in the said county of Alameda on the 25th day of August, A. D. 1914, at the general primary election held pursuant to the provisions of the direct primary law; that said crimes and frauds against the elective franchise shows a general concerted plan, scheme and conspiracy; * * * that * * * said grand jury was investigating the above matters with a view of determining what person or persons planned and directed the execution of said frauds and crimes, and who were in league and in conspiracy with the above-named defendants in the execution and perpetration of said election frauds and the above-mentioned crimes."

The investigation, the petitioner was apprised by the district attorney, covered the range of offenses prescribed by chapter 4, pt. 1, of the Penal Code, which is devoted to crimes against the elective franchise, and embraces sections 40 to 61½, the latter making applicable to primary elections the provisions of the preceding 24 sections. In addition, as already appears, indictments had been found against Higgins and Gale for violations of section 113 of the Penal Code, which relates to the stealing, destroying, mutilation, altering, falsifying, and the like of records in the custody of a public officer.

It is averred by the petitioner on his information and belief that the inquiry concerning his employment on behalf of the three men was immaterial and irrelevant, and that the purpose of the district attorney in asking the

questions was to implicate Woolley and Gorman and the so-called "clients." Whether the court found in favor of these averments does not appear by any specific finding. But it is proper to consider in this connection, as well as with regard to the legal conclusions of the superior court, that a grand jury is an appendage of the superior court, and its members officers thereof (In re Gannon, 69 Cal. 541, 11 Pac. 240; Heard v. Pierce, 8 Cush. [Mass.] 338, 54 Am. Dec. 757); that they are "persons specially invested with powers of a judicial nature" (title 3, pt. 1, Code Civ. Proc.); and that "the grand jury must inquire into all public offenses committed or triable within the county, and present them to the court by indictment" (section 915, Pen. Code).

While the subject-matter of investigation by a grand jury must fall within the original jurisdiction of the superior court as to the grade of offenses, and the inquiry be clearly defined when the authority of the superior court is invoked by it to compel a witness to answer, yet because of the inquisitorial nature of the powers of the grand jury, it is not requisite that the court shall be fully advised of the exact evidentiary import of the proposed evidence, nor that it shall be informed of every angle and turn of, or keep pace with the investigation, or who may be involved thereby. It must affirmatively appear, however, that the inquiry is within the general scope of the investigation, and that the subject-matter thereof is not in excess of the cognizance of the grand jury.

A full investigation of the matters referred to in the affidavits of the foreman of the grand jury was of transcending importance to the public and to the administration of justice, for crimes of the character mentioned tend to sap the foundations of free government and subvert the will of the people in the exercise of their electoral rights. It is readily conceivable that the inquiry had many ramifications, a close knowledge of which would properly be confined to the grand jury and to the district attorney, and I cannot assent, therefore, to this statement in the prevailing opinion:

"* * * It is obvious, of course, that the sole purpose of the questions was to obtain from petitioner proof of admissions by a client to him, tending in some degree to show complicity on his part in the alleged crimes for which Higgins et al. had been indicted, made while he was acting as the attorney of such client in the very matter of said alleged crimes."
* * *

This excerpt assumes the existence of facts about which, as I have shown, there is serious doubt. But even if by "client" is meant Woolley or Gorman, or both, or the unnamed "clients," the fact of petitioner's employment on behalf of Higgins et al. should have been divulged, whether the questions had the import alleged by petitioner or tended to the effect described in the opinion. The test as to whether a communication is privileged is not the effect the disclosure may have either on the client or the attorney, but whether

the communication comes within the rule of privilege, and this question must inevitably be determined by the facts and circumstances of each particular case.

The reasons calling for the identification of the client are set forth in Wigmore on Evidence, § 2313, and I cannot conceive of a criminal case where the privilege is urged that the fundamental fact of employment may not be inquired into. The questions of employment and the privilege claimed are in their essence interdependent, and each must be determined according to the accepted rules governing them.

The general doctrine of privileged communications is expressed in the following cases:

"* * * There is no presumption of privilege, and though its allowance may, in a clear case, be founded upon the voluntary statement of the attorney that his knowledge of the fact of which he is asked to testify was acquired in professional confidence, yet wherever the circumstances suggest that the sufficiency of the grounds of that statement should be considered, it is the right of the opposing party to demand that the proponent of the privilege shall be submitted to such interrogation as may be necessary to test its validity." Section 748a, Jones on Evidence; In re Ruos (D. C.) 159 Fed. 252; People's Bank of Buffalo v. Brown et al., 112 Fed. 652, 50 C. C. A. 411; and Hughes v. Boone, 102 N. C. 160, 9 S. E. 286.

"* * * It was incumbent on the party who objected to the examination * * * to show that the communication was privileged. * * *" Carroll v. Sprague, 59 Cal. 659.

"The burden is on the party seeking to suppress the evidence to show that it is within the terms of the statute." Sharon v. Sharon, 79 Cal. 677, 22 Pac. 26, 131.

"Authorities establish the rule that the attorney may be compelled to disclose the character in which the client employed him."

"* * * It is further to be observed that, as this rule has a tendency to prevent the full disclosure of the truth, it ought to be strictly construed." Satterlee v. Bliss, 36 Cal. 508.

"Whether or not the circumstances are such as to make the rule of privilege applicable in a particular case is a question for the court." 23 Am. & Eng. Ency. of Law, 71, citing cases.

And " * * * as the rule of privilege has a tendency to prevent the full disclosure of the truth, it should be limited to cases which are strictly within the principle of the policy that gave birth to it." Id., citing Satterlee v. Bliss, supra, and other authorities.

The general principle of privileged communications is laid down in Wigmore on Evidence, § 2285 (4):

"The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

And see section 2332.

In U. S. v. Lee (C. C.) 107 Fed. 704, referred to in the majority opinion, it is said:

"But it is thought that a counsel may not state that he gained the information called for from a client, and then leave that client mysterious, unknown, and undefined. The court has a right to know that the client whose secret is treasured is actual flesh and blood, and demand his identification, for the purpose, at least, of testing the statement which has been made by the attorney who places before him the shield of this privilege."

The question arose there, as here, in an investigation before a grand jury, and in the

light of the evidentiary record in the case at bar the language is peculiarly pertinent, since the range of the questions touching the employment of petitioner on behalf of Higgins et al. was limited to the identity of the party or parties who so employed him, and did not call for a disclosure of any communication received after such employment was entered into.

I apprehend there is no division of opinion on the general subject of privileged communications. When the relation of attorney and client has been created, and the object of the employment is not in furtherance of any criminal or fraudulent purpose (Jones on Ev. § 748 and Wig. on Ev. § 2298), any communication made by one to the other "during, in the course of, and for the purposes of such employment" (section 748a, Jones on Ev.) is privileged, and "it is immaterial whether the client is or is not a party to the action in which the question is put to the legal adviser." (Id.). It is the privilege of the client, and not of the attorney, and the communication shall not be disclosed by the latter without the express consent of the former.

In determining in any case the pivotal question whether the relation of attorney and client had been created before the communication passed, the inquiry should be as broad as the necessities of the particular case, in order to get at the truth of the matter. And if the prior existence of the relation is not established, the communication lacks in privilege.

I shall assume again for the purposes of what is to follow that the superior court found that the relation of attorney and client existed at the time the petitioner was employed on behalf of Higgins et al. by "clients"—Woolley and Gorman or others—whose secrets he is guarding by his refusal to testify, and now consider whether, as matter of law, upon the record of the proceedings from the superior court, the communications referring to the employment to represent the three men come within the rule of privilege. My conclusion is that they do not, and this rests on two considerations: First, that the fact of employment in criminal litigation is never privileged; and, second, that even if the privilege may attach to the fact of employment in criminal proceedings in some instances, yet under the peculiar circumstances shown by the record from the superior court, not only the fact of employment, but also the "characterizing circumstances," should be fully developed.

The question whether the fact of employment may always be inquired into in civil litigation whenever the claims of privilege are urged, upon considerations affecting the rights of third parties, or otherwise, is not involved here. But I perceive no reason for any difference in the rule. It may be suggested, however, that the rights of the public are not so immediately concerned in civil as in criminal litigation, and hence in rela-

tion to crimes against the state there would, in my opinion, always be stronger reason for having the identity of the interested parties known.

I have pursued the subject at length in order to ascertain, if possible, the reasoning the superior court followed in the premises, for it found without qualification in favor of all the averments of fact and held nevertheless that petitioner had placed himself in contempt of its authority, and it is our duty not to pronounce the judgment void except in the face of the strictest necessity.

In my examination of the law I found no case on the subject of contempt of court whose facts bear resemblance to those of the proceeding at bar, and it is because of the unusual state of the facts that I finally conclude the superior court made a finding on the entire evidentiary record—although it does not so specifically appear therein—to the effect that because of the peculiar circumstances surrounding the employment of petitioner on behalf of Higgins et al. the communications on the subject should not receive the sanction of privilege. I do not think the court could have reached any other conclusion.

According to the claims of the petitioner, before being retained for the three men, he had been employed by certain "clients," Woolley and Gorman or others, to represent them individually in any matter that might arise out of the election crimes and frauds. From certain averments in the affidavit of petitioner it was doubtless inferred by the court that the employment to represent the "clients" came as a result of prevalent rumors and articles that appeared in the public press, tending to connect them with the crimes claimed to have been committed by Higgins et al. The employment for the three men followed. The purpose of that particular employment primarily, of course, was to defend the original "clients."

I have given particular attention to the record of the said proceedings, with the view of determining the conclusion the court must have reached in reference to the character of the services the petitioner was to perform for the three men. It readily occurs that under all the circumstances presented there might well be an adversity of interest between the two sets of clients, and, of course, if that were so, the law would not support the petitioner in attempting to represent both.

The court could not have done justice to the state, as well as to the petitioner, if it failed to keep in mind the common experience in the administration of criminal justice that, in relation to crimes involving conspiracy and confederation, those who plan them remain in the background, while reckless tools are sent forth to do the actual work under promises of reward, protection, and defense. If exposure follows, the men who actually committed the criminal act are

alone brought to the bar of justice. Then an attorney, chosen by the heads of the enterprise, appears to defend them. Deference is generally paid to appearances by having one attorney for each individual. If conviction follows, the leaders in the background are naturally anxious about the outcome. Will the district attorney be able to obtain confessions from the men already in the toils of the law, and, in that way, develop all the facts of the crime and reach out for the prime conspirators? In such circumstances the advantage of hiring an attorney to guide the criminals already in the clutches of the law can hardly be exaggerated. What would be the conception of duty on the part of an attorney who would, in such a situation, accept employment to represent the two sets of malefactors? This is not an unusual experience by any means, as every one familiar with criminal litigation is aware.

If the superior court applied the foregoing illustration to the strange facts and circumstances of this case, and then in judging petitioner's conduct reached the conclusion that Woolley and Gorman were original conspirators in the scheme to debauch the election, and Higgins et al. were merely tools to do the actual work, would it be expected, under any rule of law, that the communications in relation to the employment of petitioner on behalf of Higgins et al. should be held privileged? The inherent circumstances plainly suggest that there were two such classes of participants in the enterprise—one in the conception and the other in the commission of the election crimes and frauds.

How are the interests of justice to be safeguarded if an attorney is permitted to form such divergent alliances? To illustrate: If, in the progress of the investigation or prosecution, it seemed to be for the mutual benefit of the state, and the involved men that, upon considerations of mitigation or immunity, the latter make to the authorities disclosures covering the criminal enterprise to violate the election laws on a wholesale scale, would the petitioner be in a position to give disinterested advice to his clients in the open in the face of his personal employment for the "clients" in the dark? If such practices are to be tolerated, then assuredly an attorney under the cover of his professional status could, with assurance of security, be guilty of conduct which would be reprehended by the law if committed by another.

An attorney is required to take the constitutional oath of office to faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability (section 278, Code Civ. Proc.), and his duties are prescribed by law (section 282, Id.), among which are:

" * * * (4) To employ, for the purpose of maintaining the cases confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law;

"(5) To maintain inviolate the confidences, and at every peril to himself, to preserve the secrets of his client."

On the record here it is proper to inquire, Whose confidence would the petitioner maintain, and whose secrets would be preserved? It is idle to think that Woolley and Gorman or the "clients" employed petitioner on behalf of Higgins et al. simply for the purpose of securing an adequate defense for them, for the whole record is at war with any such suggestion. The superior court must have concluded that the real purpose was nearer to the individual anxieties of the original clients. If these reflections are warranted, then the petitioner was involved in a conflict of duty, in which, considering the circumstances of the employment, the interests of the three men would probably be subordinated to those of the others; and if this be so, the petitioner has doubtless been more concerned in the proceedings about the nature of his engagement to represent Higgins et al. than he was over the prospect of the disclosure of the fact of the employment itself. If petitioner were retained by Woolley and Gorman or the unnamed clients to protect them at all hazards, then, in my opinion, he was not free to accept employment to represent the three men, and this points to the necessity of showing "the characterizing circumstances" in such a case. The dual employment is disturbing, no matter from what angle it may be viewed, and in such circumstances the law should frown upon the relation, for to sanction it is to leave the law weaker and to place a premium on unethical conduct, or something more serious. It is not to be held that the law is susceptible of such stultification.

No client, in the suggested situation of the petitioner's original "clients," is entitled to the services of an attorney for the collateral purpose indicated here, and an attorney should not be permitted to be so employed, and if he would guard his professional honor and standing, and value his own liberty, he would not be willing to be.

Upon the remaining question whether the petitioner should have been compelled to state the source from which he obtained the bail money, I am not free from doubt. The petitioner, we have seen, stated unequivocally that he had been employed separately by Woolley and Gorman on October 17th, and that before the "clients" engaged him for Higgins et al. they retained him for themselves. It was stipulated between petitioner and the district attorney that the bail money was deposited on October 19th.

If the court found that the "clients" were identical with Woolley and Gorman, and that petitioner was employed to represent Higgins prior to October 19th, then under the rule governing the findings of the superior court on habeas corpus it would be proper to conclude here that the bail was deposited for Higgins during the existence of the

relation of attorney and client between him and the petitioner, and upon this theory the point as to how the employment was brought about would lose some of its importance when considered in connection with the question of bail. This view proceeds on the assumption that in regard to the bail, communications passed between petitioner and Higgins as well as the petitioner and the "clients" who furnished the bail. The depositing of bail by an attorney on behalf of his client in the due course of employment would ordinarily be deemed a communication between attorney and client within the meaning of privilege, but there may be some question in this case whether the superior court found it was a communication for the "purposes of such employment."

However, as already stated, on the question of bail I entertain some doubt, which I shall resolve on the side of the petitioner. *People v. Atkinson*, 40 Cal. 284.

Applying the rule of decision on habeas corpus (*In re Shortridge*, 5 Cal. App. 371, 90 Pac. 478), to the record and the law on the question of employment, I am of opinion that the writ should be dismissed, and the petitioner remanded.

(170 Cal. 164)

In re TOOLEY'S ESTATE. (Sac. 2280.)

(Supreme Court of California. May 12, 1915.

On Rehearing, June 10, 1915. Dissenting Opinion, June 11, 1915.)

1. WILLS ⚡456—CONSTRUCTION.

The words of a will are to be taken in the ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 974; Dec. Dig. ⚡456.]

2. WILLS ⚡467—CONSTRUCTION—TESTAMENTARY DISPOSITIONS—"DESIRE."

Civ. Code, § 1322, provides that a distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear, or by inference from other parts of the will, or by an inaccurate recital of, or reference to, its contents in another part of the will. A will provided: "I give all my property at my death to my daughter Logan Mattie Tooley. If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother." Held, that the word "desire" indicated the wish of testatrix regarding the disposition of the property, and was a dispositive and testamentary provision, binding upon the court in the distribution of the estate, so that, where the daughter survived the testatrix and died unmarried, the property was to be distributed to the brother and sisters of the testatrix.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 954, 986; Dec. Dig. ⚡467.

For other definitions, see *Words and Phrases*, First and Second Series, *Desire*.]

3. WILLS ⚡675—TESTAMENTARY TRUST—PRECATORY WORDS.

Such provision was a command sufficient to effect a testamentary disposition of the property, and not an expression of a wish or preference directed to the daughter, so that there was no precatory trust reposed in her.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1587-1589; Dec. Dig. ⚡675.]

Department 1. Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

In the matter of the estate of Martha L. Tooley. From a decree of distribution, the brother and sisters of the decedent appeal. Reversed.

Frank Freeman, of Willow, for appellants. Glenn West, Ben F. Geis, and Durard F. Geis, all of Willow, for respondent.

SHAW, J. The transcript presents an appeal by the brother and sisters of the decedent from a decree of the superior court making distribution of her estate. The sole question presented is the construction of the last will of the decedent. The will reads as follows:

"I give all my property at my death to my daughter Logan Mattie Tooley. If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother."

"Martha L. Tooley."

The daughter, Logan Mattie Tooley, survived her mother, the testatrix, but died before the petition for distribution was filed. She also left a will by which she gave all her property to Leonard Lenus Klemmer, subject to a small annuity. She was unmarried at the time of her death, and had no children. Letters of administration with the will annexed were granted upon her estate. In the petition for distribution of the mother's estate the executor asked that distribution thereof be made to the brother and sisters of Martha L. Tooley. The administratrix of the daughter's estate filed an opposition to this petition, and asked that distribution be made to said administratrix for the benefit of the estate of said Logan Mattie Tooley. The court denied the petition for distribution, and sustained the opposition thereto. Distribution was made accordingly to the administratrix of the estate of the daughter for the benefit of said estate.

The contention of the respondents is that the first paragraph of the will vests the estate of the property of the mother absolutely in the daughter, Logan Mattie Tooley, and that the second paragraph is ineffectual to change this disposition. They rely upon the rule set forth in section 1322 of the Civil Code. It is as follows:

"A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will."

The argument is that the words of the second paragraph of the will are not as clear and distinct as those of the first paragraph, and, consequently, that they cannot affect the clear and distinct devise and bequest con-

tained in the first paragraph. The basis of this argument is that the word "desire," in the second paragraph, is not to be taken as a positive disposition of the property, but only as an expression of a wish or preference directed to the devisee Logan Mattie Tooley. We are of the opinion that this position is untenable.

[1] The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected.

[2, 3] The second clause of the will, if taken alone, would constitute a clear disposition of the remainder at the death of the testatrix to her brothers and sisters. The rule is practically universal that words in a will indicating the wish of the testator regarding the disposition to be made of her property by the law at her death are to be taken as a dispositive provision. The correct rule is clearly stated in *Board v. Culp*, 151 Pa. 470, 25 Atl. 118, as follows:

"Where, however, words of recommendation, request, and the like are used in direct reference to the estate, they are prima facie testamentary and imperative, and not precatory. * * * Should the testator say merely, 'I desire A. B. to have one thousand dollars,' it would be as effectual a legacy as if he was expressly to direct, or will it, or were to add, 'out of my estate,' or that it should be paid by his executor. The reason is obvious. A will, in its * * * nature, is the disposition which the testator desires to have made of his estate after his death. All the expressions indicative of his wish or will are commands. It is different when, having made a disposition, he expresses a desire that the legatee or devisee should make a certain use of his bounty."

In *Estate of Marti*, 132 Cal. 671, 61 Pac. 965, the court, upon this subject, said:

"While the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which he has given * * * in absolute terms."

In the Tooley will the words of the second clause are, in the sense here referred to, "addressed to the executor," and are mandatory.

The respondents here deny that there is either a precatory trust or disposition of the remainder. The *Marti* Case establishes beyond question that there is here no trust. The result would be that the second clause would be wholly ineffectual, which is contrary to the rule of section 1325 (Civ. Code) that a will is to be so interpreted as to give some effect to every clause, rather than so as to render any expression inoperative.

The proposition that words expressing desire or wish, when directed to the estate, and not to some devisee with respect to the property received by such devisee, are to be deemed as dispositive expressions evincing the will of the testator with respect to the property, is thoroughly well established. In *Estate of Wood*, 36 Cal. 80, the will began as follows:

"I wish five thousand dollars to go to John C. Cole, in the event of my dying intestate."

Notwithstanding the use of the word "intestate," the court held that this constituted a will, saying:

"It clearly fills the definition of a will given by approved writers on that branch of the law, viz.: 'The declaration of a man's mind as to the manner in which he would have his property or estate disposed of after death.'"

To hold otherwise, the court remarked, would be to assert that he went through the solemn form of executing such an instrument for no purpose whatever. The following cases declare that the word "desire," or other similar expression, when used to declare the disposition to be made of property at the death of the testator, and not as a request or prayer directed to a devisee or legatee concerning such devise or legacy, is a dispositive command, testamentary in character, and not precatory, but a positive direction binding upon the court in the distribution of the estate: *Barney v. Hayes*, 11 Mont. 571, 29 Pac. 282, 28 Am. St. Rep. 495; *McMurry v. Stanley*, 69 Tex. 231, 6 S. W. 412; *Stewart v. Stewart*, 61 N. J. Eq. 28, 47 Atl. 633; *Webber v. Bryant*, 161 Mass. 403, 37 N. E. 203; *Appeal of Philadelphia*, 112 Pa. 474, 4 Atl. 4; *Meehan v. Brennen*, 16 App. Div. 395, 45 N. Y. Supp. 58; *Taylor v. Martin* (Pa.) 8 Atl. 922; *Oyster v. Knull*, 137 Pa. 448, 20 Atl. 624, 21 Am. St. Rep. 890; *Brasher v. Marsh*, 15 Ohio St. 111; *Wood v. Camden, etc., Co.*, 44 N. J. Eq. 460, 14 Atl. 885; *Phillips v. Phillips*, 112 N. Y. 205, 19 N. E. 411, 8 Am. St. Rep. 737.

In view of these authorities it cannot be said that the words of the second paragraph of the will are not equally clear and distinct as those of the first paragraph. We think no case can be found in which a will indicating a disposition of property by the word "desire" or "wish" has been held not to be sufficient to constitute a will. The meaning of the word, when used in such connection in a will, is as clear as that of any other word in the language.

The decisions upon the question whether or not words of recommendation, entreaty, or desire directed to a devisee or legatee asking or enjoining a disposition of the thing devised or bequeathed are precatory words sufficient to establish a trust, or are mere expressions leaving the matter to the discretion of the devisee or legatee, have no bearing upon this case. Such questions arise only when the request is made, or from the context is construed to be made, to the devisee or legatee. Where the words are used to describe a disposition of property, that is, where they are directed to the executor or to the law, and not to a devisee or legatee, the authorities are uniform that the word is sufficient to declare a disposition of the property. The second paragraph of the will is not directed to Logan Mattie Tooley at all, but is a clear statement that, upon her death without husband or children, whatever of her mother's estate then remains is to be divided equally among the sisters and brother of Martha L.

Tooley. For these reasons, we are of the opinion that the court below erred in making the decree complained of.

The decree of distribution is reversed.

We concur: SLOSS, J.; LAWLOR, J.

PER CURIAM. Rehearing denied.

ANGELLOTTI, C. J. I dissent from the order denying a rehearing. To my mind it is correctly stated in the petition for rehearing that the theory of the department opinion apparently is that words which may properly be held sufficient to show a primary or direct devise of property will necessarily be sufficient to qualify or cut down an absolute estate in the same property given in unequivocal language by a preceding provision of the will. Such a theory, I think, finds no support in the authorities. The question is not whether such words as are used in the second paragraph of the will here involved would be taken as a positive disposition by the testatrix of the property referred to, if they were the only words in the will relative to such property, but whether, considered in connection with the words of the first paragraph referring to the same property, and clearly and distinctly devising an absolute estate therein, they show an intent on the part of the testatrix to limit the effect of the disposition made by such paragraph. In the determination of this question, section 1322 of the Civil Code is applicable. I am of the opinion that the judge of the lower court was correct in his conclusion that the words used in the second paragraph with relation to this property are "not equally clear and distinct" as those used in the first paragraph, that, considered in connection with the first paragraph, they fail to show any intention on the part of the testatrix that her daughter should take less than an absolute estate, and that they should be considered as nothing more than the expression of a wish or desire on the part of the testatrix, addressed to her daughter.

170 Cal. 267

In re HASKINS' ESTATE. (L. A. 4107.) (Supreme Court of California, May 28, 1915.)

1. TAXATION $\S$ 905—INHERITANCE TAX—APPRAISAL OF ESTATE—STATUTES.

Under Code Civ. Proc. $\S$ 1444, providing for the appointment of appraisers of estates in probate, and under the Inheritance Tax Law (St. 1911, p. 713), the controller names one or more inheritance tax appraisers in each county. The court in probate names three disinterested appraisers for each estate in probate, of which one must, and the others may, in the court's discretion, be selected from the authorized inheritance tax appraisers within the county; and if the inheritance tax appraiser fails to act as one of the probate appraisers, the expense of making the inheritance tax appraisement must be paid out of the estate, and not out of the inheritance tax fund.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. $\S$ 1728-1731; Dec. Dig. $\S$ 8905.]

2. TAXATION $\S$ 895—INHERITANCE TAX APPRAISER—DUTIES—STATUTE.

Under the inheritance tax law (St. 1911, p. 713), the duty of an inheritance tax appraiser is to report on the character and probable value of so much of the estate as is liable to the tax, and to determine whether transfers of property have been made by the deceased of a nature rendering the transferred property liable to the tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. $\S$ 1714-1721; Dec. Dig. $\S$ 895.]

3. TAXATION $\S$ 895 — INHERITANCE TAX — PROCEEDINGS FOR ASSESSMENT.

Under inheritance tax law (St. 1911, p. 713), where the probate court entertained a petition for the distribution of an estate, which erroneously alleged that no inheritance tax was payable thereon, whereupon the court settled the executor's account and distributed the estate to him, from which decree the controller of the state appealed on the ground that there was an inheritance tax due, and that the legal steps had not been taken to assess such tax, upon which appeal the court, by a nunc pro tunc order, corrected the decree of final distribution by finding that an inheritance tax of \$27.67 was due the state, which was ordered paid, and was tendered to the county treasurer, who refused it, the refusal of the treasurer was justified, since the inheritance tax law contemplates notice and a hearing of the report of an inheritance tax appraiser, and determination of the amount of tax by the court after such hearing, and authorization to the county treasurer to receive the tax, when such proceedings have been had, while the ex post facto order of the court attempting to amend its decree could not cure its radical omissions of appraisal, etc.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. $\S$ 1714-1721; Dec. Dig. $\S$ 895.]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Laura J. Haskins, deceased. From a decree settling the account of George M. Haskins as executor, and distributing the whole of the estate to such executor free of any inheritance tax, the controller of the state appeals. Reversed, with directions.

Robert A. Waring, Inheritance Tax Atty., of Sacramento, and John W. Carrigan, Asst. Inheritance Tax Atty., of Los Angeles, for appellant. Harry B. Washburn, of Los Angeles, for respondent.

HENSHAW, J. By the will of Laura J. Haskins, deceased, all of her estate was given to her stepson, George M. Haskins. This will was duly admitted to probate, and all probate proceedings thereunder were regularly had and taken. The time came when the estate was ready to be closed, and George M. Haskins, above named, who was also the executor of the estate, filed his final account and report and therewith his petition for distribution. It was set forth, and on the hearing shown, that the estate consisted of \$1,055.39 in money; that there were no offsets against this amount for claims or credits or disbursements. Erroneously the petition declared that no inheritance tax was chargeable or payable upon the inheritance of George

M. Haskins, or upon any of the property of the estate. Thereupon the court settled the final account and distributed the whole of the estate to George M. Haskins. From this decree the controller of the state appealed, upon the ground that there was an inheritance tax due to the state, and that the steps prescribed by law had not been taken in the matter of the appraisal of such inheritance tax, and that the decree of distribution made no award to the state of such a tax. Following the taking of this appeal the court, by a nunc pro tunc order corrected the decree of final distribution, the correction consisting in a finding that an inheritance tax of \$27-67 was due the state of California; that this sum was "in open court" ordered paid; "that said executor tendered the amount of said inheritance tax to the county treasurer of the county of Los Angeles on the 7th day of October, 1914" (the day upon which the original decree of final distribution was made); and that the county treasurer refused to receive this sum.

It is not in question but that the amount of the inheritance tax which the court thus decreed is the amount justly due to the state under the law. Inheritance Tax Law 1911, §§ 2-4 (Stats. 1911, p. 713, et seq.). The procedure, however, which the court adopted, it is urged, is so at variance with the law governing the matter as to call for a reversal, with directions to the court in probate to proceed in conformity with that law. To the method of procedure laid down we are thus brought.

Section 1444 of the Code of Civil Procedure, as it originally stood, made provision for the appointment of three appraisers, any two of whom may act, and who perform the familiar function of appraisers of estates in probate. As amended in 1911, that section now prescribes that the judge must appoint of the three probate appraisers one who is an inheritance tax appraiser. Section 14 of the Inheritance Tax Act of 1913 (St. 1913, p. 1076) provides that the state controller shall appoint—

"one or more persons in each county of the state to act as inheritance tax appraisers therein. Every such inheritance tax appraiser (in addition to any fees paid him as appraiser under section 1444 of the Code of Civil Procedure) shall be paid by the county treasurer out of any funds that he may have in his hands on account of said tax, on presentation of a sworn itemized account and on the certificate of the superior court, at the rate of five dollars per day for every day actually and necessarily employed in said inheritance tax appraisal, together with his actual and necessary traveling and other incidental expenses, and the fees paid such witnesses as he shall subpoena before him, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record; provided, that in any probate proceeding in which the executor or administrator shall have failed to have had the inheritance tax appraiser act as one of the appraisers under section 1444 of the Code of Civil Procedure and to have paid him his fees therefor, the expense of making the inheritance tax appraisal in this act provided for shall be paid out of said

estate, and the executor or administrator thereof shall be liable for said fee."

Section 16, subdivision "a" of the same act, declares that:

"When any superior court having jurisdiction in probate of the estate of any decedent, or a judge of such court, shall, in accordance with section 1444 of the Code of Civil Procedure, appoint the appraiser or appraisers in said section provided for, said superior court or judge thereof shall also at the same time designate and appoint an inheritance tax appraiser (unless such designation and appointment be previously made) to ascertain and report to said superior court the amount of inheritance tax due upon any property passing in said probate proceeding, or a lien thereon, or upon any other property transferred within the meaning of subdivision 3 of section 2 of this act, to any person, institution or corporation, taking property under and by virtue of said probate proceedings, together with such other additional information as shall assist said court in the determination of said tax. * * * Upon the completion of his inheritance tax appraisal in any probate proceeding, the inheritance tax appraiser shall make a report in writing to the superior court of the clear market value of the several interests in the estate of the decedent, and shall report the amount of inheritance or transfer tax chargeable against, or a lien upon such interests, acquired by virtue of said probate proceedings or by any transfer within the meaning of this act to any person, institution or corporation acquiring any property by virtue of said probate proceedings, together with such other facts as may advise the court in regard thereto, or which the court may require, and may return to said superior court such depositions as he may have had reduced to writing, exhibits, or other testimony or information taken before him, or submitted to him."

Under subdivision "b" of the same section the appraiser is required to mail a copy of his report to the state controller and—

"the clerk of said superior court shall forthwith give notice of such filing to all persons interested in such proceedings, by posting, and in addition thereto shall forthwith mail to the state controller and to the county treasurer, and to all persons chargeable with any tax in said report who have appeared in such proceeding, a copy of said notice. At any time after the expiration of ten days thereafter, if no objection to said report be filed, the said superior court may give and make its order confirming said report and fixing the tax in accordance therewith. At any time prior to the making of said order, any person interested in said proceeding (including the state controller or the county treasurer) may file objections in writing to said report. Thereupon said superior court shall, by order, fix a time, not less than ten days thereafter, for the hearing thereof, and shall direct the clerk of said superior court to give such notice thereof as it shall deem necessary; provided, that a copy of such notice and of such objections shall be forthwith mailed to the state controller, county treasurer and inheritance tax appraiser. Upon the hearing of said objections, said court may make such order as to it may seem meet and proper in the premises."

Section 17 deals with the proceedings which shall follow the inheritance tax appraiser's disclosure that a transfer of property of the decedent has been made, the property affected by which transfer being subject to an inheritance tax. Further provisions of the act authorize the reception by the county treasurers of the amount of the tax when determined in accordance with the law.

[1] With these provisions before us (and they are thus elaborately set forth, not because of their consequence in this litigation, but because the state has asked a definition of the powers and duties of our courts in probate), we may briefly sum up the matter. The controller names one or more inheritance tax appraisers in each county. The court in probate names three disinterested appraisers for each estate in probate. Of these appraisers in probate, one must, and the others may or may not (within the discretion of the court in probate) be selected from the list of authorized inheritance tax appraisers within the county. There is no compulsion in the law upon the court in probate to appoint more than one inheritance tax appraiser as a probate appraiser. It does become the duty of the probate court, under section 16, to appoint, however, an inheritance tax appraiser. His duties and functions are quite independent and apart from those of the probate appraisers. The law in this regard prescribes merely that if the inheritance tax appraiser shall have failed to act as one of the probate appraisers, the expense of making the inheritance tax appraisal shall be paid out of the estate and not out of the inheritance tax fund under the control of the county treasurer. As a matter of economy, therefore, the executor or administrator may well see that such inheritance tax appraiser acts in the matter of the inventory and appraisal of the estate. But, again, we repeat, there is no compulsion in the law that this shall be done, the penalty for a failure so to do being fixed by section 14 of the statute as above set forth. We may, in this connection, however, anticipate the law by calling attention to the fact that by an amendment to section 1441 of the Code of Civil Procedure, which amendment becomes operative on or about the 7th of August next, it will become the duty of the court in probate, not only to appoint an inheritance tax appraiser as one of the three probate appraisers, but the probate appraisal itself can be made by two of those three appraisers only in event that the inheritance tax appraiser is one of the two. St. 1915, c. 197.

[2] While the appraisers in probate report upon the character and probable value of all the properties of the estate, the duties of the inheritance tax appraiser are essentially different. He is to report upon the character and probable value of so much of the estate as is liable for the inheritance tax, and, still further, he is to determine whether transfers of property have been made by the deceased of such nature as to render the property transferred liable to the inheritance tax. Estate of Reynolds, 147 Pac. 268.

[3] Furthermore, the law contemplates notice and a hearing of the report of such inheritance tax appraiser, a determination by the court after such hearing, and an authorization to the county treasurer to receive the

inheritance tax when such formal proceedings have been taken. The state itself may justly be heard to complain if the course prescribed by its own law is not followed, and it is not a sufficient answer to say that in the individual case no wrong has resulted. Judicially we cannot upon this bench know whether error has been committed and wrong has resulted until after the formal hearing and determination so plainly prescribed by the law. The treasurer, therefore, was justified in refusing to receive this money in settlement of the inheritance tax of the estate in the absence of a decree of the court in probate fixing the amount of that tax. The order of the court amending its decree could not avail to cure these radical omissions.

The decree appealed from is reversed, with directions to the trial court to pursue, in the matter of the closing of the estate, the course prescribed by law.

We concur: LORIGAN, J.; MELVIN, J.

(170 Cal. 192)

PRINCE et al. v. HILL, et al. (S. F. 6508.)
(Supreme Court of California. May 13, 1915.)

On Rehearing, June 12, 1915.)

1. MECHANICS' LIENS ⇨164—SUBCONTRACTOR'S LIEN—ENFORCEMENT—EXTENT OF LIABILITY—"VALUE."

Under Code Civ. Proc. § 1183, providing that where an original contract is void, the labor done and materials furnished on a building by others than the original contractor shall be deemed to have been done and furnished at the instance of the owner, and they shall have a lien for the value thereof, a subcontractor, whose contract is unaffected by the invalidity of the contract between the owner and the contractor, may not recover a sum greater than the price agreed on with the principal contractor for work done and materials furnished, the word "value" in the statute meaning "agreed value" in cases where there is an agreed value.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 285-296; Dec. Dig. ⇨164.]

For other definitions, see Words and Phrases, First and Second Series, Value.]

2. APPEAL AND ERROR ⇨1054—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Error in admitting evidence is harmless, where the court does not base its findings thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. ⇨1054.]

3. MECHANICS' LIENS ⇨141—SUBCONTRACTOR'S LIEN—NOTICE—SUFFICIENCY.

A notice of a subcontractor's lien, which gives the name of the contractor and recites that he entered into a written contract with the subcontractor, under which the latter was to perform labor and furnish materials in the construction of a building, which sets out the subcontract, and which states that the same has been performed by the subcontractor, and that the building has been completed, sufficiently shows that the person to whom the materials were furnished and for whom the labor was done was the contractor, and is sufficient.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 243-245; Dec. Dig. ⇨141.]

On Petition for Rehearing.

4. APPEAL AND ERROR $\S$ 32 — QUESTIONS REVIEWABLE—QUESTIONS RAISED ON PETITION FOR REHEARING.

A petition for rehearing presenting arguments and points not made in the briefs on which the case was originally submitted will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3215-3228; Dec. Dig. $\S$ 32.]

Department 1. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by S. J. Prince and another against William J. Hill and others. Judgment for plaintiffs. From an order denying a new trial, defendants appeal. Affirmed.

Chas. B. Rosendale and C. F. Lacey, both of Salinas, for appellants. J. H. Andresen, of Salinas, and W. S. White, of Beaumont, for respondents.

SHAW, J. The record presents an appeal from an order denying the defendants' motion for a new trial.

The plaintiffs sued to foreclose a lien for work done and materials furnished by them to the defendant, Whitcomb, in the erection by Whitcomb of a building upon the land of the defendants, William J. and Isabelle A. Hill. The contract between Whitcomb and the Hills was for more than \$1,000, and, although in writing, was not recorded. It was therefore void with respect to lien claimants.

The plaintiffs agreed with Whitcomb to do the carpenter work and furnish certain materials for the building for the sum of \$820. It is alleged that certain extra work was done and additional materials furnished, at Whitcomb's request, of the value of \$183.66, and that there remains unpaid of these two sums a balance of \$217.66. Judgment was given declaring and foreclosing a lien on the land for this amount.

[1] Upon the trial, the court below admitted evidence, over the defendants' objection, tending to show that the value of the materials furnished and work done for Whitcomb by the plaintiffs, upon the building, was greater than the agreed price thereof. In admitting this evidence the court below stated that the plaintiffs were entitled to a lien for the value of such work and materials, although such value exceeded the contract price for which they had agreed with Whitcomb to do and furnish the same. In these rulings the court erred. Even with regard to the contract between the owner and the original contractor, the decision in *Rebman v. San Gabriel, etc., Co.*, 95 Cal. 395, 30 Pac. 564, to the effect that the original contractor may recover more than his contract price, where such contract is void under the statute, has long been overruled, and such recovery is limited to the contract price. *Laidlaw v. Marye*, 133 Cal. 176, 65 Pac. 391; *Marchant v. Hayes*, 117 Cal. 669, 49 Pac. 840; *Sullivan*

v. California R. Co., 142 Cal. 203, 75 Pac. 707; *Condon v. Donahue*, 160 Cal. 754, 118 Pac. 113. Much less should the subcontractor, the validity of whose contract is not in the least affected by the provisions of the mechanics' lien law, recover for a value in excess of his agreement with the original contractor. It has never been so held, and the contrary has been decided. *Jewell v. McKay*, 82 Cal. 150, 23 Pac. 139; *Kellogg v. Howes*, 81 Cal. 179, 22 Pac. 509, 6 L. R. A. 588. In *Jewell v. McKay*, referring to the provision of section 1183, C. C. P., that where the original contract is void, the labor done and materials furnished upon the building by others than the original contractor "shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof," the court said:

"It cannot possibly have been the intention that a contractor, materialman, or laborer, who agrees for a certain sum, can have a lien for a greater sum upon the ground that the value of what he furnished is greater. * * * We think that the word 'value,' in the above provision, is to be construed so as to mean 'agreed value' in cases where there is an agreed value."

This expresses the true intent of the above provision, as applied to the point in question.

Our attention is called to the decision of the district court of appeal in *Panama, etc., Co. v. Tingey*, 147 Pac. 585, decided February 17, 1915, in which that court apparently held that under the statute requiring contractors for street work to give a bond to secure to laborers and materialmen the value of work done and materials furnished for the improvement, the actual value of the work or materials is the measure of the recovery and not the amount agreed upon. We need express no opinion as to the soundness of this opinion as applied to the street work law. It is of no binding force as an interpretation of the mechanic's lien law, and, so far as the latter is concerned, it is contrary to our own decisions, which are paramount in authority to those of the District Court of Appeal.

[2] But although the court admitted this evidence, its finding was not based upon it. The findings set forth the subcontract and state that the value of the work done and materials furnished thereunder is the sum agreed upon therein. The error was therefore without injury to the appellants.

[3] The only other point urged in support of the appeal is that the notice of lien does not give the name of the person to whom the materials were furnished. The criticism is not supported by the language of the notice. It states that "F. T. Whitcomb is the name of the contractor," who on August 2, 1909, "entered into a contract in writing with" the plaintiffs, under which plaintiffs were to perform labor and furnish materials to be used in the construction of the building. It then sets out the subcontract with Whitcomb, states that the same has been fully perform-

ed by the plaintiffs, and that the building has been completed. This sufficiently shows that the name of the person to whom the materials were furnished and for whom the labor was done was F. T. Whitcomb. The statute does not require such literal exactness and rigid adherence to precise form as the appellants contend.

The order is affirmed.

We concur: LAWLOR, J.; SLOSS, J.

On Petition for Rehearing.

PER CURIAM. [4] The defendants have filed petition for rehearing in which they present arguments and points not mentioned in the briefs upon which the case was submitted. This court has consistently declined to consider petitions for rehearing presenting new points. In *Payne v. Treadwell*, 16 Cal. 247, it held that it was too late to urge a point for the first time in a petition for rehearing after the case had been fully considered and decided by the court upon the points presented in the original briefs. In *Kellogg v. Cochran*, 87 Cal. 200, 25 Pac. 677, 12 L. R. A. 104, it said: "We have decided—and with manifest propriety—that we will not grant a rehearing in order to consider points not made in the argument upon which the case was originally submitted." In *San Francisco v. Pacific Bank*, 89 Cal. 25, 26 Pac. 615, 835, the court said: "The court will not consider a petition for rehearing that attempts to discuss the case upon grounds * * * not presented in the original argument or discussed in its opinion."

Upon these grounds it is clear that the petition must be denied. It is so ordered.

170 Cal. 344

CITY OF LOS ANGELES v. KRUTZ et al.
(L. A. 3492.)

(Supreme Court of California. June 4, 1915.
Rehearing Denied July 1, 1915.)

VENDOR AND PURCHASER. —187—INSTALLMENT CONTRACT—FORFEITURE—ESTOPPEL.

Where plaintiff's option contract for the purchase of land provided for successive payments on account of the purchase price, with the provision that the vendor might declare a forfeiture for default, where condemnation proceedings were instituted by the city, and the vendor so reasonably led plaintiff buyer to believe that it did not propose to insist on a forfeiture, but would wait for the payment of the balance of the price from the condemnation money, such vendor waived its right to insist on the forfeiture until notice to the buyer that it proposed to do so at a time sufficiently distant to give him reasonable opportunity to pay, and was estopped to declare forfeiture outright.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 121, 374, 375; Dec. Dig. —187.]

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the City of Los Angeles against Wm. G. Krutz, Jr., and the Nebraska & California Real Estate Company. Judgment for Krutz on his cross-complaint, and the Real Estate Company appeals. Affirmed.

Olin Wellborn, Jr., and Alfred H. McAdoo, both of Los Angeles, for appellant. John W. Shenk, City Atty., Howard Robertson, Chief Deputy City Atty., and Haas & Dunnigan, all of Los Angeles, for respondent.

HENSHAW, J. The city of Los Angeles condemned a certain piece of land, part of a larger tract. Dispute having arisen between defendants Wm. G. Krutz, Jr., and the Nebraska & California Real Estate Company, a corporation, over the right to moneys arising under the condemnation proceedings, the city of Los Angeles interpleaded these defendants to have those rights determined. Defendant and respondent Krutz filed his answer and cross-complaint against the codefendant, Nebraska & California Real Estate Company, and by stipulation the action was tried upon this cross-complaint and the corporation's answer thereto; the city of Los Angeles being thus eliminated from the controversy. The respondent Krutz pleaded compliance upon his part with the terms of an executory contract for sale by the defendant corporation to him of the tract of land, a part of which, as has been said, was condemned by the city. He sought a decree of specific performance and an award to the defendant corporation of so much of the condemnation fund as was necessary to pay the corporation the balance of the purchase price of the land. The corporation defended, asserting that Krutz, by failure and neglect to make the payments provided, had lost all his rights under the contract. It sought a decree accordingly and a payment of the condemnation fund to it. The court's judgment was in favor of Krutz's contention, and the corporation appeals.

The contract between the parties provided as follows:

"In case said party of the second part (respondent) shall refuse, neglect or fail to pay such purchase money and interest as above stated and agreed, he shall forfeit any and all rights in and to said real estate acquired under and by virtue of this agreement, and shall forfeit any money paid for the purchase of the same, unless said party of the first part shall elect otherwise."

Defendant showed that, before the time when the remainder of the purchase price was due under the original contract, negotiations were had, culminating in a supplemental agreement whereby it extended the original agreement for the period of ninety days in consideration of the payment of \$3,000, to be applied upon the purchase price; that the contract, as thus extended, fixed the last day of payment on June 17, 1909; that the payment was not made on that date, and on September 20, 1909, it exercised its option

and declared a forfeiture. Appellant contends that under the equitable principle as expounded in *Grey v. Tubbs*, 43 Cal. 359, and the numerous other cases which have approved the doctrines there laid down, it was within its equitable rights in declaring the forfeiture, and that Krutz, for his inexcusable default, is remediless.

Respondent pleaded and showed that he first secured an option to purchase the land in question in February, 1907, paying therefor a valuable consideration; that the existence of the condemnation proceedings was known to and recognized by the parties, and Krutz covenanted to attend to the litigation and to hold the corporation harmless from any liability arising therefrom; that this option of purchase provided for successive payments on account of the purchase price, which respondent duly made, keeping his rights under the contract alive; that the condemnation proceedings resulted in a large judgment in favor of the owners of the land, and defendant corporation led and induced respondent to believe that it would wait until the fund arising under this condemnation judgment was available, and receive the final payment upon account of the contract out of that fund. Other facts, not necessary here to set forth in detail, are pleaded to show a waiver upon the part of the corporation of the provisions making time the essence of the contract, and further facts by which an estoppel in pais against the right of the corporation to claim a forfeiture is asserted. The court found in accordance with these allegations of the cross-complaint, found the ability of Krutz to pay the amount due within the time stipulated by the contract, but found that he failed to do so because led to believe by the declarations and representations of the corporation that it would wait till the condemnation fund was available for this payment.

The attack here is upon the sufficiency of the evidence to support the findings. That evidence is principally documentary. It would serve no useful purpose to set it forth at length, but the whole tone, tenor, and effect are to create the belief which Krutz entertained that the corporation did not propose to insist upon the forfeiture, but would await the payment of the balance of the purchase price from the condemnation money, if that money was available within any reasonable time. There was therefore a waiver upon the part of the appellant corporation of the right of forfeiture which in equity would prevent it from asserting such forfeiture, at least until after notice to Krutz that it proposed to do so at a time sufficiently distant to give him a reasonable opportunity to make the payment. The corporation did not act in this way, but declared its forfeiture outright. It was estopped from so doing. *Dolbeer v. Livingston*, 100 Cal. 617, 35 Pac.

328; *Carpy v. Dowdell*, 115 Cal. 687, 47 Pac. 695; *Nicholson v. Randall*, 130 Cal. 539, 62 Pac. 930.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

170 Cal. 347

PEOPLE v. LOOMIS. (Cr. 1909.)

(Supreme Court of California. June 4, 1915.)

1. CRIMINAL LAW ⚡595—CONTINUANCE—GROUNDS.

Where accused's application for a continuance failed to show any diligence in searching for evidence as to his alleged insanity, alleged no substantial reason for failure to find it, and merely stated that he hoped to procure such evidence, not that he could do so, denial of postponement of trial on the ground was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 1323-1327; Dec. Dig. ⚡595.]

2. CRIMINAL LAW ⚡586, 1151 — CONTINUANCE—DISCRETION OF COURT.

The denial or granting of postponement of trial is a matter resting in the discretion of the trial court, not reversible in the absence of abuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 3045-3049; Dec. Dig. ⚡586, 1151.]

3. CRIMINAL LAW ⚡1159—APPEAL AND ERROR—REVIEW—FINDINGS.

The findings of a jury on conflicting evidence that accused was not insane is conclusive upon the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. ⚡1159.]

4. CRIMINAL LAW ⚡452—EVIDENCE—INSANITY.

In a prosecution for homicide, witnesses who talked with defendant often before and after the killing were properly allowed to testify that questions to him by them were answered quickly and promptly; such matter bearing on sanity, being subject to common observation, and not solely within expert knowledge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1053-1055; Dec. Dig. ⚡452.]

5. CRIMINAL LAW ⚡311, 331—EVIDENCE—SANITY—PRESUMPTION.

The sanity of one charged with crime is presumed, so that, to prove insanity as a defense, the burden is on the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742-744; Dec. Dig. ⚡311, 331.]

6. CRIMINAL LAW ⚡570—SANITY—BURDEN OF PROOF.

Where the defendant in a criminal case offers evidence tending to show insanity, the prosecution in rebuttal may produce evidence of his sanity; since sanity is a defense which is sustained by proving it by a preponderance of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1285-1288; Dec. Dig. ⚡570.]

7. CRIMINAL LAW ⚡829—TRIAL—INSTRUCTIONS.

It is not error to refuse a requested charge which differs from instructions given only in

the use of different words having the same meaning.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⚡829.]

8. CRIMINAL LAW ⚡811—TRIAL—INSTRUCTIONS EMPHASIZING PARTICULAR MATTERS—SANITY.

In a prosecution for homicide, where the evidence as to the sanity of defendant's mother was vague and unsatisfactory, an instruction that if the jury believed the mother had been insane, and that insanity was hereditary, they should consider the matter in determining defendant's sanity, was properly refused as tending to magnify its importance in the minds of the jury; the general instructions on the subject being correct and full, and including the proposition that the jury might consider that defendant's ancestors were insane.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. ⚡811.]

9. CRIMINAL LAW ⚡829—TRIAL—INSTRUCTIONS.

It is not error for the court to refuse a requested instruction substantially given elsewhere.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⚡829.]

10. CRIMINAL LAW ⚡570 — INSANITY — MEASURE OF PROOF.

A defendant is not entitled to an acquittal merely because the evidence raises a reasonable doubt of his sanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1285-1288; Dec. Dig. ⚡570.]

11. CRIMINAL LAW ⚡1186—TRIAL—CONDUCT OF PROSECUTING ATTORNEY.

In a prosecution for murder, where the district attorney asked an obviously improper question on cross-examination of a witness, but the jury upon objection were directed to disregard it, there was no ground for reversal where the record as a whole showed that the defendant had a fair trial, and the evidence was clear and convincing; since, under Const. art. 6, § 4½, providing that no judgment shall be set aside or new trial granted in any criminal case for the improper ruling on evidence, or for any error as to matter of pleading or procedure, unless after an examination of the entire cause, including the evidence, the court shall be of opinion that the error complained of has resulted in a miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. ⚡1186.]

In Bank. Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Earl Martin Loomis was convicted of murder in the first degree, and he appeals. Affirmed.

J. Fontaine Johnson and Dal M. Lemmon, both of Sacramento, for appellant. U. S. Webb, Atty. Gen., for the People.

SHAW, J. The defendant appeals from a judgment of the superior court of Sacramento county imposing upon him a sentence of death, and also from an order denying him a new trial. He was charged with the murder of Marie G. Hollcroft, alleged to have been committed on August 17, 1914. He pleaded not guilty, but was convicted of murder of

the first degree, without mitigation of punishment. Sentence was passed on November 17, 1914. The transcript on appeal was filed on January 4, 1915, but at defendant's request the hearing was postponed to the May, 1915, session at Sacramento.

[1] The defendant's application for a postponement of the trial was properly denied. The continuance was asked to enable him to obtain evidence relating to the alleged insanity of the defendant. No facts were stated to show the exercise of any diligence in searching for evidence, nor was any substantial reason given for the failure to find it. The defendant did not state that he could procure evidence on the subject, but merely showed that he hoped to do so. Under these circumstances the court had no choice but to go on with the trial.

[2] It is suggested that the showing made should have raised a doubt of the defendant's sanity at the time of the trial, and should have caused the court to suspend the proceedings and call a jury to determine the present sanity of the defendant as provided in section 1368 of the Penal Code. This claim is untenable. The statements in the affidavit offered in support of the motion for a continuance were not of such a character as to compel such doubt. They can scarcely be considered as tending to suggest a doubt on the subject. The matter was one calling for the exercise of the discretion of the trial court. No abuse of discretion is shown, and its decision must be upheld. *People v. Hettick*, 126 Cal. 426, 58 Pac. 918; *People v. Geiger*, 116 Cal. 440, 48 Pac. 389; *People v. Kirby*, 15 Cal. App. 269, 114 Pac. 794.

[3] The claim that the defendant should have been acquitted on the ground that the preponderance of the evidence established his insanity at the time of the homicide cannot be sustained. There was some evidence tending to show insanity. But there was also ample evidence to show that the defendant was sane. The case is in no wise different from the numberless cases in which we have held that the finding of a jury on conflicting evidence is conclusive upon this court.

[4] Witnesses who frequently talked with the defendant, after the homicide and before the murder, were allowed to testify that questions put to him by them were answered by him quickly and promptly. Objection was made that this was a matter for expert testimony, and that they did not show special knowledge as experts. There was no error in this. Such facts may be stated in testifying by any witness who has observed them. They are mere matters of observation, and not of expert knowledge. *People v. Manoo-gian*, 141 Cal. 595, 75 Pac. 177; *People v. Lavelle*, 71 Cal. 352, 12 Pac. 226; *Holland v. Zollner*, 102 Cal. 638, 36 Pac. 930, 37 Pac. 231; *In re Wax*, 106 Cal. 350, 39 Pac. 624.

[5, 6] The prosecution was not required to

prove the defendant's sanity as a part of its case in chief. Sanity is presumed. If insanity is urged as a defense in a criminal case, it is for the defendant to prove it by a preponderance of the evidence. *People v. Coffman*, 24 Cal. 236; *People v. Harris*, 145 Pac. 526. If, in his defense, he offers evidence tending to show insanity, the prosecution, in rebuttal, may produce evidence of his sanity. The court did not err in allowing physicians to testify to his sanity in rebuttal of defendant's case.

[7] The court gave full and correct instructions to the jury on the subject of insanity and the burden of proof thereof. Other instructions on the subject were asked by the defendant and refused by the court. So far as these latter were correct in law, they differed from the instructions given only in the use of different words having the same meaning.

[8, 9] The defendant asked the following instruction:

"If the jury believe that the defendant's mother, in her lifetime, was insane, and that insanity is hereditary, they must take that fact into consideration in determining the question of defendant's insanity at the moment of shooting."

This is open to the criticism that it relates to a specific fact upon which the evidence was vague and unsatisfactory, and that, therefore, it might tend to magnify its importance in the minds of the jury. *People v. Keith*, 141 Cal. 690, 75 Pac. 304; *People v. Patterson*, 124 Cal. 102, 56 Pac. 882; *Thomas v. Gates*, 126 Cal. 4, 58 Pac. 315. The general instructions given on the subject were correct, and were sufficient to fully advise the jury thereon. They included the proposition that in determining sanity the jury might consider evidence that his ancestors were insane. Under these circumstances, even if the specified instruction was unobjectionable, it was not error to refuse it.

[10] The proposition that the defendant is entitled to acquittal if the evidence raises a reasonable doubt of his sanity is not the law in this state. The court properly refused to instruct the jury to that effect. *People v. Coffman*, supra; *People v. Harris*, supra.

[11] During the trial the district attorney, on cross-examining a sister of defendant, who had testified in his behalf, asked an obviously improper question. Objection was made at once, the objection was sustained, and the court directed the jury to disregard it. This is now assigned as misconduct on the part of the district attorney, although not so assigned at the trial. In the haste and zeal of a trial attorneys will sometimes ask improper questions. Judgments cannot be reversed for an inadvertence of this character, unless upon an examination of the record, including the evidence, we reach the opinion that it caused a miscarriage of justice. Const. art. 6, § 4½. The record as a whole shows that the defendant had a fair trial,

and the evidence of his guilt is clear and convincing. No miscarriage of justice appears. We cannot perceive that this irregularity could have affected the verdict. It must therefore be disregarded.

No other points are presented that deserve notice. We find no prejudicial error.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

170 Cal. 305

GOODWIN v. WHITTIER COBURN CO.
(L. A. 3480.)

(Supreme Court of California. June 2, 1915.)

1. LIBEL AND SLANDER ⇐80—COMPLAINT—SUFFICIENCY.

Where a complaint charged that defendant corporation mailed a letter to an association of credit men, falsely stating that plaintiff owed it for materials furnished, that the contents of such letter received was made known to plaintiff's wife, that it was designed that she should know the contents, and that the necessary results of said knowledge were to estrange the wife from her husband, and to work a continuance of such state of mind "for a long time," "the exact duration of which is unknown to plaintiff," such complaint did not charge a cause of action for libel.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 184-186; Dec. Dig. ⇐80C.]

2. COSTS ⇐260—FRIVOLOUS APPEAL.

A party prosecuting a frivolous appeal will be assessed costs as a penalty.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. ⇐260.]

Department 2. Appeal from Superior Court, Los Angeles County; Gavin F. Mull, Judge.

Action by W. M. Goodwin against the Whittier Coburn Company. From a judgment following the sustention of defendant's demurrer to an amended complaint, plaintiff appeals. Affirmed.

E. M. Barnes, of Los Angeles, for appellant. Bert F. Mull, of Los Angeles, for respondent.

HENSHAW, J. This is an appeal from the judgment which followed the sustaining of the demurrer to plaintiff's second amended complaint. Appellant's principal grievance would appear to be that the ruling of the court sustaining the demurrer was made in his absence, he being "at the time busy in another department." In response to this it is shown that upon no occasion when the pleading of plaintiff's attorney was under attack did he appear to defend it. He neither appeared upon the motion to quash service, upon the motion to set aside and strike his complaint from the files, upon the hearing of the demurrer to his amended complaint, nor upon the hearing of the demurrer to the second amended complaint, which was sustain-

ed without leave to amend. And, finally, it is shown that the demurrer, called for hearing at 10 o'clock a. m., was not reached until 2:30 of the afternoon of the same day. It is not, however, so much a matter of surprise that plaintiff's attorney should have absented himself from the hearing on the demurrer, as that he should have filed the complaint to which the demurrer was interposed.

The complaint charges that plaintiff is a married man; that he was engaged in the business of "building and contracting"; that there is an association in the city of Los Angeles "of credit men, building material dealers, of whom plaintiff has been buying his materials for building and contracting. The names of the members thereof are unknown to plaintiff," but are well known to defendant. This would seem to mean that plaintiff did not know the names of the "building material dealers" from whom he had been buying his material, but the defendant did. Next it is alleged that in November, 1912, the defendant "through its agents wrote a letter to said association stating that plaintiff owed defendant herein a bill of \$33.80, and had owed the same since December, 1911, for materials purchased from said defendant by plaintiff." Defendant deposited this letter in the United States post office and the letter was received by the association through the post office on the day last mentioned. "That statement made in said letter above named was false, and well known to the defendant at the time of writing the same to be false and made by defendant willfully and maliciously. That said false and malicious statements in said letter became known to plaintiff's said wife on or about the 20th day of November, 1912. That the necessary and inevitable results of said knowledge to plaintiff's wife caused her to become ill with much increased continuous flowing of blood of the monthly period peculiar to women and caused her to have great distaste and repugnance toward plaintiff and to continue in said illness and frame of mind up to the present time, and, as plaintiff is informed and believes, she will so continue for a long time, the exact duration of which is unknown to plaintiff, solely as the necessary and inevitable result of said knowledge, and solely thereby and therefrom plaintiff is now and ever since said 20th day of November, 1912, has been deprived of the society and comfort of his said wife." "Plaintiff's said wife knew the contents of the said letter solely because of said mailing, and at the time of said mailing it was the intention of said defendant that plaintiff's wife should become possessed of said knowledge." By these acts plaintiff alleges he has been damaged in the sum of \$5,000, and he asks exemplary damages in the sum of \$5,000 more.

[1] Construing this pleading most strongly in favor of, rather than against, the pleader, we have here a charge that the defendant

mailed a letter to some sort of an association of credit men of a building material dealers' association, falsely stating that plaintiff owed defendant \$33 for materials furnished. We have the statement that the contents of this letter, received by the association on the 19th day of November, was in some unexplained manner made known to plaintiff's wife on the following day; that it was designed that she should know the contents, and it is then declared "that the necessary and inevitable results of said knowledge" were to estrange the wife from the husband, to inordinately increase her menstrual flow, and to work a continuance of this state of mind and of this physical condition "for a long time," "the exact duration of which is unknown to plaintiff."

It would be stultifying the law to enter into any exposition of the insufficiency of a complaint such as this to charge a cause of action.

[2] The judgment appealed from is affirmed, with \$50 added costs for a frivolous appeal.

We concur: LORIGAN, J.; MELVIN, J.

170 Cal. 307
LINEHAN v. DEVINCENSE. (S. F. 6506.)
(Supreme Court of California. June 2, 1915.)

1. VENDOR AND PURCHASER ⇨23—RECORD—SUBSCRIBING WITNESS.

One who did not sign an executory contract for the sale of land as a subscribing witness could not, by a second recordation of the contract with the added words "witness to signature of Cecilia Bremen, Lawrence C. Cull," give it efficacy as tending to establish the execution of it by B. herself.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 28; Dec. Dig. ⇨23.]

2. SPECIFIC PERFORMANCE ⇨121—SUFFICIENCY OF EVIDENCE—CONTRACTS.

In an action to quiet title, wherein defendant demanded specific performance of a contract of sale from plaintiff's grantor, evidence held insufficient to show the existence of such contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. ⇨121.]

3. SPECIFIC PERFORMANCE ⇨32—REMEDIES—MUTUALITY.

Under Civ. Code, § 3386, providing that there shall be no remedy by specific performance unless the remedy is mutual, a vendor who contracted to convey a tract of land, part of which she did not own, and who therefore could not have compelled specific performance of the contract, could not be required to specifically perform.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 39-99; Dec. Dig. ⇨32.]

4. SPECIFIC PERFORMANCE ⇨105—RIGHT TO REMEDY—LACHES.

Where defendant claimed as a purchaser and, after notification from plaintiff that he would not convey the property to defendant in pursuance of the terms of an asserted contract with plaintiff's grantor, took no steps to enforce his right under the contract and met plaintiff's action to quiet title by seeking specific perform-

ance years after such repudiation of the contract, his unexplained laches precluded any right which he might otherwise have had to a specific performance of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. § 105.]

Department 2. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by John J. Linehan against John Doe Devincense, also known as John Doe Derenchi. Judgment for plaintiff, and, from an order granting a new trial, he appeals. Reversed.

Mastick & Partridge, of San Francisco, for appellant. Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

HENSHAW, J. This is an appeal from the order of the court granting a new trial. The order is in the following language:

"In this action the motion for new trial herein having been heretofore submitted to the court for consideration and decision, and now the court having considered the same renders its judgment as follows: In consequence of the failure of defendant's attorney to present the motion, it has remained on the calendar. New trial granted November 25, 1912."

Seemingly from this order a new trial was granted for the laches of defendant's attorney in failing to present his motion. No neglect of any kind is imputed to plaintiff's attorney. It is difficult to understand why, for the reason given in the order itself, the motion should not have been denied rather than granted. It suggests an erroneous entry.

But passing this, and coming to the merits of the appeal, the action itself was brought by plaintiff to quiet title to a piece of land in the county of San Mateo, which piece of land may for convenience be described as the southwest quarter of lot 16. Both plaintiff and defendant claim title from a common source—Cecilia Brennan. Plaintiff's title was based upon a deed to him of the land by Cecilia Brennan, recorded in February, 1904. Defendant claims through an executory contract of sale, under which he had been admitted to possession of the land by Cecilia Brennan in 1903. This executory contract is in the following language:

"San Francisco, May 6, 1903.

"Received of Mr. Derenchi \$50, being deposit on account of property in San Mateo the piece to be paid \$700, the purchase price of the property this day sold to subject to the owner's approval, and being in the city of Colma, county of San Mateo, state of California, and described as follows: Lot 16, as known and designated on certain map marked map of the property at the Villa Homestead Association which said map is on file in the office of county recorder of the county of San Mateo, state of California, and recorded in said county.

"Term of sale 15 days are allowed to examine title and consummate the sale. At the termination of said time the balance of said purchase money is due and payable upon tender of the deed of the property sold if the title is defective, 60 days are allowed to perfect the same,

and if, after the expiration of said term, unless extended by mutual consent, the title shall not have been perfected, the deposit is to be returned.

"[Signed] Cecilia Bremen, Owner,
By L. C. Cull, Agents."

It was first recorded precisely as above set forth on February 27, 1905, and then again upon December 22, 1905, was once more recorded with the following added: "Witness to signature of Cecilia Bremen, Lawrence C. Cull."

Defendant by answer set up his possession under this contract, and by cross-complaint averred the performance by him of all things necessary to be done under the contract, made a tender of the amount due thereunder, and demanded specific performance. To overcome the controlling effect of the deed recorded in 1904 over the executory contract first recorded in 1905, defendant alleged that plaintiff at the time that he took his conveyance knew of the existing contract. This plaintiff denied. The court's findings were wholly in favor of the plaintiff, and judgment passed for him. The new trial was ordered under the circumstances above indicated.

Appellant argues with much force that this new trial could have been granted only upon the theory of a valid written contract between Cecilia Brennan and the defendant; that if such a contract did not exist defendant had no defense to this action, and, as the existence of this contract depends upon the copy of it produced from the records (the original having been destroyed by fire), this court can and will consider the evidence touching this contract precisely as it would be considered by a trial court. *Wilson v. Cross*, 33 Cal. 60; *Reynolds v. Snow*, 67 Cal. 497, 8 Pac. 27; *Tuller v. Arnold*, 93 Cal. 166, 28 Pac. 863. So construing this contract, appellant argues that upon its face it bears overwhelming and conclusive evidence that it was never executed by Cecilia Brennan, and that there is not a word of evidence that Cull, who signed his name as agent under that of Cecilia Bremen, was ever her duly authorized agent or attorney in fact to execute in her name and on her behalf the instrument in question.

[1, 2] The evidence in this regard is certainly most potent and persuasive. The contract itself declares that the property is sold "subject to the owner's approval"—a clause which, in the nature of things, would not be in a contract executed by the owner herself. The name of the owner was Cecilia Brennan. The contract is signed "Cecilia Bremen." Cecilia Brennan, it is disclosed, could write. It is not to be presumed that she would misspell her own name. Moreover, the contract as originally recorded declares, if language means anything, that the name of "Cecilia Bremen, Owner," was written by "L. C. Cull, Agent." And finally the

language, "Witness to signature of Cecilia Bremen, Lawrence C. Cull," was unquestionably added to the instrument after its first recordation and after the death of Cecilia Brennan, who died within a year after the date of the execution of the original contract. The effort therefore to establish the execution of this contract by the belated declaration of Lawrence C. Cull that he signed as a witness to the signature of Cecilia Bremen is unavailing under all of the authorities. He did not sign as a subscribing witness and the second recordation of the instrument was without efficacy as tending to establish the execution of it by Cecilia Brennan herself. *Hollenback v. Fleming*, 6 Hill (N. Y.) 305; *Early v. St. Patrick's Church*, 81 Hun, 369, 30 N. Y. Supp. 981; *Pritchard v. Palmer*, 88 Hun, 412, 34 N. Y. Supp. 789; *In re Clute's Estate*, 37 Misc. Rep. 586, 75 N. Y. Supp. 1060. Nor is this evidence at all overcome by the statement of Mrs. Ottoboni, sister-in-law of the defendant, that she knew Cecilia Brennan in her lifetime, had seen her signature, had seen the original of the contract, and that the signature to the original of the contract was like the other signatures of Cecilia Brennan.

[3] Were there nothing further upon this appeal, the order granting a new trial would of necessity be reversed for the utter failure to show an existing contract between Cecilia Brennan and this defendant. But there are other considerations which remove any possible doubt upon the question if any could be said to exist. Thus the contract which Cecilia Brennan is said to have entered into was one for the conveyance of the whole tract of land. It is established and, indeed, admitted that she did not own it all, that part of it was owned by her sister, whose estate was in probate. As she could not have compelled specific performance of the contract, so specific performance may not be enforced against her or her successor in interest. Civ. Code, § 3386; *Husheon v. Kelley*, 162 Cal. 656, 661, 124 Pac. 231. We are not unmindful of the early case of *Marshall v. Caldwell*, 41 Cal. 613, and *Swain v. Burnette*, 76 Cal. 301, 18 Pac. 394, which latter relies upon the first cited case for its authority. But the force of these cases as authority is entirely destroyed by the more recent decisions of *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695, and *Olson v. Lovell*, 91 Cal. 508, 27 Pac. 765. In the earlier of these cases last mentioned the husband and wife jointly agreed to sell a piece of property which they owned in undivided interests. The wife refused to acknowledge the contract, and thus it became nonenforceable against her. Plaintiff sought to compel a conveyance by the husband of his undivided interest, and it was held that equity would not decree such a conveyance. In the later case of *Olson v. Lovell*, the vendee contracted to purchase a tract of land owned by the vendors as cotenants.

The contract was signed by one of the vendors. The name of the other was signed without authority. The court refused a specific performance to the vendee of the interest of the vendor who had formally executed the contract, and in its decision pointed out that the foundation of the determination in *Jackson v. Torrence* was not that equity refused specific performance because the parties defendant were husband and wife, but because to compel a part performance by the husband would be to make him "perform a contract which he never made or intended to make," and the same equitable principle was applied in *Olson v. Lovell*.

[4] And finally it may be said that the uncontradicted evidence shows that defendant, after notification from plaintiff that the latter would not deed the property to the former in pursuance of the terms of the asserted contract with Cecilia Brennan, took no steps to enforce his right under that contract, and meets this action to quiet title by a cross-complaint seeking specific performance years after plaintiff's repudiation of the contract was made known to him. Under the authority of *O'Donnell v. Jackson*, 69 Cal. 622, 11 Pac. 251, this unexplained laches precluded any rights which defendant might otherwise have had to a specific performance of the contract.

The order granting a new trial is therefore reversed.

We concur: LORIGAN, J.; MELVIN, J.

170 Cal. 321

SAN FRANCISCO STEVEDORING CO. et al.
v. PILLSBURY et al., Industrial Accident Commission. (S. F. 7435.)

(Supreme Court of California. June 2, 1915.)

MASTER AND SERVANT — 250%, New, vol. 16
Key-No. Series—INJURIES TO SERVANT—ESTOPPEL BY ACTION TO CLAIM COMPENSATION UNDER INDUSTRIAL COMPENSATION ACT.

Where an employé injured in the course of his duties brought an action in the superior court, such commencement of action was not a final election of the employé's remedy depriving the Industrial Accident Commission of jurisdiction to award him compensation, since the judgment of the superior court sustaining a demurrer to the complaint merely determined that the allegations failed to state a case of the character for which the Industrial Compensation Act provides an exception to its general provision that the right to recover compensation under it shall be an injured employé's exclusive remedy, and that therefore the proper tribunal for the adjudication of the claim was the Industrial Accident Commission.

In Bank. Proceedings under the Industrial Compensation Act by Jeremiah Broderick to obtain compensation for personal injuries opposed by the San Francisco Stevedoring Company, the employer. Compensation was awarded, and the employer petitions for certiorari to review the proceedings of the Industrial Accident Commission resulting in the award. Application denied.

Lloyd S. Ackerman, of San Francisco, for petitioners. C. M. Bradley, of San Francisco, for respondents.

ANGELLOTTI, C. J. Petitioners seek a writ of certiorari to review the proceedings of the Industrial Accident Commission resulting in an award by said commission to one Jeremiah Broderick of compensation for personal injuries alleged to have been received by him in the course of his employment by the San Francisco Stevedoring Company.

The only point made in support of the application is that the Industrial Commission was without jurisdiction by reason of the fact that Broderick, prior to instituting his proceeding before the Industrial Commission, instituted an action for damages on account of the same injuries against the stevedoring company, in the superior court of the city and county of San Francisco. A demurrer to his complaint interposed by the company was sustained by said court, and, on his failure to amend, judgment was given against him. At the time of the award by the Industrial Commission, Broderick had filed a waiver of his right of appeal. It is claimed that by commencing his action in the superior court Broderick finally elected his remedy, and thus deprived the commission of jurisdiction in the matter, and also that the superior court judgment is a final determination of his rights in the matter.

We are satisfied that there is no force in this claim. The Industrial Compensation Act provides substantially that, where the specified conditions of compensation exist, the right to recover such compensation in a proceeding before the commission shall be the exclusive remedy of the employé, "except that when the injury was caused by the employer's gross negligence or willful misconduct and such act or failure to act causing such injury was the personal act or failure to act on the part of the employer himself, * * * and such act or failure to act indicated a willful disregard of the life, limb or bodily safety of the employés, any such injured employé may, at his option, either claim compensation under this act or maintain an action at law for damages."

It will thus be seen that the right of the employé to resort at his option to an action at law for damages is restricted to the class of cases specified in the provision just quoted, viz., cases where the injury was caused by the employer's gross negligence or willful misconduct of a certain specified character. The judgment of the superior court in Broderick's action simply determines that the allegations of his complaint failed to state a case of this character, and therefore that the proper tribunal for the adjudication of his claim is the Industrial Accident Commission. Nothing else can be held to have been determined against him. He cannot be held to be

estopped thereby from pursuing his remedy before the commission, nor can the commission be held to have been without jurisdiction of the proceeding instituted by him.

The application for a writ of certiorari is denied.

WE concur: LORIGAN, J.; SHAW, J.; HENSHAW, J.; LAWLOR, J.

170 Cal. 339

In re MICHELS. (L. A. 4124.)

(Supreme Court of California. June 4, 1915.)

1. INFANTS $\S$ 13—CUSTODY AND PROTECTION.

It is a part of the power as well as the duty of the state to guide and guard the helpless young, in the exercise of which duty it may provide for the custody and maintenance of abandoned children, and process of law and a forum to determine whether a child is an abandoned child, and may base proceedings in guardianship and in adoption upon decrees of abandonment, and declare what acts shall constitute abandonment by parents.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 14; Dec. Dig. $\S$ 13.]

2. INFANTS $\S$ 19—ADJUDICATION OF STATUS OF ABANDONED CHILD—EFFECT—PETITION FOR GUARDIANSHIP.

While a decree that a child is an abandoned child, made after proceedings duly had, is a final adjudication of its status as of the date of the decree, resulting under Civ. Code, § 246, subd. 4, defining such decree, in depriving the parents of the present right to the guardianship and custody of the child, it does not forever destroy the parental right to its care and custody, and, in the absence of intervening rights, the parents may, by petition for guardianship, etc., show their competency, willingness, and ability to support and maintain the child, and have their rights heard and considered.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 19; Dec. Dig. $\S$ 19.]

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Petition by the parents of Rosa Michels, an infant, for appointment as guardians of her person, opposed by Verna Shaw. Decree for opponent, and the parents appeal. Reversed, with directions to overrule the demurrer and to allow any person in interest to appear and plead to the merits of the petition.

Joseph Scott, of Los Angeles, for appellants. Schweitzer & Hutton, of Los Angeles, for respondent.

HENSHAW, J. Petitioners, who are likewise the appellants herein, are the father and mother of Rosa Michels, a female child, aged about seven years. They petitioned the superior court to be appointed guardians of the person of their infant daughter. Their petition showed that they are husband and wife, and that the child was born in lawful wedlock; that some years previously they came to Los Angeles with their five children, the eldest then about ten years of age, the youngest Rosa, then about one year of

age. At that time Rosa was crippled and unable to stand on her feet. A physician told the parents that the child should be sent to a hospital for treatment, and the child was sent to the Children's Hospital, a charitable institution, where she was taken care of without charge. She remained there 12 months—11 of those months upon a stretcher. During that period the father called upon her frequently. The mother was unable to do so, being herself engrossed in her household duties, being ill, and during that period giving birth to another child. Miss Verna Shaw was a nurse in the Children's Hospital and became interested in little Rosa. Verna Shaw sought to be allowed to adopt her. The father declined to accede to her request, but permitted her to take the child to her parents' ranch in the neighborhood of Los Angeles, where it was represented the child would improve in health, with pure air and fresh milk. It was agreed between the parents and Verna Shaw that she should take the child, keep her at the ranch for a period of two years, and then return her to her parents. The child was taken to the ranch. Thereafter Verna Shaw visited the petitioners, and told them the child was doing well. They asked to see it, but Verna Shaw replied that it was better that the child be not brought to the city. Receiving no more visits from Verna Shaw, the petitioners called upon her at the Children's Hospital and were told that Verna Shaw had left the hospital and that her address was unknown. The child was taken to the country in the early part of the year 1911, and they did not learn where she was until March, 1914, when they took steps to regain her custody. Upon learning that petitioners desired to secure possession of the child, Verna Shaw proceeded to have the child declared by the juvenile court to be an abandoned child, and for that purpose, on or about the 1st of May, 1914, filed in the superior court a petition under the act concerning dependent and delinquent minor children (Stats. 1909, p. 213; Civ. Code, § 224), in which petition it was declared that the infant, Rosa Michels, was on the 24th day of December, 1910, left in the care and custody of Verna Shaw by the parents of the minor without the parents making any provision for the minor's support. A hearing was had in the juvenile department of the superior court before the Honorable Fred H. Taft, and the superior court determined and declared Rosa Michels to be an abandoned child. Petitioners were present at the hearing in person and by their attorney, and introduced evidence showing that they had not abandoned the child and never intended to abandon the child, and, after the court made its order declaring the child to be an abandoned child, petitioners instructed their attorney to appeal from this order and decree. Through the oversight, inadvertence, or neglect of their attorney, their appeal was not taken. The petition then asserts that

section 224 of the Civil Code, by virtue of which the proceedings resulting in the declaration that the child was an abandoned child were had, is null and void as being in violation of sections 1, 6, and 13 of article 1 of the Constitution of the state of California, and of the fifth, fourteenth, and eighth amendments of the Constitution of the United States.

The petitioners further declare that they are the owners of a fruit and grocery store, the income from which suffices to provide a comfortable living for themselves and all their children; that, while the order of the superior court declared the child to be an abandoned child, neither that nor any other order of the court provided a guardian for the child, nor gave it other parents by adoption. It is then averred, touching the spiritual welfare of the child, that section 27 of the juvenile act provides that children coming within the purview of the act shall be placed "with people of the same or similar religious belief"; that petitioners are members of the Roman Catholic Church; that Verna Shaw is a young unmarried woman without a home of her own, is not of the Roman Catholic faith, is obliged to and does maintain herself by her own exertions as a nurse in the office of a physician, and is compelled to leave the care of the child to relatives and other persons not of the Roman Catholic faith.

A demurrer was interposed to this petition, and the hearing was before the same judge who presided at the hearing of the petition to have the infant declared an abandoned child. The court sustained the demurrer and declared that the "petition does not state facts sufficient to require the appointment of petitioners as guardians of the person of the said infant."

The order and the only order of the court entered in the matter of the proceedings had under section 224 of the Civil Code is puzzling in its language. It is in the following words:

"It is stipulated in open court that the petition (of Verna Shaw) be denied and that further evidence might be taken at this time, notice being waived, all parties agreeing thereto. The court ordered that the child be declared abandoned."

It is not clear from this why, if the petition was denied, the child should have been declared an abandoned child. But, for the purposes of this consideration, this order adjudging the child to be an abandoned child may be taken as satisfactory and complete. So taking it, we may come directly to the consideration of certain questions here involved. Certain, we say, because the demands of this case do not require that all of appellants' arguments, and in particular those against the constitutionality of section 224 of the Civil Code, should be considered.

[1] Upon the general proposition, suffice it to say this: That it is unquestionably a part of the power as well as a part of the

duty of the state to guide and guard its helpless young. In the exercise of that duty, it is quite proper for the state to make provision for the custody, care, and maintenance of abandoned children, and in so doing to provide process of law and a forum for the determination of the question whether or not a child is an abandoned child. Upon a determination of abandonment, it is equally within the power and the duty of the state to provide for the care and nurture of the child in the future, and proceedings in guardianship and proceedings in adoption may be and by our law are based upon decrees of abandonment. And finally it is within the power of the state to declare what sins and acts of omission or commission shall constitute abandonment by the parent or parents. Unquestionably due process of law demands some sufficient notice to the parents of the proceedings about to be taken, with an opportunity to the parents to be heard upon the issue. But, so far as concerns this case, it appears by the petition that the parents not only received this notice, but responded to it, and were present in court with their attorney, at the hearing.

[2] Unquestionably also a decree that a child is an abandoned child, duly given after proceedings duly had, is a final adjudication of the status of this child as of the date of the decree. But the underlying question in this case is how far-reaching and how conclusive upon the future rights of the parents is such a decree of abandonment, treating it, as here we do, as a final, valid, subsisting decree.

Respondent argues broadly that the effect of the decree is forever to destroy parental rights in both their characteristics, to destroy the property right which the parent has in the child, and to destroy the natural right to the care, custody, nurture, and love of the offspring; that, the child having been decreed to be an abandoned child by an order which has become final, the present petition of the parents for letters of guardianship is to be treated as the unwarranted intrusion of strangers.

This view of the scope and meaning of a simple decree that a child has been abandoned by its parents is altogether beyond the reason of the law and so beyond the law. It is no more in contemplation of the law that parents should forever be deprived of the custody of a child because of a judgment of abandonment, than it is within the contemplation or power of the law to say that the decree of abandonment extirpates and destroys all parental affection for the child. What a decree of abandonment amounts to

is defined by section 246, subd. 4, of the Civil Code. It is a decree which judicially strips the parents of the then present right to the guardianship, care, custody, and control of the child. If other provision, thereafter, shall have been made for such custody and control, it may be that, upon hearing, the court will not disturb such custody, but this does not mean that the parents shall not be heard. We are not in this consideration confronted with the case of a child which, after a decree of abandonment, has been either adopted or provided with a guardian, and as well said in *Matter of Forrester*, 162 Cal. 493, 123 Pac. 283:

"The past failure of a parent to provide for his child may well coexist with a present ability to fully discharge all the duties of guardianship."

While the law has earnestly at heart the welfare of a child, yet, as pointed out in the same case, it will not even under such considerations, deprive the natural guardians of their rights. It is no light thing to endeavor to destroy the love of offspring which nature has implanted in every normal human being, nor does the law contemplate the doing of such a thing. It proposes merely to lend its guiding hand to helpless youth who have been deserted or abandoned from any cause. But it never means to say that if the cause has been removed, in other words, if the parents can show their present competency, willingness, and ability to support and maintain their offspring, they shall not be heard merely because some earlier decree that they have abandoned their child is supposed to have erected insurmountable barriers, and absolutely to have destroyed all their rights. Upon an application by the parents under such circumstances, if intervening rights following the decree of abandonment have come in, as if a guardian of the person has been appointed, or if the child has been formally adopted, these matters may be shown and will be considered upon the hearing. But in every such case, under the dictates of the law, which would be barbarous otherwise, but which is in truth humane, the parents are entitled to their day in court and to such a showing for the recovery of their offspring as they are able to make.

It was error, therefore, for the court to sustain a general demurrer to this petition; and the judgment is therefore reversed, with directions to the trial court to overrule the demurrer and to allow any person in interest to appear and plead to the merits of appellants' petition.

We concur: LORIGAN, J.; MELVIN, J.

170 Cal. 313

HARTIGAN v. CITY OF LOS ANGELES
et al. (L. A. 4062.)

(Supreme Court of California. June 2, 1915.)

1. MUNICIPAL CORPORATIONS — 918 — BONDS — ELECTION — PROPOSITIONS — SEPARATE SUBMISSION.

Where the issuance of bonds by a city is submitted to vote of electors to comply with Const. art. 11, § 18, providing that no city shall incur any indebtedness exceeding the revenue for the year in which it is incurred without the assent of two-thirds of the qualified electors, there must be a separate proposition on the ballot for each distinct, unrelated, and independent object or purpose for which it is proposed to incur indebtedness, showing expressly the amount desired for each one, in order that the voter may express his choice on each without thereby affecting the other.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. 918.]

2. MUNICIPAL CORPORATIONS — 918 — BOND ISSUE ELECTION — VALIDITY — PLEADING — COMPLAINT — SUFFICIENCY.

In an action to enjoin defendant city and its officers from issuing certain bonds on the ground that the election required by the Constitution to authorize such bond issue had been invalid because the ballot had not submitted the question of authorizing municipal improvements, alleged to be separate and distinct, separately to the voters, in considering the question whether or not the proposed bond issue was for two distinct purposes, the court could not consider facts not alleged in the complaint, and not within its cognizance by judicial notice.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. 918.]

3. EVIDENCE — 1 — JUDICIAL NOTICE — LOCAL PUBLIC CONTROVERSIES.

Local and temporary conditions of public sentiment and local public controversies, as whether a city should merely complete a generating plant for electric power, or acquire distributing facilities for such power as well, are not subjects of judicial notice.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1; Dec. Dig. 1.]

4. MUNICIPAL CORPORATIONS — 918 — BONDS — MUNICIPAL GENERATING AND DISTRIBUTING PLANT — SUBMISSION TO VOTE.

The city of Los Angeles was authorized by vote of its electors to issue bonds to the amount of \$6,500,000 to provide a municipal plant for the supply of electricity, \$1,250,000 to be spent in completing a power station, etc., that had already been partly finished, and \$5,250,000 to be spent in constructing or acquiring distributing lines, conduits and substations, and the acquisition of lands, right of way, machinery, etc., necessary therefor. The plaintiff, a resident citizen and taxpayer of the city, sued to enjoin the issuance of such bonds, contending that no valid election had been held for the approval of the issue, since the ballot submitted the question of the expenditure in a single proposition, while he claimed that the completion of the power station and the acquisition of the distributing facilities were two independent improvements, which should have been submitted separately. *Held*, that the description of the objects of the expenditure in the ballot as "works for supplying said city and its inhabitants with electricity for purposes of light, heat and power," proceeding to state that such works included both a generating plant and a distributing system, stating the elements of the plant and of the system, and the estimated cost of

such two parts of the improvement, presented but one municipal improvement for popular approval, properly submitted as such on the ballot.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. 918.]

5. MUNICIPAL CORPORATIONS — 918 — BONDS — MUNICIPAL GENERATING PLANT — SUBMISSION TO VOTE — STATUTES — "CONSTRUCTING" — "ACQUISITION."

Where the proposition on the ballot, in an election to authorize the city of Los Angeles to issue bonds for a municipal improvement, stated that \$1,250,000 was to be used for the "construction or acquisition of electric generating works," such city was thereby authorized to use the sum for the completion of a partly constructed generating plant, since the language of the bond act, authorizing the city council, when it shall determine that the public interest or necessity demands "the acquisition, construction, or completion" of any municipal improvement exceeding the city's annual income, to call a special election and submit the matter to the voters, does not necessarily imply that the acquisition of an improvement, or its construction, or completion, is each a separate and distinct proposition which must be submitted separately to the voters for their approval, and that money voted to construct improvements cannot be expended to complete an improvement already partially constructed, for the city would be "constructing" an improvement if it was engaged in the building of the unfinished portion of works already begun, and it could accomplish the "acquisition" of an improvement by buying an entire plant, by constructing a new one, or by completing one partially constructed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. 918.]

For other definitions, see Words and Phrases, Second Series, Acquisition; also First and Second Series, Construct.]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Frank E. Hartigan against the City of Los Angeles and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. R. Young, of Los Angeles, for appellant. Albert Lee Stephens, City Atty., and Howard Robertson, W. B. Mathews, and Wm. B. Himrod, all of Los Angeles, for respondents.

SHAW, J. The plaintiff, as a resident, citizen and taxpayer of the city of Los Angeles, began the action to enjoin the city and its officers from issuing, signing, or selling certain bonds of the city amounting to \$6,500,000. The plaintiff claims that no valid election has been held for the approval of said bond issue by the voters of the city.

[1] The constitutional provision is that no city shall incur any indebtedness exceeding the revenue for the year in which it is incurred "without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose." Article 11, § 18. The act of 1901, as amended in 1913, providing for such elections, declares that propositions for incurring indebtedness for more than one object or purpose may be submitted at the same election, and

that the ordinance calling the election must recite the objects and purposes for which the indebtedness is proposed to be incurred. Stats. 1913, p. 13. The rule of the decisions regarding more than one object or purpose is:

"That there must be a separate proposition on the ballot for each distinct, unrelated, and independent object or purpose for which it is proposed to incur indebtedness, and showing separately the amount desired for each one, in order that the voter may express his choice on each without thereby affecting the other." *Clark v. Los Angeles*, 160 Cal. 321, 116 Pac. 966.

The election, the validity of which is here attacked, was held on May 8, 1914, in pursuance of ordinances passed for that purpose under the aforesaid bond act. The ordinance calling the election provided that the proposition should be stated on the ballot in the following form:

"Shall the city of Los Angeles incur a bonded debt of \$6,500,000 for the purpose of acquiring and constructing a certain revenue-producing municipal improvement, to wit: Works for supplying said city and its inhabitants with electricity for purposes of light, heat and power, including the construction or acquisition of electric generating works, receiving substations, transmission lines, and the acquisition of lands, water rights, rights of way, machinery, apparatus and other works and property necessary therefor, the estimated cost of which is \$1,250,000; also including the construction or acquisition of distributing lines, conduits and substations, and the acquisition of lands, rights of way, machinery, apparatus and other works and property necessary therefor, the estimated cost of which is \$5,250,000."

This proposition was stated on the ballot, in the language above given, as a single proposition. To the right were the words "Yes" and "No," printed on separate lines, with voting squares at the side wherein the voter might indicate his choice for or against the proposal as an entirety. There was no mode provided by which the voter could vote "No" on that part of the proposition relating to the acquisition or construction of generating works with the substations, transmission lines, lands, machinery, and other property necessary therefor, estimated to cost \$1,250,000, and vote "Yes" on that part of the proposition embracing the acquisition or construction of distributing lines, conduits, and other property necessary therefor, estimated to cost \$5,250,000. The contention of the plaintiff is that these two branches or elements of the proposition constituted two distinct municipal improvements which should have been submitted separately in such a manner that the voter could vote for or against either or both, at his option. The ordinance declaring the necessity for the issuance of the bonds in question described the municipal improvement in the same words as on the ballot.

In support of his claim that this presents two distinct improvements, the plaintiff alleges the following facts which do not appear in the ordinance or on the ballot used at the election: Prior to the adoption of the resolution, the city of Los Angeles had con-

structed a municipal improvement known as the Los Angeles aqueduct. This aqueduct is not otherwise described, but we take it to be a conduit for the conveyance of water to Los Angeles for the use of the city and its inhabitants. Along and upon this aqueduct the city had begun the construction of a plant for the generation of electricity and had already expended thereon \$3,500,000, leaving it unfinished. It would require the expenditure of \$1,250,000 to complete it. At the time and prior to the proceedings for the election the city proposed, and now proposes, to expend \$1,250,000 of the bond money in completing this generating plant, and not for the construction or acquisition of new or other electric generating works. Neither the ordinance nor the ballot shows that this \$1,250,000 is to be used for the completion of the existing unfinished generating works. No reference was made to any unfinished works in any of the proceedings. There was at that time, and there is now, as the complaint alleges, no necessity for the construction or acquisition of a distributing system, being that part of the proposition calling for an expenditure of \$5,250,000. The reasons for this lack of necessity are stated to be that the city was then, and now is, adequately supplied with systems for distributing electric current, that there was and is no necessity for the city to engage in such distribution, and that if the city should generate electricity, after completing its plant, it could dispose of all such electric current without engaging in the municipal distribution thereof. The plaintiff was a voter of the city, and entitled to vote at said election, and desired to vote in favor of incurring the indebtedness of \$1,250,000 for the completion of the unfinished generating plant and to vote against the incurring of any indebtedness for the construction or acquisition of a distributing system. On the proposition as submitted on the ballot, in order to express his choice in favor of the \$1,250,000 indebtedness, he was obliged to vote in favor of bonds amounting to \$6,500,000.

[2, 3] In considering the question whether or not the proposed bonded debt was for two distinct purposes concerning which the voters should have been given the opportunity to approve or reject either or both, the court cannot consider, as bearing upon the question, facts not alleged and not within judicial cognizance. Local and temporary conditions of public sentiment and local public controversies are not of the latter class, and they must be alleged in order to become the basis for an argument. In his brief the plaintiff states that it is a well-known fact that the advisability of municipal ownership of an electric distribution system by Los Angeles was, at and before the time of said election, a question which was much discussed and upon which public sentiment was divided; that there were thousands of voters in the city who favored the completion of

the generating plant, but greatly opposed the city engaging in municipal distribution; that several large companies were engaged in distributing electricity adequately and cheaply to the city and its inhabitants; that the wisdom of the city's taking over this branch of the work was open to serious question, and that the voters of the city were greatly divided in their beliefs on the subject, but that the completion of the partially constructed plant was generally favored, and the necessity of it was plainly apparent. The plaintiff alleges that he was a voter of the city, and desired to vote in favor of one part of the proposition and against the other part, and found himself unable to do so, but it is not averred that there were any other voters so minded. The argument seems to be that those who favored a municipal distributing system procured the city council to combine that project with the proposition to complete the unfinished generating plant along the aqueduct, in order to make the popularity and necessity of the latter carry the proposition for \$5,250,000 to buy or build a municipal distributing system. If these facts had been alleged, or were susceptible of judicial notice, there might be some force in this argument. But they are not alleged, and we must determine the question solely upon the facts set forth in the complaint.

[4] We are to determine whether or not the facts alleged, namely, that the \$1,250,000 was necessary to complete the generating plant and save the money already expended thereon; that that amount of the bond money was to be used for that purpose; that the city and its inhabitants were already amply supplied with electricity distributed by public service corporations; and that the electricity generated by the proposed plant could be readily disposed of by the city without the erection by it of any distributing plant—necessarily lead to the conclusion that the proposition is a dual one the parts of which must be submitted separately. We think the question is settled by the decision in *Clark v. Los Angeles*, supra. One proposition for bonds, considered in that case, was the expenditure of \$3,000,000 for the construction of harbor improvements in San Pedro Bay, of which \$2,000,000 was to be expended for improvements on the south side of a certain established line and \$1,000,000 for similar improvements on the northerly side of said line. It was urged that this constituted a double object, that the different sums to be expended for the different improvements on the respective sides of the line constituted separate and distinct objects upon which the voters were entitled to express their choice separately. The court held that the purpose intended was a single purpose, namely, that of improving the harbor of San Pedro by the construction of docks, wharves, and warehouses with the streets and waterways necessary or convenient for their use and for access to, and from the

land on one side and the water on the other. The court said:

"All this constituted but one general plan or object. The fact that the estimated cost was stated in two sums, \$2,000,000 for the improvements on one side of the line described, and \$1,000,000 for those on the other side, does not render the two parts so distinct that they cannot be embraced in one scheme for improving the harbor, nor does it make each an entirely separate and distinct enterprise."

The municipal improvement for which the \$6,500,000 was to be expended in the present case is described in the ordinance and on the ballot as "works for supplying said city and its inhabitants with electricity for purposes of light, heat and power," and the description then proceeds to say that this includes both a generating plant and a distributing system, stating the particular elements of the generating plant and of the distributing system and the estimated cost of each of these two parts of the improvement. We think it must be conceded that, under the rule as stated in the *Clark Case*, this does not describe two distinct and separate objects or improvements, but merely provides for one system for supplying electricity to the city and its inhabitants, including both the production of the supply and the distribution thereof. Neither the fact that the \$3,500,000 already expended upon the generating plant would be lost if it is not completed, nor the fact that the plant, when completed, could be leased at a profit, nor the fact that the city could operate the generating plant alone and sell the product readily to distributing companies already in operation and serving the city, nor all of these combined, are sufficient to divide the proposed system, as matter of law, into two improvements, or to render it necessary for the council to submit the two parts separately on the ballot. While it might have submitted separate proposals, it was not bound to do so. It was a matter within its discretion.

[5] The plaintiff makes the further objection that, although the proposition on the ballot stated that the \$1,250,000 was to be used for the "construction or acquisition of electric generating works," the city, in fact, proposes to use said sum for the completion of the already partially constructed generating plant, and not for the acquisition or construction of such works, and that this would be an illegal diversion of the funds raised from the proposed bonds. Upon this he insists he is entitled to the relief prayed for by way of injunction to prevent the unlawful use of the bond money. The objection is based upon the language of the bond act, authorizing the city council, when it shall "determine that the public interest or necessity demands the acquisition, construction or completion of any municipal improvement" exceeding the annual income, to call a special election and submit the matter to the voters. The argument is that this necessarily implies that the acquisition of the improve-

ment, the construction of the improvement, and the completion of the improvement each constitutes a separate and distinct proposition which must be submitted separately, and that money voted to acquire or construct improvements cannot be expended for purposes of completing an improvement already partially constructed. Neither the ordinance nor the ballot, as above stated, mentioned the fact that the money was to be used to complete an unfinished plant. We do not think the words of the bond act should be so strictly construed. The purpose, as stated on the ballot, included the acquisition or construction of electric generating works. The word "completion" in the act would seem to have been unnecessary if the words "acquisition or construction" are to be given an effect as broad as their ordinary meaning. It was probably inserted to prevent doubts from arising where an issue of bonds was proposed to finish an uncompleted improvement. It serves no other purpose, and does not add anything to the effect that would be given to the other words if it had been omitted. The city would be "constructing" an improvement if it was engaged in the building of the unfinished portion of works already begun. It could accomplish the "acquisition" of an improvement by buying an entire plant, by constructing an entirely new one, or by completing one which it had partially constructed. These words include the completion of unfinished works belonging to the city; that being one method of constructing and acquiring such works. The money voted for "acquisition or construction" could therefore lawfully be used in completing the unfinished works. It is not claimed that any one was misled by the description of the generating works as given on the ballot.

The cases cited by the plaintiff, to the effect that when money is appropriated for completing a specified building the administrative officers cannot use it for the erection of another building, are not applicable to this question. Such officers are, of course, bound by a specific legislative direction of that character, and cannot divert the fund to a different use. Nothing of that kind is proposed here. We find no ground upon which the judgment of the court below can be disturbed.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.; LAWLOR, J.

170 Cal. 323

TAKEKAWA v. HOLE. (L. A. 3460.)

(Supreme Court of California. June 4, 1915.)

1. TRIAL — 387 — TRIAL BY COURT — "DECISION" — SUPPORT IN FINDINGS.

The decision of the court, which in fact is the oral judgment in the case, is to derive its

support from written findings of fact and conclusions of law signed by the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 903-907; Dec. Dig. — 387.]

For other definitions, see Words and Phrases, First and Second Series, Decision.]

2. JUDGMENT — 271 — ENTRY OF JUDGMENT.

The ministerial duty of the clerk is to enter a judgment in conformity with the decision of the court evidenced by the signed findings and conclusions; and it is proper for the court to give the form of judgment which the decision or oral judgment requires for the direction of the clerk.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 504-509; Dec. Dig. — 271.]

3. TRIAL — 397 — FINDINGS AND CONCLUSIONS OF LAW.

In an action to recover real property, and shares of stock in a water company, the judgment controlled, and if the findings supported it, the mere absence of a specific conclusion of law upon plaintiff's right to a delivery of the stock from a judgment that defendant should comply with the terms of his contract and transfer the stock to plaintiff, as well as the reality, would not defeat the judgment, since the conclusion was expressed in the judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. — 397.]

4. JUDGMENT — 303 — AMENDMENT — CONFORMITY TO DECISION.

The court at nisi prius may always amend its own judgments to make them conform to the decision which it actually rendered, but cannot subsequently amend by new modifications or enlargements of the judgment, or the judgment record, so as to make the judgment express anything not embraced in the decision, even though the proposed amendment contains matters which ought to have been embraced.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 594, 595; Dec. Dig. — 303.]

5. JUDGMENT — 305 — ENTRY — MISPRISION.

The court in deciding that plaintiff was entitled to recover real property, which decision was entered as its judgment, on its declaration that the judgment was to be amended not by the insertion of new matter but by correcting the record to have it contain all the matters actually decided but not entered through misprision of the clerk was authorized to amend the record of the judgment so as to declare plaintiff entitled to a recovery of stock, in accordance with the actual decision.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 596, 597; Dec. Dig. — 305.]

6. JUDGMENT — 328 — AMENDMENT — VACATION.

Where the court was mistaken in its declaration, in ordering an amendment, that the judgment was amended not by the insertion of new matter but by correcting the record to have it speak the entire decision of the court, such mistake might be shown upon the motion to vacate the order.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 630, 637; Dec. Dig. — 328.]

Department 2. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by M. Takekawa against W. J. Hole. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Affirmed.

See, also, 17 Cal. App. 653, 121 Pac. 296.

Anderson & Anderson and Watkins & Blodget, all of Los Angeles, for appellant. Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

HENSHAW, J. This cause was tried in the superior court of Orange county, and in November, 1909, a judgment was rendered in favor of the plaintiff and against the defendant for the recovery of certain real property. Findings of fact and conclusions of law and the judgment were all signed by the judge who tried the case, and the judgment was duly entered by the clerk in his judgment docket. The complaint also averred the plaintiff's right of recovery of 60 shares of stock of the La Habra Water Company. It alleged an unwarranted refusal of the defendant to execute and deliver to the plaintiff a deed of conveyance to the real property "or deliver the 60 shares of water stock of the La Habra Water Company mentioned in the said contract." The prayer of the complaint also sought a transfer and delivery to plaintiff of these 60 shares. The answer denied the right of plaintiff to a conveyance of the real estate or a transfer of the water stock. By its findings the court declared the contract to be as plaintiff had pleaded, the contract containing the clause, "With this land there is to be given 60 shares of the La Habra water stock." It further declared that plaintiff had duly tendered performance and the defendant had refused to make the deed of conveyance and to deliver the 60 shares of stock of the La Habra Water Company mentioned in said contract. The conclusions of law, while pronouncing upon plaintiff's right to a deed of the real estate upon payment of the money contemplated by the contract, were silent upon the question of the water stock, making no reference thereto whatsoever. The court, as has been said, signed these findings of fact and conclusions of law. It also signed a form of judgment.

[1, 2] Under our procedure the court pronounces its decision, which in fact is the oral judgment in the case. This judgment is to derive its support from written findings of fact and conclusions of law signed by the court. The ministerial duty of the clerk is to enter a judgment in conformity with the decision of the court, evidenced by the signed findings and conclusions. In the generality of cases, to an intelligent clerk, the conclusions of law will be sufficient guidance for the entry of a correct judgment. But it is eminently proper for the court to give to the clerk for his direction the form of judgment which the decision or oral judgment calls for. The court so did in this case and declares that this form of judgment contained an award of the stock to plaintiff.

[3] But to this appellant makes answer that the conclusions of law are silent upon plaintiff's right to receive the 50 shares of water stock, and that this absence of a conclusion of law is controlling upon the proposi-

tion that the court's original judgment did not and could not have contained a decree awarding it to plaintiff. In this, however, appellant ascribes too much potency to a mere conclusion of law. The judgment itself controls, and if the findings support the judgment, the mere absence or omission of a specific conclusion of law will not avail to defeat a judgment otherwise properly given. Indeed, it will be held that the conclusion of law is at once embraced and expressed in the mandate of the judgment. In this case, then, we see that by his complaint plaintiff sought a transfer of this stock. By the prayer of his complaint he asked for it. We see that the court found the contract by which defendant agreed to convey this stock to be a valid and subsisting contract, and decreed the terms upon which defendant should be made to perform his contract. If in truth then, though the conclusions of law may have been silent upon the matter, the court in its oral judgment did decree that defendant should comply with the terms of his contract, this judgment necessitated a transfer of the stock as well as a conveyance of the real property.

And so we come to the final consideration. The form of judgment which the judge signed contained the following language:

"And that upon payment of said money hereinbefore provided for, said defendant W. J. Hole be also required to transfer and deliver to this plaintiff 60 shares of the stock of the La Habra Water Company as provided in said contract mentioned and set forth in said finding."

These words were canceled by ink lines drawn through them. Opposite them upon the margin was the initial "N," the final initial of Mr. Noyes, attorney for plaintiff, and written in between the lines thus canceled was the following: "Agreed upon by the said plaintiff and W. J. Hole." As to the meaning of this there can be no dispute. It means that in this draft of the form of a judgment provision was made for the transfer by defendant to plaintiff of 60 shares of the stock of the La Habra Water Company; that by consent of the attorneys of both parties this provision of the judgment was eliminated by cancellation from this prepared form. (At least such is the declaration of the interpolated writing, though whether or not the writing was made by the authority of defendant does not appear upon the face of it, and the assent of plaintiff's attorney is indicated by his initial.)

It would seem clear, moreover, that this provision was canceled before entry by the clerk of his judgment, for otherwise it is to be taken for granted that the judgment which he entered would have contained this provision, as it did contain with exactness everything else embraced in the form of the judgment presented to him. From the judgment thus entered defendant took his appeal, as he did also from the order denying his motion for a new trial. His appeals were de-

nied by a decision of the court of appeal rendered in February, 1912. After the decision of the appellate court affirming the judgment and order appealed from, plaintiff received and accepted from the clerk the deed to the property which had been deposited with the clerk by the defendant, and the defendant received from the clerk the moneys called for by the judgment, which moneys had been deposited by the plaintiff with the clerk. This was in February, 1912, and thereafter, in June, 1912, on ex parte application plaintiff secured from the judge, who tried the cause, an amendment to the judgment, which amendment ordered defendant to transfer to plaintiff 60 shares of the capital stock of the La Habra Water Company, the order of the court being in the following language:

"It appearing to the court that the judgment heretofore entered by the clerk in the above-entitled action, is not a correct memorial of the judgment and order rendered and announced by this court in the above-entitled action, in that said judgment as rendered and announced by said court provided that the defendant transfer and deliver to the plaintiff herein 60 shares of the stock of the La Habra Water Company, as provided in the contract mentioned and set forth in the findings; and whereas, through inadvertence and a clerical error, there was omitted from the record of said judgment, any direction specifically ordering defendant to deliver said 60 shares of stock of the La Habra Water Company to defendant upon payment of the money directed to be paid by said judgment:

"Now, therefore, it is hereby ordered that the judgment heretofore entered by the clerk in this action on November 4, 1909, be, and the same is, hereby corrected to conform to the actual judgment announced and intended by the court, by adding to said judgment, after line 30 on page 3 thereof, the following: 'It is further ordered, adjudged, and decreed that upon payment of said money hereinbefore provided for, said defendant W. J. Hole be also required to transfer and deliver to this plaintiff 60 shares of the stock of the La Habra Water Company as provided in said contract mentioned and set forth in said findings.' That this order correcting the record of said judgment be entered nunc pro tunc to appear of record as of November 4, 1909, that being the date when said judgment was originally made and entered.

"Done in open court this 14th day of June, 1912. Z. B. West, Judge."

[4] Here, then, is an amendment to a judgment, which amendment involves the transfer of property and of property rights made not only after the original judgment had become final, but after it had been satisfied. The law governing the power of the court at nisi prius in dealing with its own judgments is well settled. The court may always amend the entered judgment to make it conform to the decision which the court actually rendered (*Homeseekers' Loan Association v. Gleeson*, 133 Cal. 312, 65 Pac. 617; *City & County v. Brown*, 153 Cal. 644, 96 Pac. 281); but it may never subsequently amend by new modifications or enlargements of the judgment which it originally rendered, or of the judgment record which is in accordance with the decision which was actually rendered.

It may not make the judgment express anything not embraced in the court's decision, even though the proposed amendment contains matters which ought to have been so pronounced. *Freeman on Judg.* § 70, note 2; *First Nat. Bank of Fresno v. Dusy*, 110 Cal. 70, 42 Pac. 476; *O'Brien v. O'Brien*, 124 Cal. 428, 57 Pac. 225.

[5, 6] Indisputably the amendment here made does change the judgment in important particulars. Indisputably it is an amendment which, if it be new matter, the court had no power to make, even though it declares in conformity with what the court originally should have decided but did not decide. But, upon the other hand, if the matter of the amendment was a part of the original decision of the court and through misprision of the clerk was not entered, it was within the power of the court to amend the record of the judgment so as to have it comport with verity and speak the decision which the court actually made. In the order amending the judgment which is here appealed from the court declared that the judgment was ordered amended under the conditions and circumstances last set forth. It declared, in effect, that the judgment was amended not by the insertion of new matter, but by correcting the record to have it contain all of the matters originally decreed. We must treat the form of judgment which the judge signed as setting forth the oral judgment or decision of the court, which it was the duty of the clerk to enter. It was the duty of the clerk to enter it, not because it was in writing signed by the judge, but because it was in fact the oral judgment which the court pronounced. Such is the tenor of the court's declaration in making the order of amendment. If the court was mistaken in this it was open to the appellant upon his motion to vacate the order so to show. He did not undertake to show the contrary, but upon this appeal rests upon the strictly legal proposition that the court had no power to make the amendment in question because it was the introduction of new matter in modification and enlargement of the judgment.

The court's declaration that it is not new matter, if assailed at all, is therefore unsuccessfully assailed, and the orders appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

170 Cal. 285
CALIFORNIA-CALAVERAS MINING CO.
v. WALLS et al. (Sac. 2115.)

(Supreme Court of California. June 1, 1915.)

1. CORPORATIONS ⇨ 30 — PROMOTERS—FIDUCIARY RELATIONS.

Promoters of a corporation formed for the express purpose of purchasing property owned by them sustain a fiduciary relation to their cosubscribers, and are bound to make full dis-

closures of the facts relating to the property to them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97-100; Dec. Dig. ☞30.]

2. CORPORATIONS ☞30—PURCHASE OF PROPERTY—FRAUD.

That the promoters of a corporation formed for the purpose of purchasing property owned by them concealed the facts as to the value of the property constitutes a fraud on the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97-100; Dec. Dig. ☞30.]

3. CORPORATIONS ☞30—CORPORATE PROPERTY—CONCEALED PROFITS.

Where a promoter co-operated with others in the organization of a corporation for the express purpose of having it take over certain property upon which he held an option at its actual cost, it being intended that others should become stockholders after the organization of the corporation, but concealed the fact that he could obtain the property at a smaller valuation, which he failed to disclose to his associates, the corporation itself had a right of action against him for concealed profits.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97-100; Dec. Dig. ☞30.]

4. CORPORATIONS ☞30—RIGHTS OF PROMOTERS—FIDUCIARY RELATIONS.

A fiduciary relation may exist between the promoters and the prospective stockholders of a corporation before its organization.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97-100; Dec. Dig. ☞30.]

5. CORPORATIONS ☞30—CORPORATE PROPERTY—CONCEALED PROFITS—HOLDER IN DUE COURSE.

In a suit by a corporation against a promoter for concealed profits, evidence held insufficient to show that the promoter's assignee of a note for the purchase price of property bought by the corporation was a holder for value in due course before maturity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97-100; Dec. Dig. ☞30.]

6. EVIDENCE ☞588—WEIGHT—CREDIBILITY—UNCONTRADICTED TESTIMONY.

Although the uncontradicted testimony of a witness may not generally be disregarded by a court, where the testimony of the witness, though positive, is improbable when tested by rules which govern men of ordinary capacity in a given business transaction, the court may refuse to credit it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. ☞588.]

In Bank. Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action by the California-Calaveras Mining Company against John A. Walls and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Metson, Drew & Mackenzie, of San Francisco, John Hancock, of San Andreas, and Horatio Alling, of Oakland, for appellants. Devlin & Devlin, of Sacramento, Clarence S. Darrow, of Chicago, Ill., Chickering & Gregory and Evan Williams, all of San Francisco, and Snyder & Snyder, of San Andreas, for respondent.

LORIGAN, J. The plaintiff corporation sued for a decree canceling a promissory note for \$100,000 delivered by it to defendant

Walls, to have annulled a trust deed made by it to defendant Wilson, as trustee, to secure said note, to have canceled certain stock certificates issued by plaintiff and held by defendants Manson, Jarmuth, and McGuinn, and for an accounting by Manson to plaintiff. Manson was served by publication, and, failing to appear, his default was entered. The action was dismissed as to the defendant McGuinn. Jarmuth, Walls, and Wilson answered and contested the right of the plaintiff to recover. Plaintiff obtained a decree canceling said note, annulling said trust deed, canceling all stock certificates issued by the corporation to and held by Manson and Jarmuth, and also a judgment against Manson and Jarmuth for \$83,500. Defendants Walls and Wilson appeal.

The findings are very full, and as far as practical we epitomize them; as also other facts in the case.

The court found that defendants Manson and Jarmuth, prior to January 7, 1907, became familiar with a mining and ranch property, consisting of 7,200 acres, located in Calaveras and Sutter counties in this state, the property of a Mrs. Caroline Wright, which she was offering for sale for \$120,000, and a sale of which at that figure they had discussed with her. About January 7, 1907, Manson, for himself and Jarmuth, visited Chicago for the purpose of interesting parties there in the purchase of this property. He got into conference with David T. Adams, J. H. James, Edmund D. Brigham, John T. Jones, and Paul Brown, residents of Chicago, and hereafter to be designated the Chicago parties. He sought the co-operation of these parties with himself and Jarmuth in the purchase of this property. Several meetings and conferences were had between them on the subject, in which Manson stated that he had a verbal option on the property for \$250,000 but was endeavoring to get it for less; that he, being well acquainted with its owner, could purchase it for less than any one else; that he would, however, require Jarmuth's services to effect it, but that he, Manson, would attend to the entire matter for the benefit of all of them should they join with him in purchasing it. Some of the Chicago parties wanted to visit the property, but Manson protested against their doing so, stating that the owner was an old woman, highly nervous, and that if she learned that Eastern parties were trying to purchase the property, she would become excited and raise its price. As a result of these conferences, the Chicago parties believing all these representations of Manson, it was agreed that they and Manson and Jarmuth should co-operate in the purchase of it. As the most convenient way of accomplishing this it was agreed between them that a corporation should be formed, and stock thereof distributed to all associated in the enterprise; that

all of them would compose the corporation; that the Chicago parties would finance the corporation to be so formed by purchasing, or causing to be purchased, such of its stock as would be necessary to place sufficient funds in the treasury to pay certain promissory notes to be issued by the corporation; that Manson should act in the organization of the corporation, attend entirely to the purchase of the mining property, transfer it to the corporation, and, on the assumption of the truth of Manson's statement that the least price at which it could be purchased by him from its owner for the benefit of said proposed corporation was \$250,000, that in payment therefor the corporation should make and deliver to Manson its three promissory notes for \$100,000 each; the \$50,000 above the actual price of the mining property to be paid to Manson by the corporation, as he insisted it should be, as his profit for his services in attending to the securing of the property for the mutual benefit of all concerned and the formation of the corporation to take it over. This arrangement being reached between the parties, on January 7, 1907, a written agreement for the purpose of carrying it out was signed by Manson and Brigham, the latter as representing himself and the other Chicago parties in the transaction. This agreement provided: That Manson should organize the plaintiff corporation in California with a capital stock of \$2,500,000 divided into 500,000 shares of the par value of \$5 each. That its directors should consist of seven members to be selected by Manson. That on the organization of the corporation Manson should transfer to it the mining property and in full payment therefor the corporation should issue to Manson all its capital stock fully paid up and nonassessable, and deliver to him three of its promissory notes for \$100,000 each without interest, due, respectively, February 5, 1907, March 5, 1907, and April 5, 1907. That of this 500,000 shares of the capital stock Manson should transfer to the treasury of the corporation 150,000 shares as a fund for future use by the corporation. That 199,965 shares of said 500,000 shares should be deposited with a trustee to be delivered on payment of said three promissory notes, as follows: 50,000 shares to Brigham, 107,143 shares to Brigham for himself and his assignees, and 42,822 shares to Manson. That, further, of said 100,000 shares Manson should forthwith turn into the treasury of the corporation 150,000 shares to be issued by it to Paul Brown, as trustee, to be sold by him for the corporation at par on certain terms of payment specified in the agreement.

On the execution of this agreement Manson immediately came to California, and he and Jarmuth visited Mrs. Wright. She had given an option to Jarmuth on this property for \$120,000 before any negotiations were entered into with the Chicago parties, and would have sold it at any time for that figure. At

this conference Mrs. Wright agreed to sell it to Manson for \$120,000—\$75,000 in cash, and the delivery of certain bonds and a note and mortgage held by Jarmuth representing the balance—and on January 21, 1907, deposited in escrow with a certain bank a deed to Manson of the property to be delivered to him on payment of the money and delivery of the bonds and note and mortgage on or before February 10, 1907. On January 21, 1907, Manson caused to be carried out the written agreement between himself and the Chicago parties as far as its literal terms are concerned. He caused the corporation plaintiff to be organized, conveyed to it one-half of the mining property, and in consideration therefor the corporation issued and delivered to him all its capital stock. At an adjourned meeting on the same day he conveyed to the corporation the other half of the property, and delivered to it as treasury stock of the corporation 300,000 of said shares issued to him and received from the corporation the three promissory notes for \$100,000, each payable at the respective dates without interest as provided in the agreement. The other terms of the agreement as to the distribution of the shares of stock by Manson and the issuance by the corporation of the treasury stock to Brown were also carried out.

Prior to the maturity of the first note due February 7, 1907, Paul Brown, as trustee of said treasury stock of the corporation, obtained from various persons who had subscribed therefor the sum of \$90,000, the larger part of which was subscribed by the Chicago parties, including himself. This \$90,000, with \$10,000 subscribed by Manson, was deposited with the treasurer of the corporation to take up the first note, and was paid over to Manson for that purpose. Manson paid \$75,000 of this money to take up the Wright deed to him of this property deposited in escrow. The second note, maturing March 5, 1907, was paid on May 20, 1907, the money to pay it being received from the Chicago parties and the other purchasers of treasury stock of the corporation from Brown as trustee. The third note, maturing April 5, 1907, was not paid, and Manson caused the corporation to issue a renewal note to the defendant Walls with the trust deed, both here involved, on his statement to it that prior to the maturity of said original note of April 5, 1907, he had sold and indorsed it to said Walls. This renewal note, dated April 6, 1907, was for \$100,000, payable three years after date, with interest at 8 per cent. per annum. Manson during all these times and from the organization of the corporation was in control of it and was its president. Subsequent to the issuance by the corporation of this renewal note and trust deed, the Chicago parties, as stockholders of the corporation, and other stockholders thereof who had contributed money for the purchase

of the stock of the corporation to pay the purchase price of said mining property, discovered the truth of the facts as to the purchase price paid for said property by Manson, and, having obtained control of the corporation, brought this action in its name. As to the original note of April 5, 1907, the court found that Walls was not a purchaser of it for value, in good faith, without notice before its maturity, or at all; that in the transaction respecting the renewal note he was the agent of Manson and a mere "dummy" for him; that the original note was never indorsed or delivered to Walls until after its maturity; that Manson at all times after its issuance retained possession of it.

While many other findings were made by the court, still those we have referred to are the only ones necessary for consideration in determining the merits of the appeal of these particular appellants Walls and Wilson.

On these findings the decree herein was entered in favor of plaintiff.

As grounds for reversal it is urged: First, that no fraud upon the plaintiff corporation was either alleged or shown affecting the validity of the notes given; second, that the original note due April 5, 1907, for the renewal of which the trust deed and note here in question were given, was indorsed and delivered by Manson to Walls for value before maturity and without notice; that Walls is the owner and holder of said trust deed note, and the findings of the court to the contrary are not sustained by the evidence; third, that the trial court was without jurisdiction to adjudicate the alleged fraud of Manson or make any decree for the cancellation of the trust deed note and annulment of the trust deed, as it appears on the face of the judgment roll that Manson was not served with summons in this action.

It is to be noted that no attack whatever is made upon the findings that the representations and statements made to his associates, the Chicago people, by Manson, the prime mover in the promotion with them of the plaintiff corporation, for the express purpose of acquiring this mining and ranch property, as to the true price he could acquire it from its owner for the benefit of the proposed corporation they were to organize, were fraudulent and false. The sole contention of appellants is that, admitting this be fully proven, yet such fraud could in no way taint the transaction between Manson and the corporation itself so as to give the corporation as such a right of action to set aside its obligations on the notes. They concede that if at the time this mining property was exchanged by Manson for the stock and notes of the corporation, there were stockholders either nonassenting to the transaction or assenting by reason of ignorance of the true facts, and the transaction presented a secret

profit to Manson, that a cause of action would arise in favor of the corporation. But they claim no such situation is shown by the findings; that on the contrary a situation where when the transactions between Manson and the corporation were consummated there were no stockholders of the corporation save Manson himself; that in his transactions with it he was in reality the corporation itself because of his ownership of all its capital stock; that hence no other person was interested in the transactions save himself as both seller and purchaser of the property; that his knowledge as sole stockholder was knowledge by the corporation of all the facts respecting the property, and, as with such knowledge the corporation consented to the transaction between himself and it, no fraud was or could be practiced upon the corporation itself.

As far as the Chicago parties, the associates of Manson, in promoting the plaintiff corporation, are concerned, appellants insist that they are not entitled, as the stockholders of the corporation now, to invoke the aid of a court of equity in the name of the corporation to avoid the trust deed note; that as purchasers of stock subsequent to the incorporation of the plaintiff and the transfer of the property to it, they might have a right of action against Manson for his antecedent fraud practiced on them whereby they were induced to subsequently purchase stock, but that this was their individual right and remedy; that this, however, was not fraud for which the corporation itself could assert any right to set aside its note because, for the reasons first urged, the corporation itself was not defrauded.

Counsel for appellants marshal facts from the findings which they say present the situation which they have outlined, and cite a number of authorities to sustain their contention that, this being the situation, no fraud was perpetrated upon the plaintiff corporation of which it can complain. They rely on a line of cases including, among others, *Parsons v. Hayes*, 14 Abb. N. C. (N. Y.) 419; *Old Dominion Copper Mining Co. v. Lewisohn*, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025; *Stratton's Independence, Ltd., v. Dines*, 135 Fed. 449, 68 C. C. A. 161; *In re Ambrose Lake Tin & Copper Mining Co.*, 14 Ch. Div. 390; *Seymour v. Spring Forrest Cemetery Ass'n*, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; *Tompkins v. Perry, Jones & Co.*, 96 Md. 560, 54 Atl. 254; *Woodbury Heights Land Co. v. Loudenslager*, 55 N. J. Eq. 78, 35 Atl. 436.

We will not particularly discuss these authorities. They undoubtedly sustain the contention of the appellants if the case made under the findings is the case they claim is shown therefrom. These cited cases were all cases, or principally such, where all the stockholders of a corporation turned over property to it at an excessive valuation, receiving in payment therefor shares of its capital stock

based upon such excessive valuation and where these stockholders acquired the shares issued or participated in the profits derived from the transaction. There were no other stockholders or subscribers to the stock, nor was it contemplated that others should become future purchasers from the corporation of its stock, nor, in fact, were there any persons at all interested in the corporation or the transaction had with it save these stockholders participating in the transaction. Subsequent to the issuance of the stock to these participating stockholders they sold it to third parties, and actions were brought by the corporation in behalf of such subsequent purchasers on the theory that the corporation itself was defrauded through the original transaction. It was held that as the corporate entity at the time of these transactions consisted of these stockholders all participating in the transaction, the corporation had consented to it with full knowledge of the facts, and no fraud was committed on it of which the corporation itself could complain. But we do not think the rule of these authorities has any application to the case made out by the findings here, which we do not agree is the case counsel for appellants assumes is made. The findings, in our view, make quite a different case to which other principles than those contended for by appellants are to be applied. We will state those principles first, and subsequently apply them to the true case we consider is made under the findings. Premising, it is to be observed that in the transactions with reference to the purchase of this property by Manson from Mrs. Wright to be thereafter transferred to a corporation to be organized for that express purpose, Manson occupied the position of a promoter of the enterprise, associating with himself the Chicago parties to jointly carry out these purposes. By reason of this association and mutual co-operation a fiduciary relation was created between Manson and said associates, and if it can be said under the facts found that that fiduciary relation governed and controlled the conduct of Manson in securing the mining property, the organization of the plaintiff corporation to take it over and his transactions with the latter respecting it, we think, applying the principles to be referred to, a fraud was committed by him upon the corporation itself warranting it in the maintenance of this action; assuming, for the present, that the other finding of the court against the validity of the trust deed note to Walls is sustained by the evidence.

[1] In this court, in *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106, the principle is laid down that:

"Promoters of a corporation formed for the express purpose of purchasing a particular piece of property, occupy a fiduciary relation to their cosubscribers, and are bound to truthfully declare to their associates any personal interest they may have in the matter of the purchase. Without such disclosures they can-

not legally profit at the expense of their associates, and if they were guilty of any misrepresentations of facts or suppression of truth in relation to their personal interest in the proposed purchase, the corporation is entitled to set aside the transaction, or recover compensation for any loss which it has suffered."

And in *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444, it is said:

"The substance of the law is that promoters are corporate fiduciaries. Transactions with their companies wherein they deal honorably, with full disclosure, and without seeking to influence the action of the corporation, will be upheld. But transactions in which they suppress or misrepresent material facts, or otherwise deceive the company, or corruptly control its action, are fraudulent, and the company may either elect wholly to set aside such transactions, or to recover the promoter's secret profits."

Thompson in his work on *Corporations*, section 457, speaking with reference to secret profits of a promoter, says:

"Promoters of a corporation occupy a fiduciary relation to it, and have no right to derive any advantage over other stockholders, without a full and fair disclosure of the transaction; and any secret profits which they acquire through promoting the corporation must be refunded, and may be recovered in equity by the corporation or its legal representative, and in many cases at law. Persons who organize a corporation for the purpose of working certain property are bound to disclose to persons who may be by them induced to join them in the company what the vendors of the property actually receive for it; and if, by deceiving the members of the company as to the actual price paid for the property, or if, by collusion with the vendors they are permitted to retain for themselves a portion of the purchase money, they must account to the company for the same in equity; or the company may maintain an action in assumpsit against them for the moneys so secretly reserved to themselves, as so much money had and received to its use. In like manner, persons who purchase property and then organize a company to purchase it from them stand in a fiduciary position towards such company, and must faithfully state to the company all material facts relating to the property, which would influence the company in deciding on the desirability of purchasing it. In such cases the owners of property who desire to create a company for the purpose of purchasing it from them are bound, if they wish to make a contract which will stand, to nominate independent directors, and to disclose to them the actual facts. The principle upon which courts of equity proceed in these cases is a very familiar one. The promoter of a company, like its directors, is deemed to sustain towards the members of the company the relation of a trustee towards his *cestui que trust*. This being so, he will not be permitted to speculate out of that relation, or to derive secret advantages from it. He is bound to disclose to them fully all material facts touching his relation to them, including the amount which he is to get for his services as promoter, usually called 'promotion money.'"

And continuing, the same author says:

"This principle is undoubtedly applicable to promoters of a corporation not yet in esse, though it may be difficult in strict logic to work out such a case upon the theory that they are trustees for a body which is not in esse, and which they are proposing to create. Perhaps the conclusion is better worked out upon the reasoning of a recent writer of reputation: 'Before any shares had issued, the existence of the company was a fiction. The shareholders

really formed the company, each one becoming a member when he took his shares. While the contract for the purchase of the property was nominally in force from the time of its approval by the board of directors, yet it really took effect only after the shareholders had taken their shares. It then became binding on all the shareholders collectively, or, in other words, on the company. The fraud consisted in inducing the shareholders to enter into this contract in their collective capacity, and in using the funds belonging to the shareholders collectively in paying the purchase price. It is evident, therefore, that the injury to the shareholders was not an injury to the collective or corporate interests, and that the company was the proper complainant.' It seems, however, that the case cannot rest upon the idea of two parties to a trade dealing with each other at arm's length. While the promoters, at the time of making the offer, are not in a relation of trust and confidence with those to whom they make it, yet by the offer itself they propose to enter into such a relation with them; and this circumstance puts them under the same duty of making full and fair disclosures to them which they would be under if the trust relation had already been established. * * * The very suggestion made by associates to intending subscribers to the corporate shares, 'We are going to be your co-adventurers in this enterprise to be founded and prosecuted for the common profit of all,' implies an obligation on their part to deal openly and with the same fidelity which is demanded where a trust relation has been established."

These principles are enunciated and applied in adjudicated cases, among others: *Simons v. Vulcan Oil & Refining Co.*, 61 Pa. 217, 100 Am. Dec. 628; *Pittsburg Mining Co. v. Spooner*, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149; *South Joplin Land Co. v. Case*, 104 Mo. 572, 16 S. W. 390; *Erlanger v. New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1218; *Colton Imp. Co. v. Richter*, 26 Misc. Rep. 26, 55 N. Y. Supp. 486; *Walker v. Pike County Land Co.*, 139 Fed. 609, 71 C. C. A. 593.

In *South Joplin Land Co. v. Case*, just cited, the court said:

"Persons who take an active part in procuring subscriptions, and in organizing a corporation or company, called 'promoters' occupy a position often difficult to define. When the owner of the property deals with those promoters, representing himself only * * * it is very clear he occupies no position of trust or agency. He may deal at arm's length, as in other cases, being liable, however, for his fraudulent conduct. But it is common practice for persons who own property, or who have acquired the right to purchase property, to project and form a corporation and induce others to become stockholders for the purpose of selling the property to the corporation at a profit. * * * But the persons who thus project and form a corporation, by soliciting and procuring others to subscribe for and take shares of stock, for the purpose of selling or turning over to the company property which they own, or have a right to acquire by executory contract, do occupy a double position. On the one hand they represent their own interest in respect to the disposition of the property. On the other they represent the proposed corporation. And persons who subscribe for stock have a right to do so upon the assumption that the promoters are using their knowledge, skill and ability for the benefit of the company. It is therefore clear on principle that promoters, under the circumstances just stated, do occupy a position of trust and confidence; and it devolves upon them to make full disclosure. * * * So it has been

said in this country: 'The second principle is that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purpose of such a company, and then sell it at an advance without a full disclosure of the facts. They must account to the company for the profits, because it legitimately is theirs.' *Oil Co. v. Densmore*, 64 Pa. 43-50. * * * The point of most difficulty in this class of cases is as to the time when this fiduciary relation arises. As to this it has been well said: 'On the one hand it is quite plain that a fiduciary relation between a promoter and a company may exist long before the actual formation of a company by registration or otherwise. On the other hand, it is obvious that something must be done beyond a purchase and resale to constitute such relation—something must, it is submitted, be done by the promoter to impose upon him the duty of protecting the interests of those who ultimately form the company. He assumes this duty if he assumes to act for them, or if he induces them to trust him, or to trust persons who are under his control, and who are practically himself in disguise; he also assumes such duty if he calls the company into existence in order that it may buy what he has to sell; but he does not assume such duty by negotiating with persons who have themselves assumed that duty, and who are in no way under his influence.' 1 *Lindl. Partn.* (4th Ed.) 584."

At this point, and without discussing now the true relations between Manson and the Chicago parties in the entire transaction relative to the organization of the corporation and acquirement by it of this property, it is to be observed that by the antecedent oral agreement and understanding between Manson and the Chicago parties, and by the terms of the written contract between them, it was contemplated and intended that in the organization of the corporation future stockholders should be brought in; that treasury stock to the amount of 150,000 shares should be issued to Brown as trustee of the corporation, to be sold to third parties for the benefit of the corporation at prices and terms set out in the contract, and another 150,000 shares were to be held by the corporation as a fund for its future use, which, of course, involved a right in the corporation to sell it to future stockholders. There were then 150,000 corporate shares which the agreement expressly provided should be sold to constitute future stockholders in the corporation, and 150,000 shares additional subject to sale for such purpose, an aggregate of 300,000 shares, or three-fifths of the capital stock of the corporation. Brown actually did sell a very large portion of this treasury stock pursuant to the agreement.

[2] When in the promotion of a corporation to take over property for the benefit of the corporation it is contemplated by those organizing it that shares of its stock shall be offered for sale in order that others may become future stockholders in the corporation, such promoters in dealing with the corporation occupy a fiduciary relation to it for the benefit of such future stockholders, and the

interests of such future stockholders are entitled to protection from concealed benefits or profits acquired by the promoters in their transactions with the corporation and to a full disclosure of the true facts of the purchase price of the property turned over to the corporation, and any advantage or benefits accruing to the promoters by failure to do so or concealment constitutes a fraud on the corporation. This principle is announced in *Western State Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496. That case involved the right of a corporation to sue its president for a profit obtained where under the organization of the corporation the taking in of future stockholders was directly contemplated. We quote only from that decision as declaring the principle under such circumstances. The court said:

"The very first duty of the directors of this corporation was to procure the necessary stock subscriptions to enable the corporation to commence and continue its business. They accepted this trust when they assumed the office of directors, and in the discharge of this trust they were practically 'promoters' of the corporation. The obtaining of such subscriptions was practically a part of the formation of the company. One who engages in such work is known as a promoter, and is subject to the obligations imposed upon promoters (citing cases). As said in 1 *Thompson on Corporations*, § 415, the word 'promoter' involves the idea of exertion for the purpose of floating a company, and also the idea of some duty towards the company imposed by, or arising out of, the position which the so-called promoter assumes towards it. It is thoroughly settled that promoters cannot make a secret profit out of the corporation—that they occupy a fiduciary relation to it, and to its stockholders and have no right to derive any advantage over other stockholders, without a full and fair disclosure of the transaction."

In the application of these principles there is no distinction between promoters of a corporation and its president or directors. In the case just quoted from this court quotes with approval the following from *Bennett v. Havelock Electric Light, etc., Co.*, 21 Ont. L. R. 120:

"It has been argued in this case that the defendants are not liable, as they were in fact the only shareholders of the company at the time of the transaction, and because they, as shareholders, assented to what was done. This ignores the fact that, when there is intended to be an invitation to others to come in and take stock, the future shareholders are entitled to the protection of an absolute independent directorate and to full disclosure of the actual facts. There is no distinction between the position of promoters and directors in this respect; if any can be drawn, it must impose a more stringent obligation upon one occupying the position of director. The principles laid down in the decided cases accord with the dictates of honesty and fair play."

See, also, *Erlanger v. New Sombrero Phos. Co.*, supra; *Colton Imp. Co. v. Richter*, supra; *Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523; *Pietsch v. Millbrath*, 123 Wis. 647, 101 N. W. 388, 102 N. W. 342, 68 L. R. A. 945, 107 Am. St. Rep. 1017.

[3] Having set forth these principles we come now to a consideration and application of them to the facts found, and as we deem

the true case is presented under them. It is not simply a case, as claimed by appellants, where an owner of property offers to transfer the property to the corporation for all its stock, and where in the transaction no one save himself as the owner of all the stock and property transferred for it is interested or to be considered. This was not the real or true situation shown by the findings. The case presented is in reality one where a promoter associates and co-operates with others in the organization of a corporation for the express purpose of having it take over certain property under the control of the promoter at its actual cost, it being intended and contemplated that in the organization of the corporation all those associated are to become stockholders in it, and other stockholders are to be invited to take stock in the corporation and where, in the transactions with the corporation so organized, the promoter makes a concealed profit on the transfer of the property to it. It is true that upon the organization of this corporation the form of the transaction respecting the transfer of the property to it was one between Manson as owner of all its stock and himself as having received in effect an option on the mining property transferred by him to it. The mere form, however, which the transaction between Manson and the corporation took may not be interposed to defeat what was the evident purpose and intent of all the parties interested in the organization of the corporation and the acquirement of the property by it. The court will look beyond the form which the transaction took and to its substance and the obvious intent of the parties in the entire matter for the purpose of preserving and securing the rights of the real parties in interest and to circumvent fraud. That a fiduciary relationship existed between Manson and the Chicago parties, his associates, at least prior to the actual organization of the corporation, in their mutual endeavor to promote its incorporation for the express purpose of taking over this property at the lowest figure at which it could be obtained as represented to his associates by Manson, and that the Chicago parties should finance the corporation and all parties be stockholders therein, is beyond question. But it is said by appellants that whatever fiduciary relation may have existed between Manson and these associates prior to the organization of the corporation, none existed between him and the corporation itself in the actual transaction respecting the transfer by him of the property to the latter. But this claim is not sound when the real situation is considered; the relation in which Manson and the associates stood to each other during the entire transaction both as to the organization of the corporation and the purchase by it of this property and in which it was contemplated they should all stand to the corporation upon its organization.

[4] Under the authorities which we have

quoted the fiduciary relation of a promoter of a corporation to the corporation to be organized may exist long before its actual organization. As it may, so then we are satisfied that in the transactions here involved between Manson and the corporation it did exist. While by the terms of the contract of January 7, 1907, it was agreed by all the parties that the actual organization of the corporation should be left to Manson and all the stock be issued to him, it is apparent that this plan was determined on simply as a convenient method of effecting a transfer of the property to the corporation. The obvious purpose of the agreement with reference to issuance of capital stock of the corporation to him was in reality to make him simply a transferee for the benefit of the Chicago parties, his associates, in its organization as to a large portion of its stock, and as to a larger portion thereof he was simply a medium through which it should be redelivered to the corporation to constitute its treasury stock to be disposed of to future stockholders to be brought into the corporation. In fact, as is apparent from the terms of the contract itself, as well as the previous negotiations had between these parties, this was the entire purpose to be achieved through the organization of the corporation. Considering the relation of Manson to his associates from an equitable point of view, they were all to be considered as stockholders during Manson's negotiations with the corporation respecting the transfer of this property to it, notwithstanding that he was nominally the owner of all the stock. While nominally issued to Manson the stock was in reality acquired by him to a large extent for the benefit of his associates as intended stockholders with him in the corporation and still larger for the immediate benefit of the corporation as treasury stock to be sold to future stockholders. Very little of this stock was intended to be held by Manson himself. His prime interest in forming the corporation was to have it take over the property at a concealed and excessive valuation over its true price as represented by him; his associates and future stockholders to float and finance the corporation. Necessarily, as the scheme of the organization of the corporation contemplated, those who were to be the actual holders of this stock—the Chicago parties and purchasers of treasury stock of the corporation—were to contribute to its treasury the funds to make payment of the notes issued as the purchase price of the property, and to the extent that these stockholders through the fraudulent conduct of Manson were injured, it was an injury to the corporation as representing their collective or corporate interests. This being the true relation of the parties, the duty of Manson to his associates, as equitably constituting with himself stockholders in the corporation, as well as to the future stockholders which it was contemplated should be brought in, required the utmost good faith in his transactions with the cor-

poration. Such duty towards it required that he should make no secret profit by misrepresenting the price to be paid for the property which he was to transfer to it. In disregard of this duty, and having by a violation of it fraudulently secured an unjust advantage in the transaction, the corporation had a right to maintain this action in all respects as it was brought, and particularly as far as its outstanding obligation represented by the trust deed and the note to Walls is concerned, to have them set aside as representing an unjust gain of Manson unless, as contended by Walls, he was a purchaser in good faith and indorsee before its maturity of the original note to Manson of which the trust deed note is a renewal.

[5] Now as to the finding that Walls was not a purchaser or indorsee for value before the maturity of the original note of April 5, 1906. Appellant claims that this finding is not sustained by the evidence.

Fraud in the inception of the original note in suit being shown, the burden was cast on Walls of proving that he was an innocent purchaser or indorsee of the note for value before maturity. *Eames v. Crosier*, 101 Cal. 260, 35 Pac. 873; *Sinkler v. Siljan*, 136 Cal. 356, 68 Pac. 1024. That Walls was not such a purchaser or indorsee before maturity, or at all, the court was warranted in finding on the testimony of Walls himself as to the details of the transaction under which he claims to have purchased it, without any consideration of other evidence which was given in the case tending to negative it. Manson and himself had been for years associated together in the "bucket shop" business and dealing together in stock speculations; their relations were very close and intimate; and they had many business transactions in common and trusted each other implicitly. As to the purchase of the original note Walls testified that shortly prior to April 5, 1906, he called on Manson about investing some money, and Manson told him that he had this original note for \$100,000 falling due on the 5th of the month which he would sell him for its face value and on Manson's simple assurance that it was a safe purchase he agreed to take it. Walls did not see the note or know where it was. Manson wanted the full face value of the note as the purchase price payable at once or at the latest the next day. Walls testified that on the following day he got from his wife \$47,000 of some \$72,000 or \$73,000 in currency, which for a long time had been kept in their house in a hard wood cedar chest, and \$53,000 in currency which he took from his safe deposit box in a bank and forthwith paid Manson this money for the note. Manson then told him he did not think the original note would be paid at maturity but that a new note would be issued in place of it, to bear 8 per cent. interest. The original note bore no interest. After paying the money Walls told Manson to take charge of the original note. Later Manson

told him that the original note had not been paid, and that he was going to give him a new note of the corporation signed by himself as president and by the secretary of the corporation. This he did, it being the trust deed note here involved. This trust deed note Walls did not put into any bank or safe deposit box, but carried in a wallet in his pocket for seven or eight months. He was not present when this renewal note was made out; that matter was attended to by Manson. Walls was not engaged in the business of buying notes or mortgages, and bought no other notes. The original note he claimed to have purchased he never had in his possession. Manson retained it. Manson did not testify on the trial, though he was accessible as a witness. Neither did the wife of Walls.

This narrative of Walls as to the circumstances surrounding the purchase of the original note was not such as to impress a court with a conviction that it was true. The trial court was not so impressed, and that court cannot be said to have fallen into any error in treating his story as incredible.

[6] While the general rule is that the contradicted testimony of a witness cannot be disregarded by a court, still this rule is subject to limitations. And where the testimony of a witness, though of a most positive character, is yet so improbable when tested by rules which govern men of ordinary capacity and intelligence in a given business transaction, a court may refuse to credit it. *Davis v. Judson*, 159 Cal. 121, 113 Pac. 147.

Aside from the unusual circumstances of a sensible business man keeping a small fortune in currency in a wooden chest in his house, there are other circumstances impairing the credibility of the story of Walls. He was paying a large sum of money for this note, and it does not appear that he was a man of such wealth that whether he was making a judicious and safe investment was a matter of business indifference to him. According to his story, however, this would appear to be the fact. He knew nothing about the property of the plaintiff corporation or its financial resources or responsibility. He did not inquire as to its indebtedness by which he might have ascertained that there was a note for \$100,000 prior to that which he claims he was purchasing which the corporation had not yet paid. In fact, he made no inquiries at all about the matter. His story, summarized, shows that he bought a note for \$100,000 made by a corporation of which he knew nothing, a note which drew no interest and which might not be paid. He could derive no benefit from the transaction unless he purchased the note at a discount, which he testified he did not. After the purchase he paid no further attention to the matter, leaving it all to Manson. He did not even obtain possession of the original note, and never did have it, and, according to his own statement, in the interim between paying

Manson the money and receiving the trust deed note, Manson had the original note and his \$100,000, and he had no receipt or any other writing to protect his interest should anything have happened. There were no witnesses to the transaction, no book entries by either of the parties, no receipts or memorandum, no bank account or other account of Walls showing that his funds had been decreased through payment of this \$100,000. In fact, the transaction was so apart from the ordinary course of business as to warrant the court in concluding that the story of Walls was a fabrication and entitled to no credence, and that he was not a purchaser or indorsee of the original note of April 5, 1907, before maturity, or at all.

As to the attack upon the judgment against Manson it is sufficient to say that Manson has not appealed from the judgment and hence the validity of the judgment against him is not before us for determination.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

27 Cal. App. 204

SCHWAB v. BRIDGE. (Civ. 1478.)

(District Court of Appeal, First District, California. April 21, 1915. Rehearing Denied May 21, 1915.)

1. GUARANTY — 27 — CONSTRUCTION — INTENT OF PARTIES — EXTRINSIC EVIDENCE.

In construing a guaranty, like every other contract, the intent of the parties must, if possible, be ascertained from the instrument itself, and if it is doubtful under the terms of the instrument, resort may be had to the surrounding circumstances.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 28; Dec. Dig. 27.]

2. GUARANTY — 42 — CONSTRUCTION — CONDITION PRECEDENT.

A contract guarantying the account of a corporation provided the amount be due and presented by a certain date, expressly makes the presentation of the account by the specified date a condition precedent to the guarantor's liability, especially where the guarantor would be required to make a settlement with the principal debtor shortly after that date.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 51, 52; Dec. Dig. 42.]

3. CONTRACTS — 147 — CONSTRUCTION — CONDITION PRECEDENT.

While conditions precedent are not favored by the law, and are to be strictly construed against one relying thereon, the clearly expressed intent of the parties to declare a condition precedent cannot be disregarded.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. 147.]

4. GUARANTY — 42 — CONSTRUCTION — TIME AS ESSENCE.

Where the presentation of an account to the guarantor by a specified date was a condition precedent to his liability, time is of the essence of the contract, though not expressly made so.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 51, 52; Dec. Dig. 42.]

5. GUARANTY — 72 — LIABILITY OF GUARANTOR — CONDITION PRECEDENT — WAIVER.

Evasive answers by the guarantor to demands of payment made subsequent to the time fixed for the presentation of the account to him, are not a waiver of his right to rely on the condition precedent for the presentation of such accounts.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 82; Dec. Dig. 72.]

6. GUARANTY — 85 — ACTIONS AGAINST GUARANTOR — PLEADING — WAIVER OF CONDITION.

The creditor cannot rely on a waiver by the guarantor of a condition precedent to his liability without specially pleading such waiver.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 99; Dec. Dig. 85.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Edwin Schwab against Henry S. Bridge. Judgment for plaintiff, and defendant appeals. Reversed.

Thomas E. Haven and Haven & Athearn, all of San Francisco, for appellant. Morrison, Cope & Brobeck and Morrison, Dunne & Brobeck, all of San Francisco, for respondent.

KERRIGAN, J. This is an action to recover upon a guaranty. The circumstances under which the contract was entered into are as follows: W. W. Foote, Jr., had inherited certain sums of money from the estate of his father, which money was held in trust and was to become due on December 7, 1905. While so held W. W. Foote assigned the funds to the defendant Henry S. Bridge, defendant herein, as security for advances made and to be made by Bridge to Foote. The Pacific Central Electric Company, of which Foote was the principal stockholder, became indebted to the John M. Klein Electric Company, and to secure this indebtedness Foote requested Bridge to guarantee the account. In pursuance of this request Bridge signed the following guaranty:

"I will guarantee the account of Pacific Central Electric Company to the amount of \$1,500—provided the amount may be due and presented to me by December 3, 1905. This guaranty in place of a former one of \$1,000—in other words, my guaranty is not to exceed \$1,500.

"[Signed] Henry S. Bridge."

A considerable portion of the indebtedness, for which the guaranty was given, was not paid; and on October 31, 1907, the contract of guaranty was assigned to Edwin Schwab, who brought this action to recover judgment for the sum of \$1,500, with interest from the 4th day of December, 1905.

In defense of the action it was the claim of defendant in the court below that the contract of guaranty sued upon was a conditional one, dependent upon presentation of a demand, and that such presentation and demand be made within the time limited in the proviso of the guaranty; and, further, that the time of performance being part of a condition precedent, time was of the essence of

the guaranty; and as the demand was not made until after the time specified, no liability accrued upon the contract. Plaintiff, on the other hand, insisted that not only was the proviso relied upon as a defense not made a condition precedent by its terms, but that the time therein set forth was not made expressly of the essence of the contract, nor was it to be implied therefrom.

The trial court, while finding that no statement of the account was presented until December 29, 1905, determined that it was not the intention of the parties to the guaranty that the proviso should be a condition precedent to the liability of the guarantor, and that such proviso was not a condition precedent, and, further, that it was not the intention of the parties that time was to be of the essence of the contract, and that time was not of its essence. Judgment was accordingly rendered in favor of the plaintiff for the sum of \$1,435.55, interest and costs. The main question therefore presented by this appeal is the interpretation of the guaranty executed by the defendant.

[1, 2] A contract of suretyship is to be construed the same as other contracts for the purpose of determining the intention of the parties. To ascertain this intent resort is first had to the contract itself; and if the intention of the parties is doubtful under the terms of the instrument, resort may be had to the surrounding circumstances to determine its meaning. Here the words employed are in themselves express and precise, and clearly support the contention of the defendant, that presentation of the account due and within the time specified was intended as a condition precedent. The language of the proviso expressly declares that liability will accrue, provided the amount may be due and presented December 3, 1905. Where a contract of suretyship stipulates that notice shall be given to the surety of the principal's default, failure to comply with the condition or to give notice within the time specified will prevent recovery from the surety (U. S. Fidelity & G. Co. v. Rice, 148 Fed. 206, 78 C. C. A. 164; 32 Cyc. 176, and cases cited).

[3] While it is true that conditions precedent are not favored by the law, and are to be strictly construed against one seeking to avail himself of them (Antonelle v. Lumber Co., 140 Cal. 309-315, 73 Pac. 966), it is equally true that parties to a contract may, if they think proper, agree that any matter shall be a condition precedent; and if words are used in the contract so precise, express, and strong that such intention only is compatible with the terms employed, a court can only give effect to such declared intention of the parties. The only question in every case is whether such intention is so declared; and where such intention is sufficiently expressed to make the fulfillment of the act a condition precedent, it will be one. 2 Elliott on Contracts, § 1580; Nat. Surety Co. v. Long, 125

Fed. 887, 60 C. C. A. 623. While, as before stated, the intention of the parties to this contract is sufficiently expressed in the instrument itself, the facts and circumstances surrounding its execution, if considered, strengthen the conclusion reached. The fund that Bridge was to receive became due on the 7th day of December; and it is apparent that Bridge intended that he should be notified of the amount due by presentation to him before that time in order that he might protect himself by retaining in his settlement with Foote sufficient funds to meet any liability that had accrued under his guaranty. In contracts of this character, where the terms employed are clear and certain, and there is nothing to show a contrary intention, the liability of a surety cannot be extended by implication beyond the terms of his contract. *London & San Francisco Bank v. Parrott*, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64.

[4] The contention of plaintiff that the time therein set forth in the proviso is not expressly made of the essence of the contract is without merit. Concluding, as we do, that it was the intention of the parties to make presentation of the amount a condition precedent, time of necessity becomes of the very essence of the contract, it being the essential part of the proviso itself.

[5] The further claim that the conduct and language of the defendant show that he did not consider the requirement as a condition precedent, and that if he had ever so considered it he waived its fulfillment, is equally untenable. The statements relied upon in no way constitute a waiver. They consist of evasive answers to demands of payment made upon him under the guaranty and subsequent to the time specified for the performance of the condition precedent, and do not show any condition of facts inconsistent with the intention of defendant to rely upon the condition.

[6] Besides this, no waiver was pleaded. *Aronson v. Frankfort, etc., Ins. Co.*, 9 Cal. App. 473, 479, 99 Pac. 537.

For the reasons given the judgment and order are reversed.

We concur: LENNON, P. J.; RICHARDS, J.

27 Cal. App. 227

PEOPLE v. BURNS. (Cr. 291.)

(District Court of Appeal, Third District, California. April 24, 1915. Rehearing Denied by Supreme Court June 21, 1915.)

1. CRIMINAL LAW § 519 — EVIDENCE — CONFESSIONS—VOLUNTARY CHARACTER.

On the trial of an Indian for homicide, it appeared that the sheriff, after interviewing other Indians who were also under arrest, told accused that the other Indians said accused fired the fatal shot, and that he had sufficient evidence to convict accused, and he ought to tell the truth. The sheriff denied making any threats or promises, or using undue pressure, and there was no evidence of threats or promises or

any improper influence to secure a confession. *Held*, that the admission of the confession of accused was not error, as it could not be said that it was not voluntary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163–1174; Dec. Dig. § 519.]

2. CRIMINAL LAW § 531 — EVIDENCE — CONFESSIONS—PRELIMINARY PROOF.

Evidence of extrajudicial confessions are never admissible unless the prosecution shows previously to its reception that they were freely and voluntarily made and without any previous inducement or offer of leniency in punishment or by reason of any intimidation or threat.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1212–1217; Dec. Dig. § 531.]

3. CRIMINAL LAW § 519 — EVIDENCE — CONFESSIONS—VOLUNTARY CHARACTER.

To be admissible, an extrajudicial confession must not have been extracted by any sort of threats or violence nor obtained by any direct or implied promise, however slight, nor by the exertion of any improper influence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163–1174; Dec. Dig. § 519.]

4. CRIMINAL LAW § 532 — EVIDENCE — CONFESSIONS—DISCRETION OF COURT.

Whether a confession is free and voluntary is a preliminary question to be determined by the trial court, and a considerable measure of discretion must be allowed that court in determining it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1218; Dec. Dig. § 532.]

5. CRIMINAL LAW § 1144—EVIDENCE—PRESUMPTIONS.

In a prosecution for homicide, where it appeared that accused testified at the coroner's inquest, it would be presumed, in the absence of a showing to the contrary, that he appeared and testified voluntarily.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2764, 2766–2771, 2774–2781, 2901, 3016–3037; Dec. Dig. § 1144.]

6. CRIMINAL LAW § 1169—APPEAL—HARMLESS ERROR—ADMISSION OF CONFESSION.

The admission, on a trial for homicide, of a confession by accused, even though not voluntary, was not prejudicial error, where he voluntarily testified to the same effect at the coroner's inquest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. § 1169.]

7. CRIMINAL LAW § 1186—HARMLESS ERROR—INSTRUCTIONS.

Const. art. 6, § 4½, provides that no judgment shall be set aside or new trial granted in any criminal case for misdirection of the jury, etc., unless the court shall be of the opinion that the error complained of resulted in a miscarriage of justice. On a trial for homicide the court, in response to a request from the jury after their retirement, charged as to a confession by accused that the court admitted the evidence on the ground that, if it were true, the confession was voluntary; that, if the evidence was true, the question for the jury to determine was whether they believed beyond any question that it was true; that the court decided that, if the evidence was true, the confession was voluntary; and that, if the jury agreed upon what the sheriff testified and agreed it was true, the confession was voluntary. *Held* that, if this was susceptible of the construction that the court found the confession to be true as a necessary legal prerequisite to its admission, it was

not prejudicial error, where the evidence, independent of the confession, would have supported a conviction for murder in the first degree, but accused was convicted only of manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. ¶1186.]

8. HOMICIDE ¶244 — SELF-DEFENSE — EVIDENCE.

On a trial for homicide, the evidence tended to show that accused left a tent where he and deceased had a quarrel, went to his own tent or camp, procured his rifle, and unnecessarily returned to a point near the tent where deceased was and shot deceased when he left the tent. There was evidence that, when deceased left the tent, he picked up a hop pole and started towards two persons, saying that he was going up to club them, and that accused was standing near such persons, though, it being dark, they were unable to see him, and that as deceased did this accused fired. *Held*, that there was no ground upon which accused could justly invoke the plea of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 507-509; Dec. Dig. ¶244.]

9. HOMICIDE ¶340—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Even though an instruction on self-defense might have been technically pertinent to the case, the claimed inaccuracy in an instruction that it was the duty of accused to avoid killing deceased if he could do so with perfect safety to himself or his person was harmless.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. ¶340.]

10. HOMICIDE ¶300 — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

An instruction that the plea of self-defense was not available to a defendant who had sought a quarrel with a design to force a deadly issue, and thus by his own wrongful acts create a real or apparent necessity for killing his adversary, was pertinent to the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. ¶300.]

11. HOMICIDE ¶340 — APPEAL — HARMLESS ERROR—INSTRUCTIONS.

An instruction that the plea of self-defense was not available to a defendant, who had sought a quarrel with a design to force a deadly issue, and thus by his own wrongful acts create a real or apparent necessity for killing his adversary, was not prejudicial to accused, even though not strictly applicable to the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. ¶340.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Fox Burns was convicted of manslaughter, and he appeals. Affirmed.

T. J. Weldon and Charles Kasch, both of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant, having been charged by information filed by the district attorney of Mendocino county with the crime of murder, was adjudged guilty by the jury of the crime of manslaughter, and he brings the cause to this court on an appeal from both the judgment and the order denying his application for a new trial. The homicide occurred in a hop field of a Mr. Hildreth in

Mendocino county, on the night of the 18th day of September, 1914. The defendant, who is an Indian, with other Indians and a number of white persons, was, at the time of the homicide, engaged in picking hops. It appears that among those so engaged was a woman by the name of Rosie Judd. She was living in a tent, a temporary affair, erected for the purpose of use during the hop-picking season. The Indian hop pickers maintained a camp several hundred yards distant from the tent of the Judd woman.

On the night in question the deceased, Chester C. Rich, who was also a hop picker and engaged in that work up to the time of the homicide in the Hildreth fields, visited the Judd tent at about 10 o'clock on the night of the killing. He was accompanied by one William Mitchell, another hop picker. Gathered at the Judd tent then were the deceased, Mitchell, a man named Binkley, all three white men, and several Indians. The deceased had a bottle of whisky in his possession, and all then present in the Judd tent drank more or less of the liquor, none of them, however, getting under the influence thereof to any great degree. Within a brief time after the deceased and his companion reached Rosie Judd's tent, Fox Burns, the defendant, put in an appearance. At this time Tony Bell, an Indian, and deceased were engaged in gambling for money at a game known as the "grass game." The deceased accused Bell of cheating at the game, and a quarrel followed, each calling the other a s—n of a b—h. Burns, during the game, although not then playing at it, interjected remarks about the playing, when the deceased told him to keep his "d—m mouth shut," and this seems to have provoked an exchange of opprobrious epithets between the two men. A little later, however, the deceased and the defendant played at the game, the latter wagering his hat. The deceased won the game and the hat, but returned the latter to the defendant, saying that he had no use for it. The deceased then challenged Tony Bell for another game, and, accepting the challenge, Bell placed a dollar on the ground, on which, it seems, the game is usually played among the Indians. The deceased thereupon grabbed the dollar and put it into his pocket. Another quarrel between the deceased and Bell ensued, each abusing the other in scurrilous language. Almost immediately after the happening of this last circumstance the defendant, Bell, and an Indian named Ed Switzer left the tent, the defendant preceding the others a few seconds or perhaps a minute. Thereafter, and within a very short space of time, the deceased and Mitchell and an Indian, Dave Poe by name, started to leave the tent, Poe being a little ahead of the deceased and Mitchell, and just as they had reached the outside the Judd woman called Mitchell and requested him to return and light her lantern or lamp. Mitch-

ell returned into the tent, and the deceased and Poe remained outside. While Mitchell was engaged in the act of lighting the lantern, a shot was fired, and Rich received the contents of the weapon and a mortal wound, a rifle ball having entered his abdomen and presumably penetrated the stomach and intestines. Immediately after the shooting a messenger was dispatched for a physician, and Dr. Cleland responded, but found that Rich had expired before his arrival at the scene of the homicide. The doctor made only a superficial examination of the wound; that is, such an examination only as enabled him to ascertain the point of entrance of the bullet into the body. A hat was lying on the ground a short distance from where the body lay, and this the doctor picked up and carried to Ukiah, where, later in the day, he delivered it into the possession of the sheriff.

The testimony, while not strictly consistent on some points which may well be characterized as of minor importance, is, generally, marked by no conflict as to the circumstances under which the killing was committed.

The night was very dark, and a drizzling rain was falling. Tony Bell testified that, while he and Switser were on their way to the Indian camp, and before they had proceeded no farther than 40 yards from the tent of Rosie Judd, they met the defendant going in the direction of the Judd tent. At the same time, having looked back, they saw the deceased coming toward them. After the defendant had passed them he heard him (the defendant) say: "Come on out; I'll fix you." He heard no reply to the challenge, but immediately thereafter heard the report of a gun and saw a flash from the explosion, instantly following which he heard the exclamation, "Oh!" in a loud tone of voice, and saw the deceased fall to the ground. Some one then hastily fled from the spot and in a direction from Burns' camp.

Dave Poe, an Indian, testified that he was standing on the outside of and near the entrance to the Judd tent when the deceased came out of said tent; that at that time Mitchell's lantern was standing on the ground near the tent and was lighted; that he saw Bell and Switser standing together a short distance from the tent, and the defendant back of them a short distance; that the deceased, a moment after leaving the inside of the tent, and after some words with Poe, picked up a hop pole of about ten feet in length, and, with the pole in his hands, started in the direction of the spot where Bell and Switser were standing, saying, as Poe expressed it, "that he was going up to club them fellows out there." The deceased had proceeded only a short distance, said Poe, when a shot was fired, and the deceased, with an exclamation, fell to the ground.

Ed Switser testified that he saw the deceased, with a club in his hands, coming in the direction of where he and Bell were

standing, and at the same time heard some one say, "Come on, you s—n of a b—h." Thereupon the witness heard the report of a gun, and saw the deceased fall. He said that the voice of the person using the language, "Come on, you s—n of a b—h," he thought was that of the defendant. He said, however, that he did not see the defendant at that time, and did not know who fired the shot, but, he said, he heard some one running immediately after the shot, and that whoever he was "went around through the alfalfa field."

The sheriff of Mendocino county testified that early on the morning following the night of the homicide he, accompanied by his deputy, Oscar Weger, went to the hop field, and thence to the Indian camp. He found all the Indians, including the defendant, lying on the floor of their cabin asleep. He awoke and proceeded to interrogate them concerning the shooting. He placed several of the Indians, the defendant among them, under arrest. The sheriff had taken with him to the scene of the homicide the hat which, as above explained, Dr. Cleland had found lying near the body of the deceased. When the defendant, after having been aroused from his sleep by the sheriff, had finished "dressing," that officer asked him if he had a hat, to which question he replied in the negative. The sheriff then showed him the hat referred to and asked him if it was his, and he replied that it was, and received it from the sheriff and placed it upon his head. The Indians were taken to the county jail at Ukiah, and shortly thereafter, and on the same day, in the office of the sheriff, the latter and his deputy interviewed the other Indians, and finally the defendant, about the killing of Rich, and sought to secure a statement from the latter of what he knew of the homicide. After some little time, it appears, the sheriff, having asked the defendant what disposition he had made of his rifle (no weapon having been found in the defendant's camp at the time of the arrest), the accused replied that he had thrown the gun in the brush near the scene of the shooting. Later in the day the sheriff and his deputy, accompanied by the defendant, started for the hop field. On the way out, the defendant, although up to that time stoutly denying any knowledge of the shooting or the identity of the author of it, said to the officers:

"You white men would do the same thing, too, if us Indians come around you bothering your women; you would kill us, too."

Arriving at the hop field, the defendant guided the officers to a point in the brush about 75 yards from the Judd tent, and himself went into the brush and found and delivered to the sheriff a rifle. While out on this trip the defendant, so the sheriff testified, "told us all about it," referring to the killing. The sheriff further testified that the defendant, at the coroner's inquest, testified that he shot and killed Rich.

Deputy Sheriff Weger corroborated the

sheriff upon what occurred between the sheriff and the defendant at the first interview in the sheriff's office and as to the finding of the gun and the circumstances thereof. This witness said that he really heard no confession of guilt by the defendant either on the way to the hop field or on their way back to Ukiah; but, he said, the defendant repeatedly spoke about going to San Quentin, saying, among other things, that, as he had to work anyway, he might as well work at that prison as elsewhere. Both the sheriff and his deputy testified that the gun or rifle, when found in the brush, contained one empty shell and two cartridges.

The above constitutes a statement in substance of the more important testimony produced by the people in support of the charge set forth in the information, and, while no claim is here made that the evidence is not sufficient to uphold the verdict, thus we have presented the testimony here for the purpose of the consideration and decision of certain points made by the defendant in support of his appeals.

The defendant himself did not take the witness stand, but introduced some proof tending to establish his position in the case that the deceased was a man of bad reputation for peace and quiet; that is, that he was of a quarrelsome and pugnacious disposition, particularly when under the influence of intoxicating liquor, in which condition to some extent there was some testimony showing the deceased to have been when the homicide occurred. He also introduced some testimony tending to show that he himself was a person of good reputation for the traits mentioned.

[1] The first point made by the defendant is that the court erred in allowing in evidence the alleged confession of the defendant to the sheriff; the claim being that it was extorted from the accused by illegal means, and was therefore involuntary. As has been shown, the sheriff brought the defendant into his office shortly after the arrest and questioned him about the shooting. Previously that officer had interviewed the other Indians under arrest upon the subject, and the sheriff said to the defendant that those Indians had told him that he (the defendant) fired the fatal shot, that he (the sheriff) already had sufficient evidence to convict the defendant, and that the latter ought to tell the truth. The sheriff denied making any threats or promises or saying to the defendant that it would be better for him to tell the truth or in any manner using undue pressure in forcing from him an admission of guilt. We cannot say that the confession was not a voluntary one.

[2, 3] The rule respecting extrajudicial confessions is well understood, and it is that evidence of such confessions is never admissible unless the prosecution shows, previously to its reception, that they were freely and voluntarily made and without any previous

inducement or offer of leniency in punishment or by reason of any intimidation or threat (*People v. Miller*, 135 Cal. 69, 67 Pac. 12); or, as the proposition is elsewhere expressed, a confession, to be admissible as proof against the accused, must not have been "extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence" (3 *Russell on Crimes* [6th Ed.] 478).

[4] But, as is said in the case of the *People v. Siemsen*, 153 Cal. 387, 394, 95 Pac. 863, 866:

"Whether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it (*People v. Miller*, 135 Cal. 69 [67 Pac. 12]), and a considerable measure of discretion must be allowed that court in determining it."

See, also, *Hopt v. Utah*, 110 U. S. 574, 583, 4 Sup. Ct. 202, 28 L. Ed. 262.

In the case at bar there is an entire absence of evidence showing threats or promises, either direct or implied, or the exertion of any improper influence or the employment of any improper means to secure a statement from the accused. Indeed, the circumstances under which the confession was made in this case do not, in our judgment, go as far in impeachment of the confession as evidence against the accused as those under which a confession was obtained from the defendant in the case of the *People v. Siemsen*, *supra*. In that case the accused was told by the police officers, previously to his confession, that they had obtained a confession from one Dabner that the latter and Siemsen had committed the crime of murder, for which they were then under arrest and in the custody of the police. The confession of Dabner had been reduced to writing, and, in the presence of Dabner and certain police officers, was, before Siemsen confessed, read to him, and after it was so read Dabner remarked to the former, referring to his said confession, "Jack, you know it is true," and this was held to be a voluntary confession.

[5, 6] But it appears that after this confession of guilt to the sheriff the defendant was present at the inquest held by the coroner to inquire into and determine the cause of the death of Rich, and that he himself stated to the coroner and the jury that he had shot and killed the deceased. It was not shown that the accused was asked to testify at the inquest, nor was it shown that his statement before that tribunal was either the direct or indirect result of anything previously said to him by the sheriff. In any event, he was not, as a matter of law, compelled to testify at the inquest, and, in the absence of a showing to the contrary, it must be presumed that he voluntarily appeared before the coroner, and freely and without in any sense being coerced so to do admitted that it was he who fired the shot that killed the deceased. It follows that,

even if the incriminatory statement made by the accused to the sheriff was, in truth, involuntary, the defendant, having himself voluntarily made the same statement before the coroner, cannot now claim that he was prejudiced by the ruling admitting evidence of his confession to the sheriff, assuming (but denying) that said ruling constituted error.

[7] The next objection to the record is based on an oral instruction given by the court to the jury. The instruction was given after the jury had retired for deliberation upon the case, and were, by their own request, brought into court for further information upon the law bearing upon extrajudicial admissions. The court then addressed the jury as follows:

"When the court admitted the evidence in it did so on the ground that, if it were true, why the confession was voluntary. If the evidence is true, the question for you to determine is whether or not you believe beyond any question that the evidence is true. The court decided that, if the evidence is true, the confession is voluntary. If you argue [agree?] upon what Mr. Byrnes [the sheriff] testified to, and then if you agree it is true, why the court decided that the confession is voluntary."

The foregoing language appears, on first blush, to be confusing and inconsistent in itself, and upon a mere casual reading of it there would be considerable difficulty in determining precisely what the judge by it intended to say. In one sentence the instruction appears to have told the jury that the confession was admitted because the court had found it to be true, which is, of course, not the correct view, for the instruction, so understood, would involve a plain trespass by the court upon the domain of fact. In another sentence the instruction stated that it was with the jury to determine whether the confession was or was not true, which statement obviously involves the correct view of the law. But a careful analysis of the language of the instruction has brought us to the conclusion that what the judge intended to say was that, when the court admitted the confession, it did so because the evidence disclosing the circumstances under which it was made was true, and thus the confession shown to have been voluntarily made, but that it was for the jury to determine whether the confession itself was made, and, if so, whether it involved the truth. The instruction, so interpreted, is legally unobjectionable. It can easily be understood, however, how the jury could, from the rather inapt phraseology of the instruction, have obtained the impression that a finding by the court that the confession was true was a necessary legal prerequisite to the admissibility of evidence of the confession, and the effect of such an impression would unquestionably be greatly to prejudice the substantial rights of the accused at the trial, and would, under ordinary circumstances, constitute a sufficient legal reason for a reversal of the case. But, assuming that the jury re-

ceived from the instruction the impression suggested, still we think the cause should not be reversed therefor in view of the provisions of section 4½ of article 6 of the Constitution, which, we think, should, under the circumstances of the case, be applied here, and so rescue it from the fate to which it might be carried by said instruction but for that comparatively new amendment to our organic law.

The defendant was charged with the crime of murder, and the circumstances proved against him, independent of his confession, were, in our opinion, sufficient to support these findings by the jury had they so found: That the defendant and the deceased had a quarrel and used violent language toward each other in Rosie Judd's tent; that the defendant left said tent before any of the others present therein departed therefrom; that the defendant immediately went to his tent or camp, procured his rifle, and returned to within a short distance from the Judd tent and there waited for the appearance of the deceased; that, when the latter emerged from the tent into the darkness, the defendant fired at and inflicted upon the deceased a wound from the effect of which he died; that the defendant hastily fled from the scene of the shooting and returned to his own camp. These circumstances are borne out by the testimony of the witnesses, one of whom testified that Burns stood a few feet back of Bell and Switser when the shot was fired, and that he was heard to say, instantly before the shot was fired, "Come on, you s—n of a b—h," and by the further significant circumstance that his hat, which he was wearing when in the tent of Rosie Judd, was found after the shooting near the spot where lay the dead body of the deceased.

Thus the jury might have justly found the defendant guilty of murder of the first degree; or, to state the proposition differently, a verdict of conviction of murder of the first degree, predicated alone and independently of the confession upon the circumstances above detailed, would not be set aside on appeal on the ground of the insufficiency of the evidence to support such verdict, for from those circumstances the inference is well-nigh irresistible that the accused had made up his mind to destroy the life of the deceased before he left the Judd tent, that he went to his own camp to procure his rifle for that purpose, and that he returned and lay in wait for the deceased for the purpose of executing his previously conceived intent to slay him.

Under this view of the case, so well justified by the record, the defendant was fortunate, indeed, that his very able counsel were successful in saving him from the extreme penalty of the law, and under this view, having given the entire cause, including the evidence, a painstaking examination, we cannot justly conclude, even if the instruction had the effect of conveying to the jury the

impression that the court was, before admitting evidence of the confession, required to and did decide that the confession was true, that the instruction so understood "has resulted in a miscarriage of justice." Section 4½, art. 6, Const., *supra*.

[8, 9] The next proposition upon which a claim of reversal is based grows out of an instruction which declared it to be the duty of the defendant to have avoided the killing of the deceased if he could have done so with perfect safety to himself or his person. It is said that such an instruction was condemned and constituted the ground upon which a reversal was ordered in the case of the *People v. Maughs*, 149 Cal. 253, 259, 86 Pac. 187. The two instructions are not precisely alike, although, perhaps, it might with some reason be said that by the instruction complained of here the same doctrine was intended to be announced as was declared in the *Maughs Case* and which was held to be so far from the correct rule as to demand a reversal of that case. The instruction in that case, in effect, declared it to be the duty of one accused of slaying another and who relies upon the plea of self-defense to use, while under attack, all reasonable means within his power, consistent with his safety, "to avoid the danger and avert the necessity for the killing." In other words, the jury were thus told that it was the duty of the defendant, although under attack, to flee, rather than to take the life of his assailant, if he could do so consistently with his own safety or without injury to his own person. The instruction in this case says nothing about being under attack, but simply stated that if the defendant, with perfect safety to himself, could have avoided killing the deceased, it was his duty to have done so. However, even if it may be true that the distinction between the instructions is metaphysical, rather than substantial, and that the instruction in this case substantially states the identical doctrine declared in the instruction in the *Maughs Case* (which doctrine is not recognized by the criminal jurisprudence of this state), still it is quite manifest that the defendant here suffered no prejudice from it. The defendant himself, as seen, did not become a witness in his own behalf, and the pertinency of the instruction, if, indeed, it had any at all to the case, arose entirely by reason of the testimony of the witnesses that testified that the deceased, on leaving the inside of the Judd tent, seized a hop pole from the ground, and, with a threat, started toward the spot where Bell and Switzer were standing, and near and back of which one of the witnesses declared that he saw the defendant at the same time, although Bell and Switzer testified that, on account of the darkness of the night, they were unable to see him. Apart from

this testimony, there was no ground for the theory that the defendant, in killing the deceased, was moved by the necessities of self-preservation. But, if the defendant was responsible for the death of the deceased (and, as shown, the circumstances clearly indicate that he did the killing), there is no element of self-defense in the case. The defendant, as seen, after quarreling with Rich, left the tent in which the quarrel occurred, procured his rifle, and unnecessarily returned to a point near the Judd tent, where he was, obviously, more likely to meet the deceased than if he had remained at his own camp, where, undoubtedly, he had gone from the Judd tent for the express purpose of securing the weapon with which the life of the deceased was destroyed. And at the time of the shooting there was no actual combat between the two men. In truth, accepting the circumstances of this case as true, the defendant, in the place of attempting to avoid further trouble with Rich after the cessation of their altercation in the Judd tent, needlessly and purposely put himself in the way of a renewal thereof, and thus it is plainly manifest that, as a matter of law, there was no ground upon which he could justly invoke the plea of self-defense.

We therefore conclude that, even though an instruction on self-defense might have been technically pertinent to the case (and it could have been only technically applicable, if at all), the alleged inaccuracy of the instruction here complained of in the statement of the rights of a person assaulted, when an attack is on, was innocuous under the circumstances of this case.

[10, 11] The next and last assignment is directed against instruction No. 16, whereby the jury were charged that the plea of self-defense is not available to a defendant who has sought a quarrel with a design to force a deadly issue, and thus by his own wrongful acts create a real or apparent necessity for killing his adversary. The instruction contains a correct abstract statement of the law, but it is claimed that there was no evidence presented or any issue of fact developed by the evidence to which it was applicable. But there is, as will be perceived from the statement of the facts herein presented, some evidence to which the instruction may be said to be pertinent. There was no error in giving the instruction, and certainly no prejudice inflicted upon the defendant by giving it, even if it was not strictly applicable.

There are no other points than those which we have already considered and disposed of, and, for the reasons herein stated, the judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

27 Cal. App. 224

STAFFORD v. RAINEY. (Civ. 1328.)

(District Court of Appeal, Third District, California. April 23, 1915.)

1. BROKERS — S6 — COMPENSATION — SUFFICIENCY OF EVIDENCE.

In an action for a broker's commission on the sale of real estate, evidence held to support the court's finding that the broker did not procure the purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116-120; Dec. Dig. S6.]

2. BROKERS — S5 — COMPENSATION — ADMISSIBILITY OF EVIDENCE.

In an action for a broker's commission, where the broker had no exclusive contract, but relied for recovery on the claim that he procured the purchaser, letters exchanged between the owner and the purchaser are admissible to show that the owner himself procured the purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106-115; Dec. Dig. S5.]

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by John I. Stafford against Robert Rainey. Judgment for the defendant, and plaintiff appeals. Affirmed.

B. K. Collier and John I. Stafford, both of Yreka, for appellant. Taylor & Tebbe, of Yreka, for respondent.

CHIPMAN, P. J. This is an action to recover a commission for the sale of real property. The basis of plaintiff's claim is the following letter written to plaintiff by defendant:

"Seiad Valley, Calif. Feb. 27, 1914.

"Mr. J. I. Stafford, Dear Sir: I have got 316 acres of land about 125 acres in cultivation and about 80 more acres can be put in cultivation. Balance is rough and covered with timber there is a million or more of timber on the ranch good water right no debt. Price \$9,500 will pay the customary five per cent for a buyer. Will give you Sixty days time.

"Robt Rainey."

In his brief plaintiff says:

"The only question in this case is, Did plaintiff find a purchaser within 60 days? If so, he is entitled to his commission."

It is admitted that defendant sold his ranch to one F. E. Stewart for \$9,000 before the expiration of 60 days after February 27, 1914, and plaintiff claims that he found this purchaser and introduced him to Stewart and was instrumental in effecting the sale.

Upon the evidence adduced the court, sitting without a jury, made the following findings of fact and conclusions of law:

"(1) That defendant did not, on the 27th day of February, 1914, or at any other time, employ plaintiff as his agent to find a buyer for defendant's land known as the Rainey ranch, except to write a letter to plaintiff, giving plaintiff the right to sell said lands for the sum of \$9,500, where in said letter defendant promises, in event of sale, to pay plaintiff a 5 per cent. commission.

"(2) That plaintiff never did produce or find a buyer for defendant's said land, and was not in any way instrumental in selling the same.

"(3) That said Rainey ranch, together with certain personal property, was sold by defend-

ant himself, and by reason of an agreement the defendant had with one F. E. Stewart, such agreement being made before plaintiff had been given any authority to sell said Rainey ranch.

"(4) That plaintiff never did produce a purchaser, who was ready, or able, or willing, to purchase said Rainey ranch upon the terms given plaintiff to sell the same, nor did plaintiff furnish any purchaser whatever within the 60 days given him to find a purchaser, nor at any other time.

"As conclusions of law from the foregoing facts, the court holds that plaintiff is not entitled to any commission from defendant, nor has plaintiff been damaged in any sum or amount whatever by any acts of defendant."

Accordingly judgment passed for defendant.

[1] The essential feature of these findings, namely, that plaintiff did not "produce or find a buyer for defendant's said land and was not instrumental in selling the same," is challenged by plaintiff as unsupported by the evidence, and raises the single question of fact above stated by appellant.

Stewart, the purchaser, testified:

That he learned of the Rainey ranch, and that its owner would sell it through persons other than and not through plaintiff, and, on February 18, 1914, he wrote Rainey that he had been so informed, inviting reply, giving description of the property, price and terms of sale. Rainey replied on February 21st and, on February 26th, Stewart wrote him: "I will come down and look at your place. We will probably not get away from here [Yreka] for several days and will call you up when we start." He testified that plaintiff did not tell him he had the place for sale. "Q. Did Mr. Stafford have one single thing to do with bringing you together with Mr. Rainey in making the sale? A. No, sir; nothing in the world." It appeared that Stewart left Yreka to go to the Rainey ranch on February 27th. Before going he applied to plaintiff for a blank option, which was given him by plaintiff, and plaintiff volunteered to give him a letter of introduction to Rainey, whom Stewart had never met. On that day, or the day before, plaintiff telephoned Rainey, soliciting an answer to his former letter concerning the terms on which he would sell his ranch, and it was in response to this request that Rainey wrote the letter of February 27th, relied upon by plaintiff in the action.

Rainey testified:

That his correspondence with Stewart was before talking with plaintiff over the phone, and before he had received any letter from plaintiff stating that he had a possible purchaser. "Q. As I understand you, Mr. Stewart never was mentioned to you by Mr. Stafford over the phone? A. Never. Q. And you had no idea that the man he talked about sending down was the man whom you had written to? A. I didn't have any idea. Q. So you had no chance to tell Mr. Stafford that the man he was talking about was the very man you had written to yourself about the farm; you did not have any chance to do that? A. I didn't have any chance; no. Q. You didn't suspect that Stewart was the man Stafford was talking about? A. I did not."

Without stating the evidence further, we think there was sufficient to justify the findings of the court. There is some conflict between the testimony given by Stewart and Rainey and that given by plaintiff as a witness in his own behalf, but it was for the tri-

al court to determine, in view of all the facts and circumstances shown, whether plaintiff had procured Stewart as a purchaser for defendant's ranch. Where there is sufficient substantial evidence supporting the findings, we have no concern with conflicting testimony of witnesses.

[2] Appellant claims error in overruling his objection to the letters written by Stewart and Rainey to each other, on the ground that they were hearsay and not binding on plaintiff, who had no knowledge of them. It was competent for defendant to show by this or other proper means that he had himself, unaided by plaintiff, procured the purchaser. In *Crane v. McCormick*, 92 Cal. 176, 28 Pac. 222, cited by appellant, the contract provided that the commission should be paid if the owner should withdraw the property from sale or effect a sale in any way during the year. This is not the case here. Plaintiff was not given the exclusive right to sell the land, and he does not base his claim on such right. He claims only that he procured Stewart as a purchaser. Failing to establish this claim, he failed to maintain his action, for he makes no pretense of having procured any other purchaser, or having tried to do so. No other alleged errors of law seem to call for notice.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

27 Cal. App. 297

PEOPLE v. WILLIAMS. (Cr. 572.)

(District Court of Appeal, First District, California. April 30, 1915.)

1. HOMICIDE ⚡5—CAUSE OF DEATH—SECONDARY CAUSE.

Where death was attributed to the shock of the wound inflicted by defendant, and the shock of the operation necessary to remove the bullet, the wound was the primary cause, and the operation only an immaterial contributing factor, and evidence that deceased would have survived the shock of the wound is inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 7-10; Dec. Dig. ⚡5.]

2. CRIMINAL LAW ⚡1170—HARMLESS ERROR—EXCLUDING EVIDENCE—CURE BY SUBSEQUENT ADMISSION.

Error in excluding a conversation between accused and his wife as to her relations with deceased and threats by deceased against accused was harmless where the witness subsequently related the entire conversation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. ⚡1170.]

3. CRIMINAL LAW ⚡1036—APPEAL—PRESENTING QUESTIONS AT TRIAL—EXCEPTION TO CROSS-EXAMINATION.

Accused cannot complain of the admission of testimony by his wife on her cross-examination that she had been in the detention home where he made no objection to that question, though he did object to the subsequent question whether she was sent there by accused, and that question was immediately withdrawn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. ⚡1036.]

4. WITNESSES ⚡268—CROSS-EXAMINATION—REPETITION OF DIRECT TESTIMONY.

Where the wife of accused had testified on direct examination that she had trouble with her husband, and had left his room on a certain date, a question on cross-examination calling for a repetition of that evidence was proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. ⚡268.]

5. CRIMINAL LAW ⚡695½ New, vol. 17 Key-No. Series—TRIAL—RECEPTION OF EVIDENCE—RULING ON OBJECTIONS.

Where defendant objected to a question asked his witness on cross-examination, and the court indicated that the objection was well taken, but did not rule directly thereon, and the district attorney resumed his cross-examination along other lines, defendant cannot complain, since the action was equivalent to a formal ruling.

6 CRIMINAL LAW 777—TRIAL—REQUESTED CHARGES.

In a prosecution for murder, a requested instruction that it is the duty of the jury to resolve the evidence on a theory or hypothesis consistent with the intentions of the defendant, is obviously erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1878-1882; Dec. Dig. 777.]

7. CRIMINAL LAW 829—TRIAL—REQUESTED INSTRUCTIONS—REPETITION.

Defendant's requested instructions as to self-defense, and the right to act on communicated threats, were properly refused, where they were covered, in so far as correct, by the charge of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. 829.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

George Williams was convicted of murder in the second degree, and he appeals. Affirmed.

Jos. A. Brown, F. D. Brown, and Frank J. Egan, all of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. The defendant in this case was charged with the crime of murder. Upon his trial he was convicted of murder in the second degree and sentenced to 20 years in the state prison. The appeal is from the judgment and from an order denying a new trial.

[1] The sufficiency of the evidence to support the verdict and judgment is not challenged. It should be noted, however, that the evidence shows that a bullet, fired from a pistol in the hand of the defendant, entered the body of the deceased "right above the collar bone; * * * took a downward and inward course, penetrated the body of the third dorsal vertebra; * * * cut half the cord and embedded in the spinal canal." The immediate effect of the wound was partial paralysis of the body of the deceased, and an operation for the removal of the bullet was found necessary. The location of the wound, and the course and effect of the bullet, in all probability would have caused death even if septicemia had not set in. While the death of the deceased was attributed to two causes, viz., the shock of the wound and the shock of the operation, nevertheless the former was asserted to be the primary cause, and the latter is only an immaterial contributing factor. Under these circumstances it was immaterial to know, and therefore the trial court rightfully refused to permit the defendant to show, whether or not the deceased would have survived the shock of the wound in the absence of naturally resulting complications. *People v. Lewis*, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783.

[2] The wife of the defendant was called and sworn as a witness in his behalf. Complaint is made of the ruling sustaining an objection to a question propounded to her

which called for a conversation between her and the deceased, had shortly before the commission of the homicide. Conceding that the testimony sought to be elicited by the question was admissible, still the error, if any, in the ruling complained of was rendered harmless by the fact that the witness was subsequently permitted to narrate the conversation called for by the question objected to. The witness not only narrated the conversation, but she told in detail of the conduct of the deceased towards her, and of his threats to kill her husband, the defendant, in the event of the latter interfering with the illicit sexual intercourse which had been carried on between the witness and the deceased. All that the defendant desired to show in that behalf was ultimately established in evidence by the testimony of the witness notwithstanding that several objections to that line of testimony had been previously sustained. This being so, we are not seriously impressed with the complaint that the defendant was not permitted, in aid of his defense of self-defense, to show threats of the deceased, which it was claimed had been communicated to the defendant prior to the commission of the homicide.

[3] Upon cross-examination this witness was asked if she had been in the detention home. The question was answered without objection in the affirmative. In the absence of an objection the defendant will not now be heard to complain of the admission of this testimony. True, the question immediately following, "Were you in the detention home upon your husband's complaint * * *?" was objected to; but the latter question was withdrawn as soon as the objection was made, and as a matter of course the objection to the latter question cannot now be resorted to as a valid objection to the first question.

[4] Upon cross-examination of this witness an objection by the defendant to the question, "You had trouble with your husband on the 31st of August last * * * and left his room?" was overruled. There was no error in the ruling. The witness upon her examination in chief had testified that she had had trouble with her husband, the defendant, and had left his room on or about the 31st day of August. The question objected to did no more than call for the repetition in evidence of this fact, and in any event it was legitimate cross-examination.

[5] The trial court in effect sustained an objection to the question as to whether or not the witness had, with the knowledge of the defendant, associated with other men than the deceased. Without directly ruling upon the objection interposed, the court indicated that the objection was well taken, and without receiving an answer or pursuing the question further the district attorney continued his cross-examination along other lines. The result was equivalent to a formal

ruling sustaining the objection, and therefore the defendant has no just cause for complaint in this particular.

[6] The defendant requested, and the court refused, to charge the jury that it was the duty of the jury "to resolve all of the evidence in this case upon a theory or hypothesis consistent with the intentions of the defendant. * * *" Obviously the requested instruction did not state the law, and therefore it was rightfully refused.

[7] There was no error in refusing the defendant's requested instruction relating to the law of self-defense, and the right of the defendant to act upon communicated threats. In so far as the requested instruction correctly stated the law, it was covered by the charge of the court.

The judgment and order appealed from are affirmed.

27 Cal. App. 296

PEOPLE v. MACK. (Cr. 569.)

(District Court of Appeal, First District, California. April 30, 1915.)

1. CRIMINAL LAW — 829 — TRIAL — REQUESTED INSTRUCTIONS — REPETITION OF GIVEN INSTRUCTION.

The refusal of requested instructions, the substance of which was embodied in given instructions, which fully preserved the substantial rights of accused, is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. 829.]

2. CRIMINAL LAW — 1122 — APPEAL — QUESTIONS CONSIDERED — REFUSAL OF REQUESTED INSTRUCTIONS — EVIDENCE.

The refusal of instructions requested by accused, which refer to the evidence, cannot be reviewed, where the evidence was not brought up on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940-2945; Dec. Dig. 1122.]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Charles Mack was convicted on a charge of assault with intent to commit murder, and he appeals. Affirmed.

F. J. Murphy and Henry G. Tardy, both of Oakland, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. This is an appeal from a judgment of conviction of the defendant upon a charge of assault with intent to commit murder and from an order denying his motion for a new trial.

The appellant having presented no request for the transcription of the evidence taken in the trial court, and no such transcription having been made or filed in this court, the case comes before us upon the judgment roll alone.

[1] The appellant relies upon certain alleged errors of the trial court in refusing to give certain requested instructions. As to some of these, an inspection of the entire

body of instructions given by the court discloses that the substance of these rejected instructions is embodied in other instructions which the court gave, and in which the substantial rights of the defendant are as fully preserved as they would have been if his requested instructions had been given.

[2] As to certain other of the defendant's requested instructions, they embody references to the evidence, and, that not having been presented upon this appeal, we are unable to say whether there was any such evidence as would have entitled the defendant to have the instructions given. We find no error in this case upon the face of the record.

The judgment and order are affirmed.

27 Cal. App. 263

STREET et al. v. HAZZARD et al.
(Civ. 1287.)

(District Court of Appeal, Third District, California. April 27, 1915.)

1. MINES AND MINERALS — 112 — LIENS FOR LABOR — STATUTORY PROVISIONS.

The presumption created by Code Civ. Proc. § 1183, providing that every person in charge of any mine shall be held to be the agent of the owner, is rebuttable, and one working in a mine with knowledge that the owner will not be liable for his compensation is not entitled to a lien on the property on any theory of agency.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 233-235; Dec. Dig. 112.]

2. MINES AND MINERALS — 112 — LIENS FOR LABOR — STATUTORY PROVISIONS.

The failure of an owner of mining property to file for record, as required by St. 1911, p. 1318, a notice disclaiming liability for work on the property, does not affect a workman having actual notice of the fact that the owner would not be liable for his compensation.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 233-235; Dec. Dig. 112.]

3. MINES AND MINERALS — 112 — LIENS FOR LABOR — ENFORCEMENT.

A miner working in a mine and looking to one having an option for the purchase of the property for his compensation may not enforce a lien on the property against the owner.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 233-235; Dec. Dig. 112.]

4. MINES AND MINERALS — 117 — LIENS — ENFORCEMENT — "FINAL JUDGMENT" — SUBSEQUENT JUDGMENT.

A judgment in a suit to enforce a lien for work on mining property, which adjudges a lien for the work on the property to the extent of any judgment that may be recovered against the employers having an option to purchase the property, is final, and a subsequent judgment is a nullity, under the rule that there can be but one final judgment, which ends the suit and finally determines the rights of the parties.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 239; Dec. Dig. 117.]

For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

5. MINES AND MINERALS ⚡117—LIENS—ENFORCEMENT—JUDGMENT.

A judgment in a suit to enforce a lien for work on mining property which does not state the amount for which the lien is decreed is uncertain and will not be enforced.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 239; Dec. Dig. ⚡117.]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by J. W. Street and another against Elizabeth M. Hazzard and others. From a judgment for plaintiffs, defendant named appeals. Reversed.

L. N. Peter, of Quincy, for appellant. M. C. Kerr, of Quincy, for respondents.

BURNETT, J. It was stipulated at the trial that all of the allegations of the complaint and all the affirmative allegations of appellant's answer were true. The facts thus agreed upon are as follows: The Bushman Mining Company is a California corporation. Appellant, Elizabeth M. Hazzard, is the owner or reputed owner of a certain mining claim described in the complaint, and, on the 7th of April, 1910, she entered into a certain agreement in writing with one Henry Adams by virtue of which he secured a working bond upon said premises with an option to purchase the same. On October 7, 1911, said Adams assigned said contract to the said Bushman Mining Company, and thereafter said company was the owner of said bond and option. Thereafter said company authorized said Adams to work and develop said mining claim. On or about December 9, 1911, said Adams employed plaintiff J. W. Street to work in and about said claim as an engineer, and agreed to pay him at the rate of \$2.50 per day and board. That said plaintiff thereupon entered upon said work under said contract and continued till he had earned the sum of \$116.25, of which only \$10.80 was paid, leaving a balance due of \$105.45 after deducting all just claims and offsets. On the 29th of February, 1912, said Street filed in the recorder's office a notice of lien in due form for said amount, together with \$1.50 for the costs of verification and filing of the same.

On or about December 29, 1911, the other plaintiff, R. W. Goodhue, was employed by August Goebel as foreman for said Adams to work in and about said mining claim as a miner for the sum of \$2.40 per day. Under said contract Goodhue earned \$67.10, of which no part has ever been paid. On or about February 29, 1912, said Goodhue filed in the recorder's office of said Plumas county his notice of lien in due form for said amount of \$67.10, together with \$1.50 for the cost of verification and filing of said notice of lien.

On or about the * * * day of June, 1910, and within ten days after she had obtained knowledge of the work and labor in and about said mining claim as alleged in the

complaint, defendant Elizabeth M. Hazzard gave notice that she would not be responsible for the same, by posting a notice in writing to that effect in a conspicuous place upon the said mining claim, which said notice ever since has remained and now remains posted in said place upon said mining claim. When each of said plaintiffs went to work and during all the time he was at work on said property he well knew of said notice and of the interest of said Adams and of said defendant mining corporation in said mining claim, and well knew that said Adams and said mining corporation were alone responsible for his claim for wages. Each of said plaintiffs performed said work at the instance and request and upon the sole credit of said Adams or said defendant corporation, and each of them well knew at the time he commenced said work that said Elizabeth M. Hazzard would not be responsible for his labor, and well knew that he must look to said Henry Adams or said defendant corporation alone for his wages during and at all times he was working.

[1] Upon the foregoing stipulated facts it seems clear that no judgment should have been rendered against appellant. Either of the two circumstances, first, that respondents had actual notice and knowledge that appellant would not be liable for their compensation, and, second, that they extended credit entirely and exclusively to said Adams and said mining company, is sufficient to destroy the foundation for any claim against appellant or her property.

If no notice had been given to respondents that appellant disclaimed liability for the work, the presumption would be indulged that the person in charge of the mining property was the agent of the owner, and, if nothing were shown to the contrary, this would be equivalent to an employment by said owner. Section 1183 of the Code of Civil Procedure provides that:

"Every contractor, subcontractor, superintendent or other person having charge of any mining or work or labor performed in and about such mining claim or claims or real property worked as a mine, either as lessee or under a working bond or contract thereon shall be held to be the agent of the owner for the purposes of this chapter."

But this is a disputable presumption and may be rebutted and overcome.

"The presumption raised by section 1183 of the Code of Civil Procedure, in favor of one performing labor on a mining claim, that the person having charge of the mining was the agent of the owner, may be rebutted; and one doing such work, with knowledge that the person having charge of the mining did not own the property, and was not working the mine as the owner's representative is not entitled to a lien thereon on any theory of his employer's agency." *Jurgenson v. Diller*, 114 Cal. 491, 46 Pac. 610, 55 Am. St. Rep. 83.

[2] In the face of the stipulation as to actual notice and knowledge, it is of no consequence that said notice given by the own-

er was not filed in the county recorder's office. It seems that, when the notice was posted no such requirement was found in the law, but in 1911 (Stats. of 1911, p. 1318) the Legislature added the provision requiring the owner to "file for record a verified copy of said notice in the office of the county recorder of the said county in which said property or some part thereof is situated." The filing could have been of no possible advantage to respondents, since its purpose was entirely accomplished by the actual knowledge that they had of the facts as set forth in said stipulation. The recording of the notice is undoubtedly to convey to the persons performing the work knowledge of the nonliability of the owner. In the present instance, therefore, it would have added nothing to what was known and recognized without it.

[3] The other circumstance also that respondents knew of the interest in the property of said Adams and the mining corporation, and looked entirely to them for their wages, and gave no credit whatever to appellant, would seem to be totally inconsistent with any theory of appellant's liability. The case would be no stronger if respondents had expressly agreed to waive any claim of lien against the property or any cause of action against appellant, as their contract, in effect, amounts to the same thing.

"A party desiring to hold and enforce a lien upon the property of one who did not employ him must bring his case clearly within the terms of the statute. The lien is a creation of the statute, and the statute creating it must be looked to both for the right to such lien and the mode by which it may be enforced." *Spinney v. Griffith*, 98 Cal. 151, 32 Pac. 974.

"The appellant, in its answer, alleged that plaintiffs well knew the status of Pugh and his interest under the contract, and that with such knowledge they worked for Pugh, as principal and looked to him for their wages. This, if true, was a valid defense, and raised a material issue. *Jurgenson v. Diller*, 114 Cal. 492 [46 Pac. 610, 55 Am. St. Rep. 83]; *Ayers v. Green Gold M. Co.*, 116 Cal. 335 [48 Pac. 221]; *Reese v. Bald Mountain, etc. Min. Co.*, 133 Cal. 290 [65 Pac. 578]."

The transcript presents a rather peculiar situation, in that two separate judgments appear to have been rendered against appellant.

[4] The first is dated March 5, 1914, and recites:

"It is ordered, adjudged, and decreed that plaintiffs J. W. Street and R. W. Goodhue have a lien for work and labor performed on the hereinafter described property, and said lien shall be against said property and improvements to the extent of any judgment that may be recovered in this action against defendants Bushman Mining Company, a corporation, and Henry Adams, as may be found due said plaintiffs from said defendants, together with all costs of suit in this action or to be hereafter recovered herein."

In the second judgment, rendered July 2, 1914, the amount found due the plaintiffs is recited, and it is directed that they "have a

lien for said amounts and said costs on the hereinafter described property."

"There can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy." *Stockton, etc., Works v. Ins. Co.*, 98 Cal. 577, 33 Pac. 637.

It would seem that the judgment of March 5th was a final determination of the issues as to appellant, and the second judgment, having been rendered without the first having been set aside, is a mere nullity. In *White v. White*, 130 Cal. 599, 62 Pac. 1063, it is said:

"The judgment rendered was a final adjudication of the rights of the parties, and was conclusive not only as to the relief granted, but as to the relief denied or withheld. Code Civ. Proc. § 1908. Upon its entry the jurisdiction of the court over the subject-matter of the suit and the parties was exhausted, unless preserved in the mode authorized by statute. * * * After final judgment any further judgment, or order materially varying the judgment, is a mere nullity. *Barry v. Superior Court*, 91 Cal. 486 [27 Pac. 763]; *Hubbard v. Moss*, 65 Mo. 647; *Ross v. Ross*, 83 Mo. 100."

[5] The judgment entered March 5th, it may be suggested, is voidable for the reason, in addition to what has already been stated, that it lacks the essential element of the amount for which the lien is decreed. It is manifestly too uncertain in that respect to be enforced.

The appeal, it may be stated, is taken from each of said purported judgments and the order denying appellant's motion for a new trial.

The judgments and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

PEOPLE v. LEVEL. (Cr. 290.)

27 Cal. App. 257

(District Court of Appeal, Third District, California. April 26, 1915.)

1. HOMICIDE $\hookrightarrow$ 254—MURDER IN SECOND DEGREE—SUFFICIENCY OF EVIDENCE.

In a prosecution for murder, evidence held sufficient to support finding of guilty of murder in the second degree.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 533-538; Dec. Dig. $\hookrightarrow$ 254.]

2. HOMICIDE $\hookrightarrow$ 215—EVIDENCE—DYING DECLARATION.

The dying declaration of a deceased person, to be admissible in evidence, must relate to facts and not to mere matter of opinion.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 451-456; Dec. Dig. $\hookrightarrow$ 215.]

3. HOMICIDE $\hookrightarrow$ 338—APPEAL—HARMLESS ERROR—DYING DECLARATION.

Where the only conclusion to be drawn even from the evidence for accused was that the murdered man was not to blame in the quarrel, the admission of his dying declaration to that effect was not prejudicial error.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 709-713; Dec. Dig. $\hookrightarrow$ 338.]

4. HOMICIDE ⚡216—EVIDENCE—DYING DECLARATION — FOUNDATION — BELIEF IN APPROACHING DEATH.

Where the deceased, whom defendant had shot fatally in the back, stated three times that he was dying, and proof thereof was made, proper foundation was laid for the introduction of his dying statement as the dying declaration of a deceased person.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 457; Dec. Dig. ⚡216.]

5. HOMICIDE ⚡217—EVIDENCE—DYING DECLARATION.

Where proper foundation was made for the admission in evidence of a dying declaration by proof that the deceased had been aware of his approaching death, a question to the witness as to what conversation he had with the deceased after he said he was dying, was not improper as calling for statements made out of the presence of the defendant or as calling for an answer embodying the question asked of the deceased by the witness, being to that extent a self-serving declaration, so far as the prosecution was concerned.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 462; Dec. Dig. ⚡217.]

6. CRIMINAL LAW ⚡1044—APPEAL—ADMISSION OF EVIDENCE—NECESSITY FOR OBJECTION BELOW.

In a prosecution for murder, where the question of a witness, to which objection was made, seeking to elicit deceased's dying declaration, was proper, but the answer was improper as stating such decedent's opinion as to whether he was to blame in the quarrel, no motion being made to strike out the answer or any portion of it, defendant could not complain on appeal of its admission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2672, 2674, 2675; Dec. Dig. ⚡1044.]

7. CRIMINAL LAW ⚡519 — CONFESSION OR STATEMENT—VOLUNTARY CHARACTER—SUFFICIENCY OF EVIDENCE.

In a prosecution for murder, evidence as to the voluntary character of a statement of defendant's to the district attorney held sufficient to warrant the ruling of the court admitting such statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163-1174; Dec. Dig. ⚡519.]

8. WITNESSES ⚡330—TRIAL—EVIDENCE.

In a prosecution for murder, where defendant at the time of the shooting, made statements indicating that deceased's attentions to his wife were the cause of the quarrel, and where defendant's wife testified to acts of familiarity with her on the part of deceased, and that she was induced to leave her husband by the solicitations of deceased, for purposes of impeachment it was proper to cross-examine such wife as to the truth of contradictory statements she had made as to the familiarities and as bearing on whether she had told her husband at all, and also to assail her testimony that she had been induced to leave him by inquiries as to whether she had not declared that she left on account of his ill treatment of her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. ⚡330.]

Appeal from Superior Court, Shasta County; W. D. Tillotson, Judge.

John M. Level was convicted of murder in the second degree, and he appeals. Affirmed.

Braynard & Kimball and Oscar Geballe, all of Redding, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1] Defendant was convicted of murder in the second degree, and the appeal is from the judgment and the order denying his motion for a new trial. The evidence without conflict shows a deliberate, premeditated murder, and defendant was fortunate in escaping a verdict for the higher offense. The homicide occurred at the home of one J. K. Kelly, about three miles east of Redding, Shasta county. On the evening of August, 1, 1914, deceased and Mr. and Mrs. Kelly were engaged in conversation on the front porch of the Kelly home. The deceased sat in a small rocking chair at the southeast corner of said porch, and J. K. Kelly reclined on a roll of blankets at the northwest corner of the porch. Until a few minutes before the killing, Mrs. Kelly was in a hammock which was hung from the northeast to the southwest corner of the porch. About 9:30 o'clock p. m. appellant went to the Reid & Adams livery stable in Redding and asked for a rig to go to Clear Creek. He came, however, to the Kelly home, arriving about midnight, hitched his horse in front of the house, and approached the front porch through the front gate. Deceased was still sitting in said rocking chair and J. K. Kelly reclining on said roll of blankets. What then occurred may be stated in the language of Kelly:

"He was singing, 'Doodle, doodle, doodle, doodle,' as he oftentimes did about his common business. He came up, and he says, 'You are the man I am after.' Stepped his right foot onto the porch, and says, 'I will let you know that no God damned son of a bitch of a dago can step between me and my wife;' and he (Joseph Parenti, the deceased) sat pretty quiet, considering the fire, and at that time—about that time, he made something like such a motion as this (illustrating by arising from the witness chair and extending both arms out in front slightly spread apart) towards John M. Level. And he then drew right back and the firing commenced, and then he was on the run, really, and two shots were fired there, and he really was on the run at the time. It was all over instantaneous. Q. In what direction did the deceased, Joseph Parenti, reach out his hands, as you have illustrated? A. Well, right over the hammock towards John M. Level. Q. Did the deceased place his hands upon or reach the defendant, John M. Level? A. I don't think that he reached him. It was quite a distance across there, and that I couldn't positively say that he reached him or not, but, if he didn't he was close to him. Q. And after the deceased, Joseph Parenti, reached as you have illustrated, towards the defendant, John M. Level, what did he next do? A. The deceased? Q. Yes. A. He ran and disappeared through the front door, there, into the dining room."

It appears further that appellant crawled under the hammock and followed deceased; and, as he was pursuing, he said: "I will have you yet, you son of a bitch of a dago; I will kill you yet." Appellant stop-

ped at the door of the front bedroom, pushed it open, knocking a lamp out of the hand of Mrs. Kelly, and saying, "Is the son of a bitch in here?" He then continued the chase through the house to the rear, and Mr. and Mrs. Kelly heard another shot fired. Appellant returned to the house and said to Mr. Kelly, "Come and see what I have done." Kelly went into the field and found Parenti about 270 feet from a side gate in the fence between the yard and said field. Parenti was on his hands and knees and was in a dying condition. He was shot in the back; the bullet having entered about three inches to the right of the spine and producing a wound necessarily fatal. There is not found in the record the shadow of justification or excuse for the homicide. Even defendant's explanation of the affair affords no substantial support to any valid claim of self-defense, and it was not even pretended that he was insane. In his statement made after his arrest to the district attorney he declares:

That he went to Kelly's to warn deceased not to interfere with appellant's family, and he found deceased sitting on the porch, and "I says, 'You are the man I want.' I says, 'I want to inform you not to come between me and my wife.' So I says, 'If you see her, don't speak to her.' I says, 'If you do I will follow you to the end of the world, or get you.' So he got indignant. He says he does as he God damned please to do. I says: 'Don't get excited; don't open your head or I will blow it off. You have interfered as far as I am going to bear.' He jumped up and got a chair and I shot at him. Mr. Chenoweth: How many times? Mr. Level: Three. Mr. Chenoweth: Three times on the front porch? Mr. Level: He went through the sitting room. I shot. So I run out the back. He was as far as from here to the street. I shot at him the third time. He went through the house, out the back door, out the side gate east of the house, just run south down the fence to the field. I followed him to the gate and fired at him. Mr. Chenoweth: Did you see him drop? Mr. Level: He staggered and fell on the—up on the fence. I walked up within 40 feet, and he was groaning. I turned and went to the house. Mr. Chenoweth: He was running when you shot the last time? Mr. Level: Yes, sir. Mr. Chenoweth: From you? Mr. Level: Yes, sir."

Comment on the foregoing is not called for. It may be said, however, that as to the chair he was contradicted by the testimony of Mr. and Mrs. Kelly; the latter stating that, when she went out on the porch immediately after the shooting, she noticed the condition and position of the rocking chair in which deceased had been sitting, and that the chair remained in its same position on the southeast corner of the porch with the cushion in the seat and deceased's hat was hanging on the back. From this, of course, the inference would follow that deceased had not picked up the chair or disturbed it, as claimed by appellant. But, according to his own statement, it is manifest that the episode of the chair furnished no justification for the subsequent pursuit and killing of deceased.

We have, therefore, a case of such clear and convincing proof of murder that it is impossible to conceive of an intelligent, fair-

minded jury granting any greater favor to the defendant than finding him guilty of murder in the second degree. With the foregoing in view, we might with propriety dismiss the various assignments of error with the general observation that they should be disregarded as not affecting appellant prejudicially. Indeed, no case could be presented calling more persuasively for the application of the principle embodied in the recent amendment (section 4½, art. 6) to the Constitution. However, we may express our opinion somewhat sentimentiously as to these assignments of error.

[2, 3] The court gave this instruction:

"If you believe from the evidence that the deceased, after he was shot, made a statement as to who shot him, and under what circumstances the shot was fired, and that at the time he made such statement he believed he would die from the effects of said shot and entertained no hope of recovery, then you will give such statement, if proven, as much weight as if he were duly sworn, present, and testifying in the case."

The objection is that:

"This instruction was not applicable to the facts. Deceased did not speak of the circumstances under which the shot was fired. Deceased said he was not to blame. The instruction in effect directed the jury to give as much weight to the dying declaration of deceased that he was not to blame, if proven, as if deceased were duly sworn, present, and testifying in the case. If deceased had been duly sworn, present, and testifying in the case, he would not have been permitted to express the opinion that he was not to blame."

It is claimed, and justly so, that declarations of a deceased person, to be admissible in evidence, must relate to facts and not to mere matters of opinion. *People v. Taylor*, 59 Cal. 640. Appellant is right in his statement of the principle of law and in his contention that the instruction "was not applicable to the facts." But, as already has appeared, there was no room for any difference of opinion as to who was to blame for the homicide. The jury must necessarily have reached the conclusion that deceased was not to blame if they had not been so instructed or if said opinion had not been received in evidence. In other words, there was an irrelevant declaration of a principle of law that did not injure and could not possibly have injured appellant.

[4-6] As to the introduction of said opinion in evidence, we may mention the fact that Mr. Kelly testified that Mr. Parenti said as many as three times that he was dying. Considering this and the nature of his wound, there can be no doubt that the proper foundation was laid for the introduction of his dying statement. Then the record proceeds: "Mr. Chenoweth: Now, Mr. Kelly, after the remark or remarks were made by the deceased, Joseph Parenti, that he was dying, did you have any conversation with him with reference to the shooting? A. I did. Q. What was it?"

To this objection was made on the ground that no foundation had been laid; that it was made without the presence of the defendant; and that it embodied the question

asked by the witness of the deceased and to that extent was a self-serving declaration, as far as the prosecution was concerned. It is clear that the objection was properly overruled, and the court did not err in allowing the witness to answer. The witness replied:

"I asked him if he had any feelings, anyway in the world that he was to blame for that matter, for that case of shooting. He says, 'Oh, no; no.'"

No motion was made to strike out the answer or any portion of it, and it is too late for appellant to complain of it. It presents the instance of an objectionable answer to an unobjectionable question, but appellant seems to have been satisfied to let it stand.

[7] The admissibility of said statement of appellant made to the district attorney is questioned on the ground that it was not shown to have been made freely and voluntarily. As to this we think, however, that the preliminary proof was sufficient to warrant the ruling of the court. The district attorney testified as to the interview:

"I simply introduced myself to the defendant, told him that I was the district attorney, and that I came to interview him if he desired to make a statement, and he started in immediately to tell me a version of the shooting, and after he had proceeded a short ways I had him stop, and went out into the sheriff's office, and whether Miss Scamman had come with me, or whether she had just arrived at that time, I called her in and had the statement taken down."

Miss Scamman, the stenographer, testified that she took down everything that was said, and we may remark that nothing appears therein to indicate in the slightest degree that the statement of defendant was other than entirely voluntary. There was no evidence of threats, promises, duress, or coercion, and it appears that the district attorney acted in the utmost good faith and was careful to take no undue advantage of defendant. It is suggested that the sheriff or jailer may have brought improper influence to bear upon the defendant to induce him to make the statement, but nothing of the kind appears, and the prosecution was not required to go further to show the voluntary character of the conversation. Of course, there was nothing to prevent the defendant from interrogating these officers as to the matter, but presumably he was satisfied to forego the privilege.

[8] There is some discussion as to the propriety of certain questions asked of Mrs. Level on cross-examination, but it is not apparent that any error was committed therein. On direct examination she had testified to acts of familiarity with her on the part of defendant, and it was surely permissible for the district attorney to interrogate her as to contradictory statements that she had previously made on the subject. It is the claim of appellant that the only purpose of the direct examination was to disclose the fact that she had complained to her husband about her

treatment by deceased, thereby to account for the distraught condition of defendant's mind. The inquiry, however, extended to the truth of the statements that she claimed to have made to appellant, and to this it was manifestly proper to address the cross-examination. It would also be proper to test the truthfulness of the declared statements as affecting the probability of whether she had such communication with her husband at all.

Likewise, the witness having virtually testified that she was induced to leave her husband by the solicitations and importunities of deceased, it was open to the prosecution to assail the credit of this statement by inquiry as to whether she had not declared that she left on account of the ill treatment of her husband.

But, as already stated, no court would be justified in reversing the case, even if convinced that error was committed in each of the instances referred to.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

27 Cal. App. 320

DIETZ v. SCOTT et al. (Civ. 1601.)

(District Court of Appeal, First District, California. May 4, 1915.)

1. APPEAL AND ERROR ⇐872 — JUDGMENT ROLL—UNCERTIFIED INTERMEDIATE ORDERS.

Where, on appeal from a judgment foreclosing a mortgage, the clerk certified a record purporting to contain intermediate orders of the trial court, a paper writing, signed by the defendants, declaring and notifying the commissioners, appointed to make foreclosure sale, that the premises, by virtue of a homestead, were exempt from execution to a certain amount, and another paper writing, filed with the clerk subsequent to the entry of judgment, setting forth objections to the judgment and demanding that it be dismissed for such reasons, such intermediate orders and papers were not part of the judgment roll, and, as their integrity and purpose were not certified by the trial judge, could not be considered by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3513-3521; Dec. Dig. ⇐872.]

2. APPEAL AND ERROR ⇐671—APPEAL ON JUDGMENT ROLL.

Where the record on appeal did not set out, or purport to set out, the evidence, the appeal was simply on the judgment roll, and the court could consider only the papers and records constituting such roll.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. ⇐671.]

3. APPEAL AND ERROR ⇐907 — PRESUMPTIONS—EVIDENCE SUPPORTING FINDINGS.

Where the findings below sustained the judgment, in the absence of a record showing the evidence, it was to be presumed on appeal that the evidence supported the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. ⇐907.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by John Dietz against John Scott and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. F. Rose, of San Francisco, for appellants. Perry & Dailey, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment foreclosing a mortgage. The appeal purports to be taken under the new or alternative method prescribed by sections 953a et seq. of the Code of Civil Procedure, but the notice required by that section was not given to the clerk of the court below, requesting the preparation of such portions of the record as the defendants desired to use upon the appeal. The clerk, however, prepared and certified to a record which purports to contain the judgment roll, several intermediate orders made by the trial court, a paper writing signed by the defendants, declaring and notifying the commissioner appointed to make the foreclosure sale that the mortgaged premises were by virtue of a pre-existing homestead exempt from execution to the extent of \$5,000, and another paper writing, filed with the clerk subsequent to the entry of the judgment, setting forth numerous objections to the judgment, and demanding that the judgment be dismissed for the reasons stated in the objections.

[1] The intermediate orders and the papers referred to are clearly no part of the judgment roll, and, as their integrity and purpose have not been certified to by the trial judge, cannot be considered here. *Totten v. Barlow*, 165 Cal. 378, 132 Pac. 749.

[2] The record before us does not set out nor purport to set out the evidence adduced at the trial; and, as was said in the case of *Totten v. Barlow*, supra:

"We have therefore simply an appeal upon the judgment roll, and can consider only the papers and records constituting such roll."

[3] Apparently the several points attempted to be made in the support of the appeal relate solely to the sufficiency of the evidence to sustain the findings and judgment made by the lower court. The findings of the court, however, sustain the judgment; and in the absence of a record showing the evidence it must be presumed that the evidence in turn supports the findings.

The judgment appealed from is affirmed.

27 Cal. App. 290

MEDDOCK et al. v. BROWN et al.
(Civ. 1603.)

(District Court of Appeal, First District, California. April 30, 1915.)

TAXATION ⇐679—TAX SALE—PURCHASE BY STATE—RESALE—NOTICE.

Under Pol. Code, § 3897, providing that notice of the sale of land, purchased by the state at a tax sale, shall be given by publishing the notice for three successive weeks prior to the sale, and by mailing a copy to the party to whom the land was last assessed, the notice must be mailed to such person at least three weeks prior to the sale; otherwise the sale is void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1361, 1362; Dec. Dig. ⇐679.]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by J. T. Meddock and others against George Brown and others. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Ross Campbell, of Santa Rosa, for appellants. Philip Ware and A. B. Ware, both of Santa Rosa, and J. T. Coffman, of Healdsburg, for respondents.

PER CURIAM. This is an appeal from a judgment of nonsuit in an action to quiet title. The plaintiffs relied for their proof of title upon a tax collector's deed. The defendants objected to the admission of this deed in evidence upon the ground that it was void upon its face, for the reason that its recitals as to the notice of the sale of the property for taxes showed affirmatively that the required length of time of personal notice to the owners of the property prior to its sale was not given as required by section 3897 of the Political Code. The deed was conditionally admitted; but when the plaintiffs rested their case the defendants renewed their objection in the form of a motion for nonsuit, which motion having been granted by the court, the plaintiffs appeal.

Upon the motion for nonsuit the respondents relied successfully upon the case of *Healton v. Morrison*, 162 Cal. 668, 124 Pac. 240, as decisive of the question as to the invalidity of the plaintiff's deed. The trial court granted the motion upon the authority of that case. In so doing it committed no error, for no material distinction can be drawn between that case and the case at bar.

Upon the authority of *Healton v. Morrison*, supra, the judgment is affirmed.

27 Cal. App. 313

DES GRANGES v. CRALL et al.

(Civ. 1745.)

(District Court of Appeal, Second District, California, May 1, 1915.)

1. LIBEL AND SLANDER — 85—COMPLAINT SETTING OUT DEFAMATORY WORDS.

A complaint in an action for libel, based on an alleged written notice sent by the defendants to a bank, the effect of which was pleaded as a notice in writing signed by them, in which they wrongfully, maliciously, and falsely charged that the plaintiff was insolvent, and that they were about to have him declared insolvent and a receiver appointed, was defective, for failure to set out the words of the notice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 201-204; Dec. Dig. — 85.]

2. LIBEL AND SLANDER — 80—WORDS ACTIONABLE.

A complaint, alleging defendants' notice to a fruit company, not to pay any moneys on account of the purported sale of oranges from certain land, pending their application for a receiver to protect their claimed rights in the land, notices to two corporations not to transfer certain shares of stock to the plaintiff, as he did not own them, but held them for the use and benefit of the defendants, stated no causes of action.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 184-186; Dec. Dig. — 80.]

3. LIBEL AND SLANDER — 86—COMPLAINT—"INUENDO."

The fact that the complaint pleaded an innuendo as indicating a hidden meaning to be drawn from the words did not aid causes of action, wherein the alleged libelous language was clear and plain, since an "innuendo" must not introduce new matter or enlarge the natural meaning of words, or put upon them a construction which they will not bear, and can never change the import of the words, or avail, unless the words to which it applies have a violent presumption of the innuendo.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 205-208; Dec. Dig. — 86.]

For other definitions, see Words and Phrases, First and Second Series, Innuendo.]

4. JUDGMENT — 303—AMENDMENT.

Where the court entered an order sustaining the demurrer as to each of the alleged causes of action, which, through inadvertence of the clerk, was entered as an order sustaining the demurrer only as to certain of the causes of action, the court's order that the minutes be corrected to set out the intended ruling was within its right and duty.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 594, 595; Dec. Dig. — 303.]

5. APPEAL AND ERROR — 854—RULING ON DEMURRER—REASON FOR DECISION.

The sustaining of a demurrer upon specific grounds cannot be disturbed on appeal, where it appears that any of the objections taken to the complaint, even though other than those deemed valid by the trial judge, are good.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. — 854.]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Otto des Granges against Ada des Granges Crall and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles, for appellant. Avery & French, of Los Angeles, for respondents.

JAMES, J. Plaintiff brought this action to recover damages from defendants because of the alleged publication of certain libelous statements affecting said plaintiff. A demurrer on both general and special grounds was interposed to the complaint, which demurrer was sustained by the court, and judgment followed, dismissing the action after plaintiff had failed to amend his pleading. The appeal is taken from that judgment.

Four causes of action were set out in the complaint, the first three of which were based upon certain notices alleged to have been sent to certain corporations. The first was a notice to a fruit company, directing them not to pay any moneys on account of the purported sale of oranges from certain land in Orange county pending an application by the defendants for a receiver to protect some claimed rights in the land upon which the oranges were grown. The second was a notice to a water company not to transfer certain shares of stock to the plaintiff, the notice stating that plaintiff was not the owner of the stock, but that he held the same for the use and benefit of the defendants. The third notice was one directed to a petroleum company, instructing that company not to make transfer of a certain number of shares of stock. In general substance this notice was the same as that set out in the one described last above.

[1] The fourth cause of action was based upon an alleged written notice sent by the defendants to a bank. The words in which this notice was framed are not set out, and the effect only of such words is pleaded, as follows:

"A notice in writing, signed by them, in and by which notice in writing they wrongfully, maliciously, and falsely charged that the plaintiff was insolvent, and that they were about to have him declared insolvent, and were about to have a receiver appointed of his business and affairs."

Allegations followed pleading an innuendo that it was intended by the notice to charge that the plaintiff was insolvent. As to this fourth cause of action, assuming that in the absence of a special demurrer plaintiff might be permitted to plead the libelous statements in the manner in which he did set them out, the specific point was here made that the words used were not made to appear in the pleading. The order sustaining the demurrer for that ground alone was the proper one to be entered. In the case of Haub v. Frier-muth, 1 Cal. App. 556, 82 Pac. 571, that being an action for libel where the court refers to the requirements to be observed by the plaintiff in pleading his cause of action, it is said:

"It is not sufficient to merely allege that he charged the plaintiff with having committed a certain designated crime. The words must be

set out in the complaint that the defendant may have notice of the particular charge which he is required to answer."

[2] As to the other three alleged causes of action, an examination of the statements which it is charged were libelous does not disclose that they purport to be such upon their face, or that by any reasonable inference they could be so construed.

[3] The fact that the plaintiff pleaded an innuendo as indicating a hidden meaning to be drawn from the words does not aid these causes of action because the alleged libelous language set out is clear and plain.

"But an innuendo must not introduce new matter, or enlarge the natural meaning of words. It must not put upon them a construction which they will not bear. * * * Therefore, if the meaning of the language is plain, no innuendo is needed. The use of it can never change the import of the words, nor add to nor enlarge their sense. 'An innuendo helps nothing unless the words to which it applied have a violent presumption of the innuendo.'" Newell on Slander and Libel (2d Ed.) p. 619.

Unambiguous publication in words of common and ordinary import, containing no technical or provincial terms, is libelous per se or not libelous at all. *Hearne v. De Young*, 119 Cal. 670, 52 Pac. 150, 499.

[4] Appellant makes the point that he is entitled to a reversal for the further reason that the court first made an order sustaining the demurrer only as to certain of the causes of action and overruling it as to others, and later entered a corrected order sustaining the demurrer as to each of the alleged causes of action. The second order shows that the first entry was made by the clerk in the form in which it appeared through inadvertence, and this second order recited that the first ruling as entered was incorrect, and for that reason the minutes were ordered corrected to set forth the intended ruling of the court. We can see no error in this course being pursued; in fact, it was the duty of the court, if the clerk made an improper entry, to direct a correction thereof. In the judgment it is recited that the appellant was granted 16 days after the date of the corrected order in which to file an amended complaint, and that he failed to take advantage of this permission.

[5] It has been uniformly held, so often as to require no citation of authority to support it, that where the trial judge has sustained a demurrer upon certain specific grounds, that that ruling cannot be disturbed on appeal where it appears that any of the objections taken to the complaint, even though they be other than those deemed valid by the trial judge, are good.

In this case we think that as to the first, second, and third alleged causes of action the demurrer was properly sustained for want of sufficient facts stated, and as to the fourth alleged cause of action, conceding, though not deciding, that the pleading of that cause of action was sufficient as to general

facts, that, upon the special demurrer of the defendants being made, plaintiff was required to set out the specific language which he alleged composed the libelous statement.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

27 Cal. App. 268

CLOUGH v. ALL PERSONS, ETC., et al.
(Civ. 1364.)

(District Court of Appeal, Third District, California. April 27, 1915.)

1. JURY $\Leftrightarrow$ 13—RIGHT TO TRIAL BY JURY—EQUITABLE RELIEF.

A defendant, in an action under the McEnerney Act (St. 1906, p. 78) to quiet title, who seeks relief under Civ. Code, § 3412, authorizing the cancellation of a written instrument, as to which there is a reasonable ground for apprehension that, if left outstanding, it may cause injury to a person against whom it is void or voidable, seeks equitable relief, and is not entitled to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35-83; Dec. Dig. $\Leftrightarrow$ 13.]

2. JURY $\Leftrightarrow$ 13—RIGHT TO TRIAL BY JURY—EQUITABLE RELIEF.

A defendant, who tenders the issue of fraud and undue influence in the procurement of deeds under which plaintiff claims, presents an equitable issue, and is not entitled to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35-83; Dec. Dig. $\Leftrightarrow$ 13.]

Appeal from Superior Court, City and County of San Francisco; J. A. Plummer, Judge.

Action by George A. Clough against All Persons, etc., and others. From a judgment for plaintiff, defendant Margaret Williams, administratrix of Thomas Fagan, deceased, appeals. Affirmed.

Albert L. Johnson and Ferno J. Schuhl, both of San Francisco, for appellant. Greg. S. McEvers and A. E. Bolton, both of San Francisco, for respondent Clough. Percy V. Long, of San Francisco, for respondent City and County of San Francisco. N. A. Elsner, of San Francisco, for respondent McCloskey.

CHIPMAN, P. J. This is an action to quiet title to land in the city and county of San Francisco under the so-called McEnerney Act. Plaintiff had judgment as prayed for in his complaint, from which defendant Williams, as administratrix, appealed. She also appealed from the order denying her motion for a new trial.

When the case was called for trial, defendant Williams (appellant here) requested that the cause be heard before a jury.

"The Court: I have read the pleadings, and I am of the opinion that the defendant is not entitled to a jury, and I therefore deny the demand for a jury trial and order that the trial proceed before the court."

Appellant says in her brief:

"The only point raised on this appeal is that of the refusal of the right to a jury trial."

It appears that:

"Plaintiff acquired the title under a trust deed set forth in full in the complaint, the recitals of which showed the grantors to be all the tenants in common, owners of the land, and the interest of each; that the Hibernia Savings & Loan Society held a first mortgage covering all the interests, and a second mortgage covering a part of the interests, also several other mortgages to other parties covering a part of the interests; that the Hibernia Savings & Loan Society had, under the power in its mortgage, advertised the property for sale, to pay the debt due to it; that all the tenants were desirous of a partition sale, payment of the mortgages, and division of the remainder. The trust deed provided that the trustee should go into possession (and it is alleged that he did), and instituted proceedings to have the title established under the McEnerney Act; and that he should lease the property to Chas. W. Lentz, from month to month until sold, at a fixed rental; that at any time prior to March 5, 1911, said Chas. W. Lentz should have the right to purchase at a fixed price, payable to the trustee, and, upon failure of said Lentz to purchase, then the trustee should sell the property; that from the moneys received by the trustee, after paying his expenses and fee, he was to pay off the first mortgage to the Hibernia Savings & Loan Society, and the balance of the money should be paid as in the trust deed directed."

Prior to the execution of the trust deed, Fagan, appellant's intestate, made a deed to defendant Minnie Tucker of his sixteen-thirtieths interest. She signed the trust deed, as did Fagan, also, and the trust deed provided that the money coming from the Fagan interest should, after the bank was paid, be paid to Minnie Tucker. The only issue raised by Margaret Williams' answer is that the deeds made by Fagan to Minnie Tucker were "procured and accomplished" by fraud and undue influence of Minnie Tucker and her husband, and that the trust deed under which plaintiff claims was obtained under like influence. Williams did not deny the facts alleged by plaintiff and raised no issue on them.

Consistently with her answer, defendant Williams prayed the decree of the court establishing that at his death Fagan was the owner of sixteen-thirtieths interest in said property; that the instruments set out in the answer (from Fagan to Minnie Tucker and said trustee) be declared void and Fagan's interest at the time of his death be ascertained; and that Minnie Tucker held the interest described in said deeds in trust for Fagan.

[1] If appellant was seeking relief under section 3412 of the Civil Code, it "is clearly equitable," as was held in *Angus v. Craven*, 132 Cal. 691, 697, 64 Pac. 1091. But if she was not seeking relief under that section, as was said in *Davis v. Judson*, 159 Cal. 121, 127, 113 Pac. 147:

"Whether an action involves legal issues, or issues of equitable cognizance, must depend upon the facts alleged in the particular case; and, when the facts alleged here and the issues raised are considered, it is apparent that they are strictly of an equitable nature."

[2] It is not necessary to determine whether a proceeding brought under the McEnerney Act is an action in equity or at law, for no issue involved in the McEnerney portion of the proceeding was raised. The only issue tendered by Williams' answer was that of fraud and undue influence in the procurement of the deeds under which Minnie Tucker claimed an interest in the property. This issue was clearly of equitable cognizance. It follows that the court did not err in its ruling.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

27 Cal. App. 291

PEOPLE v. FINLEY. (Cr. 534.)

(District Court of Appeal, First District, California. April 30, 1915.)

1. HIGHWAYS $\hookrightarrow$ 186—OFFENSES INCIDENT TO TRAVEL—AUTOMOBILE COLLISION—FAILURE TO STOP—STATUTES.

Pen. Code, § 367c (as added by St. 1911, p. 62), provides that, whenever an automobile collides with any vehicle, the driver shall stop and render to the occupants all necessary assistance, including carrying to a physician or surgeon for treatment, if it be required or requested and shall give the number of the automobile, with the name and address of the driver and of the passengers, and imposes a penalty of imprisonment in the state prison not exceeding five years, in the county jail not exceeding one year, or by fine not exceeding \$5,000 or both fine and imprisonment, for violation. Motor Vehicle Act, § 21 (St. 1913, p. 649), provides that in case of accident on a public highway, due to the operation thereon of any vehicle, the person operating it shall stop, and, on request of the person injured, shall give his name and address and the registration number of the vehicle, if it be a motor vehicle, and, if such person operating is not the owner thereof, his license number, if he is an operator or chauffeur, and the name and address of the owner, and that for violation is a misdemeanor punishable by fine not more than \$250 and imprisonment not to exceed 30 days. Section 40 of the Motor Vehicle Act expressly repeals all other acts and parts of acts inconsistent therewith. *Held*, that the defendant, who ran into one riding a motorcycle, injuring him, and proceeded on his way without stopping, could be convicted of a violation of, and sentenced under, Pen. Code, § 367c, to imprisonment for one year in the county jail, since the Motor Vehicle Act did not repeal statutes not inconsistent with it, and so did not affect the duty of a motorist under Pen. Code, § 367c, to stop and render assistance to one struck by him aside from the duty to stop and give name, address, and license number.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 476, 477; Dec. Dig. $\hookrightarrow$ 186.]

2. HIGHWAYS $\hookrightarrow$ 186—OFFENSES INCIDENT TO TRAVEL—AUTOMOBILE COLLISION—FAILURE TO STOP—SUFFICIENCY OF EVIDENCE.

In a prosecution against an automobile driver for having collided with one on a motorcycle, and thereafter failed to stop to render assistance, an offense denounced by Pen. Code, § 367c, evidence held sufficient to show that defendant failed to render any assistance to the injured party.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 476, 477; Dec. Dig. $\hookrightarrow$ 186.]

3. CRIMINAL LAW — 1032—APPEAL—INFORMATION — CHARGE OF FELONY AND MISDEMEANOR—FAILURE TO DEMUR.

In the absence of demurrer, where an information charged a felony, a violation of Pen. Code, § 367c, denouncing the offense of striking another while driving an automobile and failing to stop to render assistance, and also charged conduct constituting merely a misdemeanor, as violative of the Motor Vehicle Act, § 21, on appeal the defendant would not be heard to complain that the information charged both a misdemeanor and a felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2627, 2628, 2642; Dec. Dig. 1032.]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

W. A. Finley was convicted of the felony denounced by Pen. Code, § 367c, and he appeals. Affirmed.

P. M. Walsh, of Piedmont, and H. A. Gabriel, of San Jose, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. The defendant in this case was charged, in an information filed in the superior court of Alameda county, with the commission of the felony defined by section 367c of the Penal Code. The charging part of the information, in substantial accord with the language of the Code section referred to, alleged that an automobile, which was being driven by the defendant, collided with a motorcycle which was being ridden and driven by one Sumner Blacow, and that, although the defendant knew that his automobile had struck said Sumner Blacow and collided with a motorcycle upon which he was riding, the defendant "did then and there unlawfully, willfully, and feloniously fail and refuse to stop or cause to be stopped, either immediately or at all, said automobile, or to forthwith or at all render all necessary or any assistance to said Sumner Blacow * * * and carry said Sumner Blacow to a physician or surgeon for medical or surgical treatment, and said W. A. Finley then and there refused to give or cause to be given to the said Sumner Blacow, the person struck by said automobile, * * * the number of said automobile, with the name and address of the driver, * * * or the name of the driver of said automobile. * * *

The evidence adduced at the trial, briefly stated, was to the effect that an automobile, driven by the defendant along a public highway in Alameda county, between the hours of 6 and 7 o'clock in the evening of the day charged in the information, collided with a motorcycle ridden by one Sumner Blacow. The latter, as the result of injuries sustained in the collision, was rendered unconscious, and died within a short time thereafter. Upon the happening of the collision, the defendant did not stop his automobile, but proceeded toward the city of San Jose, where he resided, without attempting to render assistance of any kind to Blacow. Just before

reaching San Jose, the defendant's automobile came to a stop as the result of a breakdown, and while endeavoring to repair the machine the defendant was placed under arrest.

The defendant, as a witness in his own behalf, testified that, on account of the peculiar light and climatic condition which he claimed existed on the evening in question, he did not see the approach of the motorcycle, and in fact did not know that he had collided with it.

The defendant was found guilty as charged, and sentenced to imprisonment for one year in the county jail of the county of Alameda. The appeal is from the judgment and from the order denying a new trial. No demurrer was interposed to the information.

No fault is found with the rulings and the charge of the trial court, and the sufficiency of the evidence to support the verdict and judgment is conceded if it can be held that the trial court had jurisdiction of the subject-matter of the offense charged. That the trial court was without such jurisdiction is the only point made in support of the appeal.

[1] It is the contention of the defendant that he should not have been charged with and tried for any greater offense than that of the misdemeanor defined and denounced by the provisions of section 21 of the Motor Vehicle Act. Stats. 1913, p. 649.

The Motor Vehicle Act went into effect some five months subsequent to the time when section 367c of the Penal Code, under which the information was drawn, became law. The Code section in question reads as follows:

"Whenever an automobile, motorcycle, or other motor vehicle, or any vehicle whatsoever, regardless of the power by which the same may be propelled or drawn, strikes any person, or collides with any vehicle containing a person, the driver of, and all persons in, such automobile, motorcycle or other motor vehicle, or other vehicle, who have or assume authority over such driver, shall immediately cause such automobile, motorcycle, or other motor vehicle, or other vehicle, to stop, and shall render to the person struck, or to the occupants of the vehicle collided with, all necessary assistance including the carrying of such person or occupant to a physician or surgeon for medical or surgical treatment, if such treatment be required, or if such carrying is requested by the person struck or the occupant of the vehicle struck; and such driver, and person having or assuming authority over such driver, shall further give to the occupants of such vehicle or person struck, the number of such automobile, motorcycle, or other motor vehicle, if the same have a number, together with the name and address of the driver of such automobile, motorcycle or other motor vehicle, or other vehicle, also the name of the owner thereof and the name of the passengers; or passengers not exceeding five in such automobile, motorcycle, or other motor vehicle, or other vehicle at the time of such striking or collision. Any person violating any of the provisions of this section is punishable by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year, or by fine not exceeding \$5,000, or by both such fine and imprisonment."

The provisions of the Motor Vehicle Act, in so far as they pertain to the point presented upon this appeal, are as follows:

"Sec. 21. In case of accident or injury to person or property on the public highways due to the operation thereon of any vehicle the person operating, driving or otherwise in control of the same shall stop, and upon request of the person injured or whose property has suffered injury, or any other person present, shall give such person his name and address and the registration number of his vehicle if it be a motor vehicle and if such person operating, driving or otherwise in control of such vehicle is not the owner thereof, his license number, if he is an operator or chauffeur, and the name and address of the owner of such vehicle."

Violation of this section of the Motor Vehicle Act is made a misdemeanor punishable by fine and imprisonment not to exceed \$250 and 30 days. Stats. 1913, p. 652.

It will thus be seen that the provisions of section 367c of the Penal Code, and section 21 of the Motor Vehicle Act, are practically identical in so far as they denounce the failure of the driver of an automobile to stop in the event of a collision or in the case of accident or injury to person or property, and to give to the injured person or occupant of the vehicle struck his name and address and the number of his automobile. Section 40 of the Motor Vehicle Act in express terms repeals all other acts and parts of acts inconsistent therewith, and admittedly the provisions of section 367c of the Penal Code, denouncing as a felony the failure of a person driving an automobile to stop in the event of a collision, etc., and give his name, address, and the number of his automobile, are inconsistent with the provisions of the Motor Vehicle Act, which declares that such or a similar failure shall be considered an offense only of the grade of a misdemeanor. If this be so, it may be conceded, as counsel for the defendant contend, that, if the defendant's offense had consisted only of his failure to stop and give his name, address, and the number of his automobile, he could not have been rightfully charged and convicted of any greater offense than that of a misdemeanor. But it will be noted that, while the information charges the failure of the defendant to stop and give his name and address and the number of his automobile, it also charges the defendant with a violation of those provisions of section 367c of the Penal Code which denounce as a felony the willful failure of the driver of an automobile colliding with another vehicle to render assistance to a person who may have been injured by the collision, and, if required, to carry such person to a physician or surgeon for medical or surgical treatment. The Motor Vehicle Act is silent upon the subject of rendering medical or other assistance to an injured person; and we do not find, and counsel for the defendant do not assert, that the provisions of section 367c of the Penal Code, in so far as they cover and control the duty of stopping and

rendering assistance, medical or otherwise, in any wise conflicts with the purpose and provisions of the Motor Vehicle Act. The express purpose of the Motor Vehicle Act is to repeal only those acts and parts of acts which are inconsistent therewith; and, this being so, we are satisfied that the provisions of the Code section in question, in so far as they are not inconsistent with the provisions of the Motor Vehicle Act, must be considered as valid and subsisting law, the violation of which may be punished as in that section provided.

[2, 3] The evidence in the case, as previously narrated, was sufficient to sustain the charge of the information that the defendant failed to render any assistance or otherwise to the party injured by the collision, and the provisions of section 367c of the Penal Code denouncing such failure as a felony, not having been repealed or in any wise impaired by the provisions of the Motor Vehicle Act, it must be held that the information charged, and the evidence shows, the violation of the provisions of a valid and subsisting law, which, by the express provisions thereof, might be punished as a felony or as a misdemeanor in the discretion of the court. The fact that the information, in addition to the alleged felonious acts of the defendant, charged conduct which constituted nothing more than a misdemeanor, under the provisions of the Motor Vehicle Act, was but a defect in pleading, which could and doubtless would have been corrected by the interposition of a demurrer. In the absence of a demurrer, however, the defendant will not now be heard to complain that the information charged both a misdemeanor and a felony.

The judgment and order appealed from are affirmed.

27 Cal. App. 307

YOST et al. v. ROUX et al. (Civ. 1352.)

(District Court of Appeal, Third District, California. April 30, 1915. Rehearing Denied by Supreme Court June 28, 1915.)

1. MECHANICS' LIENS $\hookrightarrow$ 132 — SUBCONTRACTORS — ENFORCEMENT OF LIEN — STATUTORY PROVISIONS.

Under Code Civ. Proc. § 1187, as amended by St. 1911, p. 1316, authorizing a subcontractor to file for record his claim of lien within 30 days after completing his contract, or within 30 days after completion of the work by the original contractor, declaring that any trivial imperfection in the completion of the work shall not be deemed such a lack of completion as to prevent the filing of a lien, and permitting the owner within 10 days after completion to file a notice, an owner, taking possession of the building and accepting it as completed, may not deprive a subcontractor of his lien for materials subsequently furnished to complete the building, and the time within which the subcontractor may file his claim begins to run from the time when he ceased to furnish materials, notwithstanding the 10 days' notice, for the provision therefor does not change the rights of a

materialman furnishing materials after the owner accepts the building as completed.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 192-207; Dec. Dig. ☞ 132.]

2. APPEAL AND ERROR ☞ 1176—DISPOSITION OF CASE ON APPEAL.

Where the error is in the conclusions of law, drawn from findings sufficient to support a judgment in accordance with the complaint, the court on appeal will direct the entry of a proper judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4588-4596; Dec. Dig. ☞ 1176.]

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by Nicholas P. Yost and another, partners as the Mill Valley Lumber Company, against George F. Roux and others. From a judgment granting insufficient relief, plaintiffs appeal. Reversed, with directions.

H. C. Symonds, of Mill Valley, for appellants. Thomas E. Hayden, of San Francisco, for respondents.

CHIPMAN, P. J. This is an action to enforce a materialman's lien. The record is here on the judgment roll alone. The court made findings from which as conclusions of law it found: That plaintiffs are entitled to judgment against defendants Barrick & Murphy, a copartnership composed of W. C. Barrick and H. B. Murphy, for the sum of \$146.13, but without costs; that plaintiffs are not entitled to a lien against the property of defendants Roux and wife; and that these latter defendants are entitled to judgment against plaintiffs for their costs. Judgment passed accordingly, from which plaintiffs appeal.

The contention of appellants is that the trial court drew erroneous conclusions from the findings, and should have directed judgment enforcing the lien claimed as prayed for by plaintiffs. It appears from the findings of fact:

That defendants Roux and wife were the owners of the lots, situated in the town of Mill Valley, on which the building in question was being erected; defendants Barrick & Murphy were the contractors employed by the owners to erect the building; plaintiffs were materialmen, who furnished Barrick & Murphy materials for the building; that, about October 16, 1911, defendants Barrick & Murphy, having charge of the construction of said building, contracted with plaintiffs to furnish the lumber and other materials necessary for said purpose.

"(6) That acting under and in pursuance of said contract, and as ordered by said defendants Barrick & Murphy, plaintiffs herein, doing business under the firm name and style of Mill Valley Lumber Company, as aforesaid, furnished to said defendants Barrick & Murphy, between the 16th day of October, 1911, and the 4th day of April, 1912, lumber, lath, shingles, lime, cement, plaster, nails, and hardware, and other building materials to be used and which were actually used in erecting and constructing said building, and between the 4th day of April, 1912, and the 27th day of April, 1912, and the last thereof on said latter date, certain building materials as hereinafter set forth in

paragraph 13 of these findings, the agreed price of all of which materials so furnished, and also the reasonable value thereof, when so ordered, and also when so furnished, was and is the sum of \$1,676.51."

Of this amount, \$1,530.38 was paid to plaintiffs, leaving due \$146.13. It is then found that, on May 25, 1912, "and within 30 days after plaintiffs had ceased to furnish materials as aforesaid," plaintiffs filed their claim of lien in due form.

"(10) That the contract between defendants George F. Roux and May A. Roux, his wife, as owners, and defendants Barrick & Murphy, as contractors, under which the building described in the complaint was constructed, was completed on the 4th day of April, 1912, except as to trivial imperfections and modifications to correct them, which modifications were as follows: Adding about three feet to the height of the brick chimney, putting in cement steps entering into the basement, and making changes in window screens—and that on the 4th day of April, 1912, said defendants, George F. Roux and May A. Roux, his wife, as owners, went into the open, complete, exclusive, and actual use and occupation of said building."

Finding 13, mentioned in finding 6, supra, and referred to in finding 10, supra, is as follows:

"(13) That the only materials furnished by plaintiffs to defendants Barrick & Murphy, as contractors as aforesaid, from and after the 4th day of April, 1912, to and including the 27th day of April, 1912, were materials to be used, and were actually used, in making said modifications to correct said trivial imperfections in said buildings, and amounted in value to the sum of \$10.34."

Finding 11 is that:

On April 9, 1912, "and within ten days after the completion of the contract last mentioned as aforesaid" (i. e., the contract between the owners and the contractors, Barrick & Murphy), the owners filed and caused to be recorded a notice setting forth that "said contract last mentioned was completed," which was in due form and duly verified.

Finding 12 is as follows:

"(12) That plaintiffs failed to file any claim of lien in the office of the county recorder of Marin county within 30 days after the completion of said last mentioned contract as aforesaid, or within 30 days after the completion of said building save for said modifications, or within 30 days after the filing for record of the notice of completion as above set forth."

[1] The rights of the parties are to be derived from section 1187, Code of Civil Procedure, as amended in 1911. Stats. 1911, p. 1316. The section reads:

"Every original contractor, claiming the benefit of this chapter, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record * * * a claim of lien containing," etc. (These requirements were complied with.) "Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any building, improvement or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien."

Then follows what shall be deemed "equivalent to a completion for all the purposes of this chapter." The section then provides:

"The owner may within ten days after completion of any contract, or within forty days after cessation from labor thereon, file for record * * * a notice setting forth the date when the same was completed, or on which cessation from labor occurred, together with his name and the nature of his title, and a description of the property sufficient for identification, which notice shall be verified by himself or some other person on his behalf."

It is then provided that:

If such notice be not so filed the owner "shall be estopped in any proceeding for the foreclosure of any lien * * * based on the ground that said lien was not filed within the time provided in this chapter."

Briefly stated, the court found that plaintiffs continued to furnish materials as ordered and which were used in the building up to April 27, 1912, and they filed their lien within thirty days thereafter. The court found that the building was completed, except as to the trivial imperfections mentioned, on April 4, 1912, and that the owners filed their notice within 10 days thereafter. The contention of respondents is that the time in which plaintiffs' rights to file their lien began to run from the completion of the building, April 4th, while appellants' contention is that they had 30 days from the time they ceased to furnish materials. The question is to be determined by the statute as it was amended in 1911, and not as it stood prior thereto. The old statute (section 1187, Code Civil Proc.) provides that:

"Every person other than the original contractor furnishing materials" was required to file his lien "at any time after the completion of any building, * * * and until the expiration of thirty days after the filing of said notice of completion or cessation by said owner," mentioned in the early part of the section.

It will be observed that the materialman was given 30 days after the completion of the building, under the former section, and also "until the expiration of thirty days after" the owner had filed said notice. The section has been amended so that now the materialman may file his claim of lien within 30 days after he has—

"ceased to * * * furnish materials, or at his option [if this clause refers to him] within thirty days after the completion of the original contract, if any, under which he was employed."

Findings 6 and 13 were that plaintiffs furnished building materials between October 16, 1911, and April 4, 1912, and between April 4th and April 27th, certain building materials, all of which were used in the building, amounting to \$1,676.51, of which plaintiffs had received \$1,530.38 and no more, leaving due \$146.13.

It seems clear to us that plaintiffs had 30 days after they had "ceased to furnish materials" within which to file their claim of lien, and in fact filed it in time, unless they

lost this right because the owner took possession of the building and accepted it as completed. The court found that the building was completed, except as to certain modifications which required materials of the value of \$10.34, and which the court found were "trivial imperfections." Still, these materials were used in the building, and it was not complete in fact, though so treated by the owners, until those materials were so used. Whether trivial or not, the fact remained and was found by the court that plaintiffs did not cease to deliver materials, which were used in the building, until April 27th. We do not think the owner could cut off plaintiffs' right given by the statute by occupying the building while plaintiffs were still furnishing materials for it and which were being used in it. It is true that the statute provides that the occupation by the owner shall be deemed equivalent to a completion "for all the purposes of this chapter." But the time within which plaintiffs had the right to file their claim of lien did not begin to run from the completion of the building, but from the time when they "ceased to furnish materials." As to the original contractor, the time begins to run upon the "completion of his contract," and as to him the occupation of the building might "be deemed equivalent to a completion," for such is the language of the statute. The 10 days' notice which the owner may give is to be given "after completion of any contract," and, in our opinion, does not change the rights of a materialman who may be called upon to furnish materials used in the building after the owner accepts it as completed. It generally happens that materials are delivered and used in a building, and labor is bestowed upon it in course of its construction, long before it is completed. The amendment of the statute seems to have given the materialman and the one who bestows labor the option either to file his claim with reference to the time he ceases to furnish materials or labor, or to wait and take his chances of knowing just when the building is deemed completed, a fact always within the knowledge of the owner and original contractor, but not so of the materialman and laborer. We fail to see any purpose in the change in the statute unless this be true, and it is fair to assume that the Legislature had some purpose in making the amendment.

[2] Inasmuch as the error complained of lies in the conclusions of law drawn from the findings, and inasmuch as the findings are sufficient to support a judgment in accordance with the complaint, we see no reason for a new trial to be had. It is therefore ordered that the judgment be reversed, and the trial court directed to enter judgment for plaintiffs as prayed for.

We concur: BURNETT, J.; HART, J.

27 Cal. App. 322

ROBERTSON v. FINKLER et ux.
(Civ. 1334.)

(District Court of Appeal, Third District,
California, May 5, 1915. Rehearing
Denied by Supreme Court
July 2, 1915.)

1. WATERS AND WATER COURSES ⚡107—
SUBTERRANEAN WATERS—DIVERSION—SUF-
FICIENCY OF EVIDENCE.

In an action to restrain defendants from diverting more than two-thirds of the waters of a spring, evidence held to justify finding that the defendants, by developing water by means of tunnels 200 feet above the spring did not affect its flow.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 116, 117; Dec. Dig. ⚡107.]

2. APPEAL AND ERROR ⚡1008—**FINDINGS—**
PRESUMPTIONS.

On appeal every substantial conflict in the testimony must be resolved in favor of the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. ⚡1008.]

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by A. M. Robertson against H. C. Finkler and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Albert Mansfield, of Redwood City, for appellant. Ross & Ross, of Redwood City, for respondents.

CHIPMAN, P. J. Plaintiff seeks the judgment of the court that he is the owner of one-sixth of the waters of a certain spring, known as Rock spring, and restraining defendants from diverting more than two-thirds of the waters of said spring; also directing defendants to remove any obstruction maintained by them which prevents plaintiff from obtaining the use of said one-sixth of said waters; also for damages in the sum of \$2,500. The findings of fact and conclusion of law were that plaintiff is the owner of an undivided one-sixth interest in said spring and the waters thereof, and that defendants are the owners of four-sixths, the remaining one-sixth belonging to O. F. Westphal; that defendants have not nor has either of them diverted any part of the waters of said Rock spring to which plaintiff is entitled, nor have defendants or either of them interfered in any way with plaintiff's free and unobstructed use of said waters to which plaintiff is entitled nor threatened so to do; that plaintiff has not been damaged "in any way or manner whatsoever by reason of any alleged diversion or obstruction of the said Rock spring by said defendants, or either of them, or by any act or acts of defendants or either of them, whatsoever." Judgment passed for defendants, from which plaintiff appeals under the alternative method.

As respects the question of alleged damages, there was no evidence supporting plaintiff's averments, and plaintiff makes no claim

for damages in his brief. That feature of the case may therefore be dismissed from consideration.

Plaintiff states in his brief:

"This matter is one of fact rather than one of law. * * * I do not believe that there is any law entangled in his case. From the testimony and under the admission of the pleadings we are absolutely entitled to one-sixth of 'Rock spring,' wherever that may be, and to one-sixth of the waters flowing therefrom, and, whether or not Dr. Taylor or Mr. Finkler made any developments of 'Rock spring,' we nevertheless would be entitled to our one-sixth of all the waters flowing therefrom."

No question arises as to plaintiff's right to "one-sixth of Rock spring, wherever that may be, and to one-sixth of the waters flowing therefrom," for the evidence so showed, and the court so found. The only question in dispute is whether certain water developed by defendants and their predecessors in estate is part of or should have been found by the court to be part of the Rock spring water.

The land on which Rock spring and the developed water were situated is part of a tract of 600 acres formerly belonging to Jacob Kreiss, and is situated in the foothills near Redwood City, San Mateo county. After his death, in 1901, the Kreiss ranch was subdivided. Lot 5 of this subdivision was deeded to Mrs. Hattie Kreiss-Greene, a daughter, subject to the right appurtenant to the parcel of land marked "Isaac," situated on said lot 5, for an undivided one-third interest in a certain spring known as Rock spring, with the right to draw the waters thereof and therefrom, over and across said lot 5. Subsequently, the portion of the ranch marked "Isaac" was conveyed by the heirs of Jacob Kreiss to one John Isaac, the deed containing a similar recital to that above referred to in the Greene deed in reference to Rock spring, and conveying one-third interest in said Rock spring. Similarly, another portion of the ranch was sold by said heirs to one Ernest Marchand, conveying one-third interest in said Rock spring, and another portion to Harry R. Fee, who conveyed a one-sixth interest in Rock spring to plaintiff, who through mesne conveyances became owner, in 1907, of 15 acres of said land and the said one-sixth of Rock spring. Before plaintiff had obtained title Marchand conveyed his said land with his right to the spring to John Isaac, who thus became owner of two-thirds of the spring. Subsequently, Isaac's land and water right in the spring passed to Dr. A. Miles Taylor, and he sold to defendants. In December, 1908, Mrs. Greene having died, the remaining portion of lot 5, 67.73 acres, upon which Rock spring is located, was sold at probate sale for \$4,450, plaintiff and defendants being competitive bidders, and defendants became the purchasers, thus becoming the owners of the upper part of the tract, lot 5, which the evidence showed was valuable only as water-bearing land. We

find, then, that when this action was commenced plaintiff owned 15 acres of lot 5 and one-sixth interest in the waters of Rock spring, and defendants owned the fee of the upper portion, 67.73 acres, of lot 5 upon which the spring is located, and they also owned the Isaac and Marchand tracts and two-thirds of the waters of said spring.

[1, 2] It appears that a gulch runs through lot 5 with what are referred to as left-hand and right-hand branches. Above the junction of these branches and on the left-hand branch is Rock spring, and on the right-hand branch a spring called Cow spring.

While Dr. Taylor owned the Marchand and Isaac tracts he, with permission of the owners of the land, constructed a cement tank or receptacle for water at the junction of said two branches of said gulch, about 10 feet square and $3\frac{1}{2}$ feet in depth, for the purpose of a water reservoir. The so-called "Isaac pipe line," mentioned in the complaint and in the testimony, was connected with this tank and conveyed all the water stored therein to the Taylor—now defendants'—residence. By permission of the owner of the land, Taylor carried the water of "Cow spring" by pipe to this tank. No water from said Cow creek flowed or flows into or reaches Rock spring. One fact in controversy is the location of this latter spring with reference to said tank. The court found that:

It is "located at the base of a large rock situate in the left-hand ravine mentioned in finding 3 and about 40 feet distant above the Taylor tank or receptacle, and that the flow of water from said spring is sometimes barely perceptible, and does not exceed an average of more than 500 gallons per day."

The witnesses did not agree as to the distance apart of the spring and tank, but there was ample evidence supporting the finding on this fact. As to the quantity of water afforded by the spring, one witness who was familiar with its history testified that at times all its water could have been conveyed through "a wheat straw" and none of the witnesses placed its average flow in ordinary seasons at more than 500 gallons. Unless the water first developed by Taylor is part of Rock spring water, we do not see that the quantity of water in that spring is very material, for whatever it is the respective rights of the parties to it are not questioned. The court found:

"That at no time since the construction of said cement tank or receptacle by said A. Miles Taylor did all or any of the water of said Rock spring flow into said 'Isaac pipe line,' nor did the defendants, or either of them, divert or take any or use any part of said water."

The evidence is conflicting as to the point where the excavations were made in the sides of the ravine to develop water. There was testimony that it was from 150 to 200 feet above Rock spring. Witness Woodward drove the tunnels for Dr. Taylor. He testified that he ran two tunnels and found water at a distance of about 15 feet in the hill;

that he ran through formations impervious to water, indicating that the water developed did not and would not otherwise have found its way into the ravine; and that he piped the water 200 feet down the ravine to the cement tank which he built to receive it. It has already been stated that the "Isaac pipe line" connected this tank with Taylor's (now defendants') residence. Witness Bromfield, city engineer of the city of San Mateo and county surveyor of San Mateo county, who claimed to have had experience as a mineralogist, surveyed and subdivided this tract of land and visited the two water developing tunnels above referred to. He testified that:

One of the tunnels was 195 feet "from what I understand is shown to be Rock spring," and "the other is 215 feet. Q. As an expert, would you say that any of this water which has been reached by going through this rock some 16 feet, would any of the water there feed the spring which was pointed out to you by Jacob Kreiss? A. I do not think it did."

Witness Finkler, one of defendants, testified that he has to continue work in the tunnels to keep up the flow "on account of the clay that comes in there and fills up these cracks and lessens the flow." It was shown that this cement tank stood up above the bottom of the gulch so that, except when the weather was stormy, the water of the gulch coming from the Rock spring ran around it.

"Every storm, of course, it would flow over. Q. But a small stream would flow around it? A. It goes around it. There was a certain amount of flow there."

A short distance below this tank was what was called the Fee dam, from which plaintiff received by pipe his share of the water, and he testified that he received a sufficient supply up to 1909 or 1910, which was two years or more after the tunnels were dug. The evidence justified the finding that in developing water, as was shown, some 200 feet above Rock spring, it did not affect the flow at that spring. There was evidence tending to controvert this fact, and evidence also conflicting in some degree with other facts in the case, but there was some substantial evidence supporting the findings, and, under the familiar rule, we must resolve every substantial conflict in the testimony in favor of the findings. *Bancroft-Whitney Company v. McHugh*, 166 Cal. 140, 134 Pac. 1157.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

27 Cal. App. 794
WESTPHAL v. FINKLER et ux. (Civ. 1335.)

(District Court of Appeal, Third District, California. May 5, 1915. Rehearing Denied by Supreme Court July 2, 1915.)

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.
Action by O. F. Westphal against H. C.

Finkler and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Carroll Cook and Wm. Hoff Cook, both of San Francisco, for appellant. Ross & Ross, of San Mateo, for respondents.

CHIPMAN, P. J. By stipulation this case was heard and decided in the lower court upon the evidence submitted in *Robertson v. Finkler*, 149 Pac. 784. The questions involved in *Robertson v. Finkler*, No. 1334, this day decided, are identical with the questions raised in this case, and our decision in that case is determinative of this case. Westphal's interest in Rock spring was one-sixth, and is not disputed. He claimed, however, as did *Robertson*, that the water developed above the spring was part of the water of the spring. He failed, as did *Robertson*, in establishing his contention.

Upon the authority of the decision in *Robertson v. Finkler*, No. 1334, the judgment is affirmed.

We concur: HART, J.; BURNETT, J.

27 Cal. App. 301

PEOPLE v. SENEGRAM. (Cr. 341.)

(District Court of Appeal, Second District, California. April 30, 1915.)

1. PERJURY — ELEMENTS—MATERIALITY.

In perjury, the matter sworn to need not be directly and immediately material, it being sufficient if so connected with the fact in issue as to have a legitimate tendency to prove or disprove such fact by giving weight or probability to the testimony of a witness testifying thereto.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. §§ 38-54; Dec. Dig. —11.]

2. PERJURY — ELEMENTS—MATERIALITY.

In a prosecution for receiving stolen goods, a witness gave testimony, tending to fix the crime upon the accused, and to show that the testifying witness had no part in making the purchase of the goods alleged to have been stolen, accused claiming that he bought such goods on the direct orders from the witness, who was his employer. Subsequently an indictment for perjury was brought against such testifying witness. *Held*, that the evidence given by such witness was material upon one of the chief points raised in the former prosecution.

[Ed. Note.—For other cases, see *Perjury*, Cent. Dig. §§ 38-54; Dec. Dig. —11.]

3. CRIMINAL LAW — INSTRUCTIONS — CURING ERROR.

In a prosecution for perjury, an instruction that "an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false," when taken in connection with an instruction defining perjury and stating that any person who, having taken an oath to testify truly, willfully states as true any material matter which he knows to be false, is guilty of perjury, was not prejudicial to defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. —823.]

4. CRIMINAL LAW — INSTRUCTIONS.

In a prosecution for perjury, an instruction submitting to the jury the question whether any testimony given by defendant was material, while erroneous, was not prejudicial, where the court also instructed that all the testimony alleged to be false was given upon material matters.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. —823.]

5. CRIMINAL LAW — 1169 — APPEAL — EVIDENCE—OTHER OFFENSES.

In a prosecution for perjury, the admission of a resolution by a board of directors, showing that defendant as president of the corporation had feloniously taken money therefrom and used his office for the purpose of ruining the company, was prejudicial error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. —1169.]

6. CRIMINAL LAW — 1170½ — APPEAL — PREJUDICIAL ERROR—LIMITING IMPEACHMENT OF WITNESS.

Since the state of mind of a witness, his interest, or bias, are always proper matters for inquiry where the testimony upon which a prosecution is based depends for their falsity upon the testimony of the prosecuting witness, any effort to abridge defendant's right to impeach such witness is prejudicial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3129-3135; Dec. Dig. —1170½.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Philip Senegram was convicted of perjury, and from the judgment and order denying a new trial, he appeals. Reversed.

Earl Rogers, W. H. Dehm, H. L. Giesler, and Baird & Gerecht, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Dept. Atty. Gen., for the People.

SHAW, J. Defendant was convicted of the crime of perjury, and appeals from the judgment and an order denying his motion for a new trial.

It appears that one S. Bauman was an employé of the Senegram Company, a corporation, of which defendant was president. Some one telephoned the company, expressing a desire to sell a lot of copper wire and designated a certain saloon in Los Angeles as the place where negotiations could be conducted for its purchase. Bauman met the party and purchased the wire, which as a matter of fact had been stolen from some point in Arizona. Thereafter a complaint was filed, charging Bauman with receiving stolen goods. At the preliminary hearing had thereon before a magistrate, defendant was called as a witness and, as alleged in the indictment, gave certain false and material testimony the tendency of which was to fix the crime upon Bauman and show that defendant had no part in making the purchase of the wire, whereas Bauman claimed that the telephone communication was had with Senegram, who directed the former, as such employé, to go to the place designated and make an offer of 13 cents per pound for the wire. This testimony, covering some five or six pages of the transcript as set forth in the indictment, consisted of answers made by defendant to questions propounded, each and all of which are alleged to have been material and knowingly and willfully falsely made.

[1, 2] That defendant gave such answers un-

der oath in the case of *People v. Bauman* was clearly proved by the official stenographer who reported the case, and there was sufficient evidence adduced to justify the jury in finding that the major part thereof was false. The tendency of the evidence given by this defendant before the magistrate was to prove that Bauman, unknown to defendant and of his own motion, purchased the copper knowing it to have been stolen; that defendant was at the time out of the city, and did not receive a communication by phone pursuant to which he instructed Bauman to meet the party and, on behalf of the Sene-gram Company, buy the wire for 13 cents per pound.

"The matter sworn to need not be directly and immediately material. It is sufficient if it be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact by giving weight or probability to the testimony of a witness testifying thereto, or otherwise." 22 Am. & Eng. Encyc. of Law, p. 687.

Measured by this rule, we entertain no doubt as to the materiality of the evidence given by defendant upon one, if not the chief, issue raised in the *Bauman Case*. See, also, *People v. Barry*, 63 Cal. 63; *People v. Metzler*, 21 Cal. App. 82, 130 Pac. 1192.

[3] Appellant insists that the court committed prejudicial error in giving certain instructions to the jury. These instructions, which we will designate as 1 and 2, are as follows:

"(1) An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false.

"(2) The court further instructs the jury that it is not necessary to prove or establish all of the matters alleged and set up in the information as constituting the charge of perjury against the defendant herein. It is sufficient if you believe from the evidence beyond a reasonable doubt that the prosecution has proven that any of the matters charged in the information were so sworn to or testified to by the defendant on the occasion of his testifying as a witness as charged in the information, and that the same is proven by the prosecution, beyond a reasonable doubt, to have been false and untrue at the time the same was so sworn to, or testified to, to the then knowledge of the defendant, as charged in the information, and that the same was material."

Instruction No. 1, embodying the provision of section 125 of the Penal Code, must be read in connection with another instruction given by the court in the language of section 118, Penal Code, and, so considered, even conceding that it was inapplicable to the issue raised by the facts pleaded, nevertheless could not have been prejudicial to defendant. *People v. Von Tiedeman*, 120 Cal. 128, 52 Pac. 155.

[4] The other instruction, No. 2, is attacked upon several grounds. Appellant insists that it is erroneous by reason of the fact that the court submitted to the jury the determination of the question as to whether or not any testimony given by defendant was material. The court erred in so directing the jury. "The question of the materiality of evidence, no matter when or how it may

arise, is always one of law for the court, and not of fact for the jury." *People v. Lem You*, 97 Cal. 224, 32 Pac. 11. Nevertheless, defendant could not have been prejudiced by such erroneous instruction for the reason that elsewhere the court, by an instruction which we will designate No. 3, properly instructed the jury that all of—

"the said testimony * * * was a material matter and was material evidence and testimony in the said preliminary examination and proceeding."

Hence, since by No. 3 the court declared all of the charges of false testimony averred in the indictment to be material, the instruction No. 2, under which the jury might have found some of the testimony which they believed to have been falsely given immaterial, must be deemed favorable rather than prejudicial to the substantial rights of defendant. *People v. Lem You*, supra. It is likewise obvious that, conceding the two instructions respecting the question of materiality of the evidence to be inconsistent, such fact could in no wise have been prejudicial to defendant.

Appellant insists that instruction No. 2 is also erroneous in that it instructs the jury that it was not necessary to a conviction that they find all of the testimony alleged in the indictment to have been given by defendant false, but that if any of the matters and things so sworn to were proven false, such fact would justify them in finding defendant guilty of the charge of perjury. The alleged error in the instruction is based upon the contention that the offense is assigned upon all of the testimony given, instead of predicating the charge upon a particular answer. In volume 30, page 1452, Cyc., the rule is stated thus:

"If, however, the indictment is in one assignment, failure to prove all the statements substantially as alleged is fatal to the prosecution."

To the same effect is *Brown v. State*, 40 Tex. Cr. R. 50, 48 S. W. 170, where it is said:

"But here the assignment is in solido, and contains in combination several statements, all of which together are alleged to be material, and the falsity of all is charged. We cannot discover these allegations, but must consider all together, and that together they present a material issue, and as alleged it was incumbent on the state to prove * * * that appellant swore to all the statements substantially as alleged."

The indictment sets forth upwards of 30 answers to as many questions propounded to defendant in the *Bauman Case*, "each and all and every of them so made * * * and sworn to as true" are alleged to have been material, as well as false. Since the allegation is that each and every one of the answers so given was false, it cannot be said that the charge was based upon the falsity of the evidence in solido set forth in the indictment. On the contrary, while the form of pleading may be objectionable, nevertheless, in the absence of a special demurrer, the indictment, since it alleges that each and every one of the answers was false, must be

deemed sufficient as a separate and distinct assignment of perjury based upon each answer sworn to by defendant. If this be true, it necessarily follows that the court committed no error by instructing the jury that if they found any of the matters or testimony set forth in the indictment to be false, such fact was sufficient to justify them in bringing in a verdict of guilty.

[5] As stated, defendant was president of the Philip Senegram Company, a corporation. It appears that some time prior to his trial the board of directors of the corporation passed a resolution as follows:

"Whereas, it appears that Philip Senegram, president of this company, has feloniously taken moneys therefrom and has neglected the duties of his office and used his office for the purpose of ruining this company, now, therefore, be it resolved that the said Philip Senegram be and he is hereby removed as president of this company and as an employé thereof."

This resolution was admitted into evidence over the objection of defendant. The Attorney General does not seek to justify the ruling, but, conceding the error, insists that the prejudicial effect thereof, if any, was cured by the fact that defendant introduced the findings of a court in a civil action brought by the corporation against Senegram to recover moneys alleged to have been taken by him from the company, which findings and judgment exonerated defendant from such charge. That the admission of the resolution in evidence was gross error must be conceded. It had no possible bearing upon the issue involved in the trial. Whether or not defendant had wrongfully appropriated money from the corporation of which he was president and otherwise ruined the company, did not tend, in any degree, to show whether or not he had sworn falsely in the Bauman Case. By admitting in evidence the accusation thus formally made by defendant's business associates the court in effect told the jury that the making of such charge was a material matter for their consideration in determining the question of defendant's guilt, as charged in the indictment. The effect of such consideration, since the matter was well calculated to blacken his character, must necessarily have been highly prejudicial to the substantial rights of defendant.

Appellant complains of several rulings of the court sustaining objections to evidence offered for the purpose of impeaching Bauman, the chief witness for the prosecution. On cross-examination Bauman was asked if he had not tried to get one Levin to testify against defendant, and upon Levin saying he knew nothing about the case, said to him: "You don't have to know anything about it; I will tell you what to testify to." A like question was asked of Levin, to both of which the court sustained objections. The court likewise sustained objections to the introduction in evidence of a pleading, verified by Bauman as secretary of the Senegram

Company, the allegations of which defendant claimed were inconsistent with some of Bauman's answers and tended to corroborate testimony given in behalf of defendant by the witness Gerecht.

[6] The state of mind of a witness, his interest in the case, hostility to, friendship for, bias and prejudice against the parties, are always proper matters for inquiry, and this is especially true where the one testifying occupied the position, as here, of prosecuting witness. *People v. Thomson*, 92 Cal. 506, 28 Pac. 589; *People v. Wong Chuey*, 117 Cal. 624, 49 Pac. 833; *People v. Mack*, 14 Cal. App. 12, 110 Pac. 967. As stated, it was averred in the indictment that each and every one of the answers given by Senegram in the Bauman Case was false, and the jury were instructed that if they found any of such answers false, such fact was sufficient to justify a verdict of guilty. If, therefore, the answers given by Senegram, and which the jury found to be false, were those the falsity of which depended solely and alone upon the testimony of Bauman (and there were such), then it is apparent that any abridgment of defendant's right to impeach Bauman's testimony was clearly prejudicial.

For the reasons given, the judgment and order are reversed.

We concur: CONREY, P. J.; JAMES, J.

27 Cal. App. 327

TOMPKINS v. DAVIDOW. (Civ. 1355.)

(District Court of Appeal, Third District, California. May 6, 1915. Rehearing Denied by Supreme Court July 2, 1915.)

1. VENDOR AND PURCHASER — §341 — RESCISSION OF CONTRACT — SUFFICIENCY OF EVIDENCE.

In an action brought by plaintiff in his own right and as assignee of others to recover \$5,000 paid as a deposit on a contract for the purchase of real estate from defendant, evidence held sufficient to support finding that the party with whom defendant dealt as buyer, and the defendant, mutually agreed to a rescission of the contract of purchase, and that in consideration thereof defendant should retain the money paid as deposit.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1008-1017; Dec. Dig. §341.]

2. CONTRACTS — §254 — PAROL RESCISSION — EVIDENCE.

By consent of the parties a contract may be mutually abandoned at any stage of performance, and this may be done by parol.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1149; Dec. Dig. §254.]

3. TRUSTS — §357 — RIGHT TO FOLLOW TRUST PROPERTY — PURCHASER IN GOOD FAITH.

Where the owner of land contracted to sell it to one ostensibly acting solely for himself, and who made a deposit for \$5,000, and thereafter, when such purchaser declared that he was unable to take the property, and in consideration of forfeiting his deposit, there was a rescission of the contract by mutual consent, persons in fact interested with the ostensible

purchaser, whose money had gone into the deposit, could not reclaim it from the owner.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 363-368; Dec. Dig. *Ⓒ*357.]

Appeal from Superior Court, City and County of San Francisco; James W. Bartlett, Judge.

Action by Philip W. Tompkins against Bernhard Davidow. Judgment for defendant, and plaintiff appeals. Affirmed.

Alexander D. Keyes, of San Francisco, for appellant. Walter H. Robinson, of San Francisco, for respondent.

CHIPMAN, P. J. Plaintiff brought the action, in his own behalf and as assignee of other parties, to recover \$5,000 paid as a deposit upon a contract for the sale and purchase of certain real estate situated on Bryant street near Fifth street in San Francisco. The cause was tried by the court without a jury, and defendant had judgment, from which and from the order denying his motion for a new trial plaintiff appeals.

The transaction shown by the findings of the court was as follows: On March 28, 1906, defendant employed George C. Boardman, Jr., and T. D. Boardman, copartners as Boardman Bros. & Co., engaged in business as real estate agents, "as his agents to procure for him a purchaser for the real property hereafter described, for an agreed compensation, and they thereupon accepted such employment"; that, on said last-named date, pursuant to such employment, they represented to defendant that they had found a purchaser for defendant's said real property, one L. A. Steiger; that, believing said representation and relying thereon, defendant did, on said March 28, 1906, enter into a contract with L. A. Steiger for the sale and purchase of the real estate mentioned in said contract, in the words and figures following, to wit:

"Boardman Bros. & Co., Real Estate Agents. 138 Montgomery St. Contract Receipt. San Francisco, March 28, 1906.

"Received from L. A. Steiger the sum of five thousand dollars (\$5,000.00) being deposit on account of one hundred forty thousand (\$140,000.00) dollars U. S. gold coin, the purchase price of the property this day sold to and bought by him, and being in the city and county of San Francisco, State of California, and described as follows: (Describes a 100-vara lot.) Taxes for fiscal year 1906-07 to be assumed by buyer, who is to accept the property as indicated by the survey dated March 2nd, 1906. Terms of sale: Twenty-five days are given to examine title and consummate the sale, at the termination of which the balance of purchase price is payable upon tender of deed; if title is found defective the purchaser is to state his objections in writing and the seller is to perfect the title within thirty days after the time first allowed for examination, or any extension thereof, unless the title cannot be perfected within said thirty days, in which event the same shall be perfected within a reasonable time thereafter. When title is thus perfected, "the seller is to convey said property to the purchaser, and upon a tender of said conveyance to the purchaser, the purchaser is to pay the balance of

the purchase price of said property. If the sale is not consummated according to the foregoing conditions, the deposit is to be forfeited. If the title cannot be perfected within the above mentioned times, the deposit is to be returned. Taxes for the fiscal year ending June 30, 1906, also rents to be prorated from delivery of deed. The said L. A. Steiger hereby agrees to comply with the conditions of this contract. Sale to be consummated at the office of Boardman Bros. & Co.

"[Signed as follows:]

"L. A. Steiger.

"Boardman Bros. & Co., Agents."

"San Francisco, March 28, 1906.

"I hereby ratify the sale of the within described property according to the terms and conditions, therein mentioned and agree to convey said property to the party therein named or to his assigns, and agree to pay to Boardman Bros. & Co. two thousand five hundred (\$2,500.00) dollars, for services rendered when sale is closed and money paid and not otherwise. Receipt by me of the within mentioned deposit of five thousand (\$5,000.00) dollars is hereby acknowledged subject to the terms of this contract.

"Bernhard Davidow.

"We agree to the foregoing.

"Boardman Bros. & Co."

Resulting from the great fire in San Francisco, in April, 1906, "each and every day from and including April 19, 1906, to and including June 3, 1906, were regular legal holidays in the state of California." During that fire the buildings standing upon said premises were destroyed, but the court found that they did not form a part of the real property nor did they constitute any inducement or consideration to Steiger or to plaintiff or to any of his assignors for the purchase of said property, the lessee having the right under the lease to remove the same; that at all times since March 27, 1906, defendant has been the owner of said real estate "free and clear of all incumbrances, save and except the lien of said mortgage for \$80,000," as to the existence of which the court found that both Boardman Bros. and Steiger had knowledge and that it was agreed between defendant and Steiger that it should "either be assumed and the amount thereof deducted from the purchase price, or that said mortgage should be paid and satisfied out of the purchase price when the same was paid, all at the option of said L. A. Steiger, and that so much of said purchase price as would be necessary should be used to satisfy said mortgage"; that at the time said contract was executed both Steiger and the Boardmans knew of the existence of said lease and knew that pursuant to its terms the buildings on said premises "belonged to the lessee and could be severed by him at any time before the expiration of the term therein created," but neither on June 4, 1906, nor at any other time, did Steiger personally or by agent, verbally or otherwise, notify defendant that he would not accept a deed of said property "because of any defect of title or fault of defendant, nor did he at any time state any defect of title or fault of defendant

as a reason for not accepting such a deed; that, on the contrary, on June 4, 1906, the defendant tendered to said L. A. Steiger a duly executed deed of conveyance of said premises in due form, and that thereupon said L. A. Steiger stated that he could not carry out his part of said contract and declined to complete said sale, and thereupon for a valuable consideration waived all claim to said deposit of \$5,000 and to said real property pursuant to said contract or otherwise." Upon this latter point the court also found:

"That on June 4, 1906, said L. A. Steiger and the defendant agreed with each other to mutually terminate their respective obligations under said contract, that is to say, they agreed with each other than said Steiger should and he did waive all right to said \$5,000 deposit and that he should and he did release said defendant from all obligations to convey said property, in consideration whereof said defendant released said Steiger from all obligations to purchase said property, and thereupon their respective obligations under said contract were by mutual agreement terminated and abandoned and they each thereupon became released from further obligation to each other on account of said contract and said deposit."

It was further found: That said sum of \$5,000 paid to the defendant was furnished by plaintiff, the Boardman Bros., and certain other assignors of plaintiff in certain proportions, "but the fact that said plaintiff and said Boardmans and said assignors of plaintiff were in any way interested, other than that said Boardmans would earn a commission, was unknown to defendant and was not disclosed to him by any one until about May 7, 1910, when this action was commenced"; that in this respect said plaintiff and said Steiger, the said Boardmans, and said other assignors of plaintiff "led defendant to believe that the only person with whom defendant was dealing and to whom defendant was selling said property was said L. A. Steiger, and that any agreements regarding the purchase price of said real estate or the payment thereof which may have existed between plaintiff, said assignors of plaintiff, and said L. A. Steiger, were at all times concealed from and unknown to defendant until about May 7, 1910." It was also found that defendant commenced his action to establish his title under the McEnerney act, in June, 1907, and perfected his title thereunder within a reasonable time; that at no time did plaintiff or Steiger or the Boardmans, or any other person pay or offer to pay to defendant the or any part of the purchase price agreed upon, nor did defendant ever convey or offer to convey said property to any person other than said L. A. Steiger. There is a finding: That, on June 5, 1906, the Boardman Bros. left at defendant's place of business a letter, directed to him, which he received about ten days thereafter, stating that "Louis A. Steiger and all persons interested under him in the purchase of the lot (describing it) decline to accept a deed for the following reasons": That defendant has no record title. There

is an existing mortgage of \$80,000 on the property which the purchaser will not assume. The improvements on the property have been burnt. The lease on the property has been terminated without the consent of Steiger. Signed, "Boardman Bros. & Co., Agents."

As to this letter the court found:

That it was written by the Boardmans "in the capacity of agents of defendant, and was intended by said Boardman Bros. & Co. and was treated by defendant as information on the subject from agent to principal and not as a notification from said L. A. Steiger respecting any rights under said contract."

[1] The findings upon which the judgment of the court rested are challenged as unsupported by the evidence. It seems to us that, aside from other findings, if there was sufficient evidence to support the finding in effect that Steiger and defendant, on June 4, 1906, mutually agreed that the contract between them was at an end and that defendant should retain the money paid as a deposit as consideration for terminating the contract, it becomes unnecessary to consider other findings or any other features of the case.

There is abundant evidence to show that the Boardmans, while acting as defendant's agents, concealed from him that they and other persons were interested in the purchase and led defendant to believe that Steiger was the real purchaser. Defendant was fully justified in dealing with Steiger as sole purchaser. He knew nothing to the contrary and had no means of knowing anything to the contrary for nearly four years and long after he had with perfect right treated the contract as at an end and the matter fully settled between him and Steiger and had entered into engagements concerning the property on that assumption. It was on this assumption that, on August 8, 1906, he leased the lot for a term of years to the S. H. Harmon Lumber Company.

Defendant testified, concerning his settlement with Steiger, as follows:

"Mr. Mertens and myself went to Mr. Steiger's place of business and I presented him the deed. I asked for the money to pay for it. He said, 'Mr. Davidow, I cannot pay for it on account of the sale I made of the corner of Third and Brannan streets not going through. I haven't the money to pay you for it.' I said, 'What will become of the \$5,000?' and he said: 'I am out of it. Here is the terra cotta business and that is all I have left to make my living off of.' Q. He said for you to keep the \$5,000? A. He said: 'Keep it; I am out of it.' I said, 'All right,' and then we had a private conversation regarding the circumstances. Q. Did Boardman Bros. at any time following June 4, 1906, make to you any verbal statement or objection regarding the title to the property? A. No, sir."

Witness M. J. Mertens testified:

"The first conversation that I heard, or took part in, between Mr. Davidow, myself and Mr. Steiger took place on Monday, June 4, 1906, at Mr. Steiger's place of business out in the Mission. We called on Mr. Steiger, and I presented Mr. Davidow as the grantor in that transaction, and I told him we came to close the transaction. We had the deed; presented it to him, and asked him for the money, and

Mr. Steiger said: 'I cannot pay for this property now. I have met with very severe losses both in my business and in real estate. Moreover, the sale on which I depended for a part of this money has fallen through, and I am therefore totally unable to comply with your request. I cannot take the property.' He said the sale of his property on the east corner of Third and Brannan streets had fallen through. Mr. Davidow broached the matter of the forfeiture of the deposit, and said: 'You know what the penalty is if you cannot comply with the contract; you will have to forfeit this deposit?' Mr. Steiger said he had no further interest in it. He was out of it. He could not take the property. He could not buy anything at that time. Q. Did he say anything as to what could be done with the \$5,000? A. He understood that it was Mr. Davidow's. Q. What did Mr. Davidow say in reply? A. He said: 'If you cannot pay for the property, well, then, I have to be satisfied with the next best thing, with the deposit. But I am very sorry, because I depended on this money,' etc. That was substantially all the conversation. Thereupon we left. I went about my business, and Mr. Davidow went about his."

We think there was evidence justifying the court in its finding as to the letter of the Boardmans of June 5, 1906. But, if otherwise it was not written until after Steiger and defendant had reached a settlement of the transaction, and was not received by defendant for ten days later, and it does not appear, nor does the letter purport to show, that the Boardmans were serving notice as Steiger's agents. Nor did the Boardmans ever inform defendant that they were authorized to act as Steiger's agents.

[2,3] Upon the point which we think is conclusive of the case, the learned trial judge, in his written opinion, called to our attention, states the matter so clearly and forcibly that we adopt it as satisfactorily disposing of the question. We quote:

"The determination of this case depends upon the solution of this question: What, if any, was the legal effect of the interview between defendant and L. A. Steiger on the 4th of June, 1906? If the acts and declarations of these two men at that time mutually ended and terminated their obligations under the contract, the defendant must and should prevail in this action. That defendant considered the contract ended, and his liability to convey his land or to return the deposit released, is plainly evident from his subsequent actions in shortly thereafter leasing the lot for a long term of years and in his statement as to title and incumbrances made in the McKerney act proceeding. So far as the evidence in this case discloses, defendant never had any reason to believe that any one other than L. A. Steiger had an interest in the contract in relation to the purchase of the lot, until shortly before the institution of this action. The arrangement of the purchasing syndicate, its advance of the \$5,000 paid on purchase price, the proportionate interest of its respective parties, were never disclosed to him. He had every reason to believe that, instead of Boardman Bros. & Co. being interested as secret purchasers of his lot, they were his agents to effect a sale of the same, and were to receive for their labor and efforts in effecting such sale from the purchase money the sum of \$2,500. The notice of June 5, 1906, of Boardman Bros. & Co. to defendant, is entitled to little, if any, consideration. On its face it is susceptible of two readings, one assuming the firm to be the agent of defendant simply informing defendant

that Steiger has repudiated his contract and stating his purported reasons for so repudiating; the other, assuming the firm to be the agent of Steiger, notifying defendant that Steiger repudiates his contract. It is signed 'Boardman Bros. & Co., Agents.' Agents for whom, Steiger, defendant, or the individual members of the firm and other members of the purchasing syndicate? Under the facts in this case, defendant had the right to consider the firm of Boardman Bros. & Co. as his agents in the transaction, and if the firm was such agent of defendant, the notice of June 5, 1906, would be of no value as a notice of objections of Steiger to defendant's title.

"On the 4th of June, 1906, both defendant and Steiger had many reasons as business men for each ending any further obligations under this contract. Steiger did not have the money to complete the purchase and as a business man undoubtedly did not desire to purchase, in view of the decreased values of real estate in San Francisco at that time, while Davidow had on his hands a lot decreased in value far more than what he had received on purchase price, with records of title destroyed and methods of restoring them uncertain if not entirely wanting. Whether the tender of the deed on June 4, 1906, was premature or not on defendant's part, is immaterial if at the interview on that day defendant and Steiger mutually ended their duties and liabilities under the contract. Where Steiger had obtained the \$5,000 which had been paid on the purchase price was not a matter of any interest to defendant, and at that time he had no reason, legal or moral, to believe it was not the money of Steiger.

"There can be no question that a contract can be mutually abandoned by the parties at any stage of their performance and each of the parties released from any further obligation on account thereof; that it may be done by parol, and the fact of its having been done established by evidence of the acts and declarations of the parties. The long period of time elapsing between the tender of the deed and the institution of this action is a strong circumstance urging the conclusion that the contract was considered ended by both parties by the interview of June 4, 1906. If defendant and Steiger intended at that time by their acts and declarations to end and terminate the contract and any future liabilities thereunder, that intent should not be defeated by allowing parties never known by defendant to have had any interest in the contract until nearly four years after he supposed it was ended to come in and seek a recovery of moneys alleged to be theirs instead of Steiger's. Plaintiff's counsel suggests that Steiger was a trustee for plaintiff and his assignors, and therefore could not release the \$5,000 paid the defendant on purchase price. If the relation of trustee existed between Steiger and plaintiff's assignors, defendant never knew of it, and, if it were so, under these facts the remedy would be a personal one for settlement between plaintiff and Steiger and not involving the defendant.

"In view of the conclusion that the evidence shows that the contract and its obligations were mutually and voluntarily terminated by defendant and Steiger, it becomes unnecessary to discuss the various other matters so ably and fully presented by the briefs submitted by counsel in this action.

"Findings and judgment in favor of the defendant are ordered prepared and submitted by the attorney for the defendant in this action.

"James A. Bartlett, Judge Presiding."

No assignments of errors in rulings during the course of the trial are presented in plaintiff's brief.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

27 Cal. App. 281

ROCK RIDGE PARK CO. v. WELLS et al.
(Civ. 1360.)

(District Court of Appeal, Third District, California. April 28, 1915.)

1. PLEADING — 214 — DEMURRER — ADMISSION.

All the material facts stated in a complaint are admitted to be true by the demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. — 214.]

2. MORTGAGES — 449 — ACTION TO FORECLOSE — COMPLAINT — ALLEGATIONS OF OWNERSHIP.

In an action for a decree foreclosing a mortgage executed to secure the payment of a note, a complaint, alleging that the defendants executed the note set out therein and as security executed and delivered the mortgage, that the balance due on the principal of the note and the interest thereon was due and unpaid, that the plaintiff exercised its option and declared the whole amount of principal and interest to be immediately payable, showed the ownership of the note at the time of execution of the mortgage, which condition of ownership was presumed to continue, so that it was not necessary to directly allege delivery of the note or that the plaintiff was the owner of the note at the time of its exercise of the option.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1313; Dec. Dig. — 449.]

3. MORTGAGES — 74 — PRESUMPTION — DELIVERY OF NOTE.

Where a mortgage securing a note was delivered upon its execution, there is a presumption at law that the note was delivered contemporaneously with the delivery of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 172; Dec. Dig. — 74.]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by the Rock Ridge Park Company against C. B. Wells and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Wright & Wright & Stetson, of San Francisco (J. A. Elston, of Berkeley, of counsel), for appellants. Elmer Nichols, of Berkeley, for respondent.

HART, J. The plaintiff brought this action for a decree foreclosing a certain mortgage executed and delivered by the defendants to the plaintiff to secure the payment of a promissory note for the sum of \$48,000, which was executed by said defendants in favor of the plaintiff.

The note in suit, which is set out in the complaint in *hæc verba*, was made and is dated on the 15th day of March, 1912, and was payable "on or before," three years after its date. It called for interest at the rate of 6 per cent. per annum, payable annually, and further provided:

"And in case said interest is not paid within one month after the same becomes due, it shall be added to the principal and bear a like rate of interest until paid, and the whole of said principal and interest shall forthwith become due, at the option of the holder thereof, without notice."

This action was filed on the 8th day of May, 1913, and it is alleged in the complaint:

"That no interest on said principal sum mentioned in said promissory note, and in said mortgage, has been paid; that on the 27th day of November, 1912, the sum of \$4,600, in United States gold coin, on account of the principal sum mentioned in said promissory note and mortgage, had been paid; that no part of the balance of said principal to wit, the sum of \$44,300, has been paid, and the whole thereof is now due, owing and unpaid from said defendant, C. B. Wells, to plaintiff," etc.

The complaint further alleges that:

On the 16th day of April, 1912, "and during the time of default in payment of interest, and more than one month after the same became due, the said plaintiff, * * * etc., exercised its option to declare, and did declare, the whole amount of principal and interest to be immediately due and payable, and the same is now due and payable, as heretofore alleged."

It is then alleged that:

"The plaintiff is now the lawful owner and holder of said promissory note and said mortgage."

The mortgage is by the complaint expressly made a part thereof, and that instrument contains a copy of the note pleaded in full in the complaint.

A demurrer to the complaint for want of sufficient facts was filed by the defendants, and the same overruled. The defendants failed to answer the complaint within the time allowed by the court after the order overruling the demurrer, and a decree was thereupon entered in favor of the plaintiff. This appeal is by the defendants from said judgment.

[1, 2] The only point made by the defendants is that the complaint fails to state a cause of action because it omits to allege that the plaintiff was the owner and holder of the note at the time it exercised the option, prescribed by the note, to declare and treat the whole of the principal of and the accrued interest on the note as due and payable upon the default in the payment of the annual interest for one month after such interest became due. We think the point is groundless. All the material facts stated in the complaint are admitted to be true by the demurrer. It is declared in the complaint that the defendants executed the note in suit and set out in the complaint, and as security therefor executed and delivered to the plaintiff the mortgage to foreclose which is the object of this action. It is further alleged, as seen, that the balance due on the principal of the note and the interest thereon have not been paid, and that "the whole thereof is now due, owing and unpaid from said defendant, C. B. Wells, to plaintiff." It is, moreover, alleged that the plaintiff exercised its option to declare, and did declare, the whole amount of principal and interest to be immediately due and payable, etc. If this last-mentioned averment is not sufficient of itself to show ownership in the plaintiff at the time of the exercise of the option, then

the allegations just previously referred to certainly show such ownership at the time of the execution of the note and mortgage, and this condition of ownership at that time is presumed to continue, and it was therefore not necessary to directly allege that the plaintiff was the owner of the note at the time of the exercise of the option. "Such an allegation, or its equivalent," says the Supreme Court, in *Curtin v. Kowalsky*, 145 Cal. 431, 433, 78 Pac. 962, involving an action to recover upon a money judgment, "is required in actions to recover the possession of specific property, but not in actions to recover on money demands," citing a number of cases. See, also, 8 Cyc. 123, 124.

[3] It is true, as counsel for the defendants suggest, that there is no averment in the complaint that the note in question was ever delivered to the plaintiff. Since we hold that the complaint sufficiently shows that the plaintiff was the owner and holder of the note at the time of the exercise of the option referred to, we cannot see that it is important that it should appear from the complaint by direct averment that the note was delivered to the plaintiff. But, if the objection to the complaint here suggested be important, the reply thereto is to be found in the fact that the complaint alleges that the mortgage was delivered to the plaintiff upon its execution, and from this, as well as from the very nature of the transaction, the fact necessarily follows and the presumption of law, based upon the common experience of mankind, is or should be that the note was delivered contemporaneously with the delivery to the mortgagee of the mortgage given to secure its payment.

The complaint could have been more explicit and specific in the respects as to which it is criticized on this appeal; but, considering all its averments together, by the light of the nature of the transaction to which it relates and the character of the relief sought, we are convinced that it sufficiently, even if inartificially, states a cause of action, and is therefore good as against a general demurrer.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

27 Cal. App. 200

DEPAVO et al. v. RIZZO et al. (Civ. 1494.)

(District Court of Appeal, First District, California. April 21, 1915.)

1. BROKERS —8— AGENCY FOR OWNER—SUFFICIENCY OF EVIDENCE.

In an action by purchasers of realty against the owner and a real estate agent to recover a deposit of \$500, evidence held sufficient to support a finding that the broker was not agent of the owner.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 9; Dec. Dig. —8.]

2. BROKERS —96— DEPOSIT ON CONTRACT—RECOVERY BY PURCHASER.

Where a real estate broker negotiated a sale of realty, on which the purchasers paid the broker \$500, \$400 of which he retained, handing \$100 to the owner in pursuance of a prior contract made by the broker with the owner, unknown to the purchasers, whereby the owner agreed to sell to such purchasers at a less price, and for a payment in cash of \$100, instead of \$500 to which the purchasers were obligated by the contract known to them, upon failure of the owner to remedy defects in title within the contract time, the purchasers were entitled to recover \$400 from the broker, if in the transaction he had acted as agent for them, and \$100 from the owner, while if such broker had acted as a principal for himself the purchasers were entitled to recover from him the whole amount.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 138; Dec. Dig. —96.]

3. VENDOR AND PURCHASER —144— CONTRACT OF SALE—TIME OF ESSENCE—RETURN OF DEPOSIT.

Where a contract for the sale of realty specifically provided that the cash deposit should be returned if good title could not be given within a certain time, time was of the essence, and the purchasers, upon failure of such title, could recover the deposit after the expiration of the time for making title good, as the vendor was not entitled to a reasonable time after the expiration of such period in which to perfect title, it not being necessary, in order that time shall be of the essence of a contract, to so declare, any provision in the contract from which the intention clearly appears being sufficient.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 271-275; Dec. Dig. —144.]

Appeal from Superior Court, Alameda County; Wm. H. Donahue, Judge.

Action by F. Depavo and Luigi Giachino against N. Rizzo and others. Judgment for plaintiffs, and the named defendant appeals. Reversed as to the appellant.

Stetson & Koford, of San Francisco, for appellant. Aldrich & Gentry, of Oakland, for respondents.

KERRIGAN, J. This action, in form one for money had and received, was brought to recover the sum of \$500 paid as a deposit on a contract for the purchase of a parcel of real estate. Judgment went in favor of the plaintiffs and against defendants N. Rizzo and Elizabeth Piepenberg jointly for the amount sued for. This is an appeal from the judgment by N. Rizzo.

In support of his appeal the appellant contends that the evidence shows that he was the agent of the owner of the real property involved; that he performed his contract with such owner; that the owner was not in default in the performance of the contract, and that even if she were, the plaintiffs cannot recover from appellant (the agent) money paid as a deposit for account of the principal, but must look to the principal for it.

The facts of the case are substantially these: The plaintiffs, desiring to rent a store for the purpose of carrying on their business as bakers, applied to the defendant Rizzo, a

real estate broker, requesting that he endeavor to find for them a suitable place, which Rizzo undertook to do. None being found, Rizzo suggested to them that perhaps he could find a lot which they could buy and erect thereon a building for themselves. The plaintiffs assented to this course, and soon thereafter Rizzo notified them that he had found a suitable location. Plaintiffs examined it, and expressed their willingness to pay for it the sum of \$10,100. The owner of this property was the defendant Elizabeth Piepenberg, who appears in the transaction from beginning to end, by her agent or attorney in fact, the defendant L. R. Weil. On April 17, 1913, the plaintiffs met Rizzo and Weil in the former's office, and entered into a written contract for the purchase of the property in question at the price of \$10,100, of which \$500 was to be paid down, and the balance upon certain terms specified therein. Ten days were provided in the contract for the purchasers to examine title and state their objections thereto; the vendor to have 30 days thereafter to remedy any defects. On the same day, but just prior to the execution of the aforesaid contract, another agreement in writing had been entered into between Rizzo and Elizabeth Piepenberg, through her said agent L. R. Weil, by which said Piepenberg agreed to sell and convey to the plaintiffs the same property, but for the sum of \$9,660, of which \$100 was to be in cash, the remaining terms being for all practical purposes similar to the terms of the contract just described. There is nothing, however, to show that the plaintiffs had any knowledge of the existence of this second mentioned agreement. For the purpose of making the cash payment required on their contract the plaintiffs handed to Rizzo at the time of its execution the sum of \$500. Rizzo thereupon paid to Weil \$100, retaining the balance. Plaintiffs in due time stated certain objections to the title to the property, which the owner, through her agent Weil, proceeded to remedy; but this not being accomplished within the time prescribed by the contract, and the plaintiffs having refused to extend such time, they demanded of Weil and of Rizzo the return of the \$500 paid by them. It not being returned, this action was commenced for its recovery as above stated.

In the court below it was the claim of Rizzo that he was the agent of the owner of the property; and one of the arguments that he advances here upon his appeal is that, being the agent of a disclosed principal, no action will lie against him for the return of the money, even though it be in his possession. This principle finds support in the case of *Bogart v. Crosby, etc.*, 80 Cal. 195, 22 Pac. 84. See, also, *Simmonds v. Long*, 80 Kan. 155, 101 Pac. 1070, 23 L. R. A. (N. S.) 553. The court, however, found that Rizzo was not the agent of the owner of the property; and also found that said owner and Rizzo should re-

pay to the plaintiffs the \$500 paid as aforesaid.

[1] As to the first of these findings, we think that it is abundantly supported by the evidence. There is no showing of any employment of Rizzo by the owner or by her agent. On the other hand, the facts as above narrated, and the form in which Rizzo endeavored to put the sale through, indicate that he was either the agent of the plaintiffs, or that he was acting on his own account. The plaintiffs' testimony showed that they considered that Rizzo was acting for them, and this was evidently the view they took when they handed to him the \$500 to be paid as a deposit on their contract. The appellant himself, apparently, was not clear in what capacity he was acting, for in his testimony we find this (speaking of a conversation with one of the plaintiffs when there appeared to be danger that the transaction would fall through):

"I told him it didn't make any difference to me; somebody had to pay me that commission. I didn't care who paid it, because I done my duty, and I expected to get a commission from some one."

[2] We think, however, that the court's finding of a joint liability on the part of the appellant and his codefendant Elizabeth Piepenberg is not sustained by the evidence. Rizzo received from the plaintiffs \$500, which they intended should be paid to the owner as a deposit on their contract. But he, at this time, had in his possession a binding contract for the conveyance of the same land to the plaintiffs, which called for a deposit of only \$100, and this sum is all that he paid to the owner. There is no evidence, unless it be a very doubtful inference, that the plaintiffs knew of this contract. Having established their right to recover the \$500, we think it is clear that the liability to the plaintiffs on the part of the appellant and Elizabeth Piepenberg was not joint but several, and consisted of an obligation to repay the amount which they respectively received, viz., \$400 and \$100, if the appellant was acting as the agent of the plaintiffs, or of an obligation on the part of Rizzo to repay the whole amount if he was acting as a principal. The case of *Robinson v. Easton, Eldridge & Co.*, 93 Cal. 80, 28 Pac. 796, 27 Am. St. Rep. 167, presents some features similar to the case at bar. *Easton, Eldridge & Co.* were the authorized agents of Robinson for the sale of a parcel of land, but under a contract by which their compensation was to be the excess received for the land over the sum of \$10,000. The agents entered into a contract with a prospective purchaser at a price of \$10,500. A deposit on the contract having been made with the agents, it was subsequently returned by them to the purchaser in pursuance of one of the conditions of the contract of sale. Thereafter Robinson sued the agents for this sum, claiming that it belonged to him immediately it was received by them; but it was

held that the fact that the agents had an interest on their own account in the price to be received for the land clothed them with certain of the rights of a principal, as distinguished from the obligations of an agent. It may well be that in the present case the difference between the amounts of the first payment called for by the two contracts of sale, viz., the sum of \$400, remained in the hands of Rizzo as a principal.

It is also insisted by the appellant that the plaintiffs were not entitled to recover the amount of their deposit without a tender of performance upon their part, that time was not of the essence of this contract, and that therefore the vendor was entitled to a reasonable time, after the expiration of the 30 days allowed in the contract, in which to perfect her title.

[3] It is not necessary, in order that time shall be of the essence of a contract that it shall be so declared in those words. Any provision in the contract from which that intention clearly appears is sufficient. *Martin v. Morgan*, 87 Cal. 203, 25 Pac. 350, 22 Am. St. Rep. 240. In the present case the return of the deposit is specifically provided for by the contract in the event that good title could not be given within the time allowed. It was admitted by the defendant Weil, the vendor's agent, as a witness at the trial, that his principal could not comply with this requirement of the contract. The plaintiffs therefore were entitled to the return of their money under the affirmative provisions of the agreement.

The finding of the court that the appellant and his codefendant Piepenberg received \$500 to the use of the plaintiffs not being, in our opinion, supported by the evidence, the judgment against this appellant must be reversed, and it is so ordered.

We concur: LENNON, P. J.; RICHARDS, J.

27 Cal. App. 793

DEPAVO et al. v. RIZZO et al.
(Civ. No. 1555.)

(District Court of Appeal, First District, California. April 21, 1915.)

Appeal from Superior Court, Alameda County; Wm. H. Donahue, Judge.

Action by F. Depavo and Luigi Giachino against Elizabeth Piepenberg and others. Judgment for plaintiffs, and the named defendant appeals. Reversed.

W. E. Rode, of Oakland, and Rose & Glidden and Stetson & Koford, all of San Francisco, for appellant. Aldrich & Gentry, of Oakland, for respondents.

PER CURIAM. This is an appeal from the judgment by the defendant Elizabeth Piepenberg and from an order denying her motion for a new trial.

The facts are the same as in the case bearing the same name as the present but numbered 1494, this day decided (149 Pac. 793). Both appeals are from the same judgment, but taken

by different defendants and by different methods. The points here urged in support of the appeal are there considered and decided, and the conclusion reached that the case should be reversed. For the reasons there given the judgment against this appellant should also be reversed, as also the order denying her motion for a new trial, and it is so ordered.

27 Cal. App. 316

PEOPLE v. CUIN. (Cr. 383.)

(District Court of Appeal, Second District, California. May 1, 1915.)

1. CRIMINAL LAW — 1169 — HARMLESS ERROR — ADMISSIBILITY OF EVIDENCE — IDENTITY.

In a prosecution for the larceny of a cow belonging to L., where the evidence was conflicting as to whether the cow which defendant sold to a third person was the cow belonging to L., the admission of evidence that witness obtained from defendant and his brothers a light-colored Jersey cow, which L. claimed had disappeared at the same time as the cow which defendant sold, and that such Jersey cow had been removed from the witness' pasture and shot and killed, was reversible error, where the prosecution had in no way connected defendant with the theft of the second cow.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. — 1169.]

2. WITNESSES — 370 — IMPEACHMENT — ILLICIT RELATIONS WITH DEFENDANT.

In a prosecution for the larceny of a cow owned by a named person, who had leased it with others to the one from whose possession it was taken, evidence of the lessee's illicit relations with the defendant was not admissible to impeach the lessee's credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1189; Dec. Dig. — 370.]

3. CRIMINAL LAW — 1043 — APPEAL — NECESSITY OF OBJECTION BELOW — MISCONDUCT OF DISTRICT ATTORNEY.

Where defendant, at the trial, did not specifically assign the district attorney's misconduct as the basis for his objection to the attempt to introduce inadmissible evidence, his misconduct was not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. — 1043.]

4. CRIMINAL LAW — 683 — TRIAL — EVIDENCE — REBUTTAL.

It was within the discretion of the court to allow a witness to be called in rebuttal and to give testimony which more properly should have been introduced on the main case for the prosecution, where defendant was given an opportunity to rebut such testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615-1617; Dec. Dig. — 683.]

5. CRIMINAL LAW — 824 — INSTRUCTIONS — NECESSITY OF REQUEST — REASONABLE DOUBT.

The court's failure to give an instruction specifically defining reasonable doubt was not error in the absence of a request therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. — 824.]

6. CRIMINAL LAW — 761 — INSTRUCTIONS — ASSUMPTION OF FACT.

In a prosecution for larceny, an instruction that if the jury believed from the evidence that defendant was found "with the stolen prop-

erty in his possession" improperly assumed that the cow had been shown to have been stolen.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1764, 1771, 1853; Dec. Dig. ¶ 761.]

7. LARCENY ¶ 70—INSTRUCTIONS—INTENT.

In a prosecution for grand larceny, an instruction that, to constitute larceny, there must be a felonious and fraudulent taking of the property with the intent to deprive the owner of its use, and that such taking must be accompanied by the removal, but that such removal was sufficient, was ambiguous.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 182, 183, 185, 186; Dec. Dig. ¶ 70.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

U. S. Cuin was convicted of grand larceny, and he appeals. Reversed.

O. V. Willson and Willson & Frazier, all of El Centro, for appellant. U. S. Webb, Atty. Gen., and R. M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of grand larceny and sentenced to serve a term in the state penitentiary. There was a motion for a new trial, and an appeal was then taken from the judgment and from the order denying that motion.

The subject of the alleged larceny was a certain cow belonging to one Lammers. By the testimony it was shown that Lammers, being the owner of a lot of cows, leased 11 of them to a Mrs. Elliott, who was conducting a dairy a short distance from the town of El Centro, in Imperial county. Mrs. Elliott received the cows in July, 1914. In September Lammers visited the Elliott ranch and found only 9 of the 11 cows there. He was told that the two had jumped out of the field into another pasture. At another time, as Lammers testified, Mrs. Elliott stated that the 2 cows had strayed off. Upon making a search for the missing cows, Lammers discovered on the ranch of one Gibson, which was several miles away, the carcass of a cow, with the hide, head, and horns, which he identified as being those of one of the missing cows. The color of the hide, he testified, was like that of his cow, but he particularly based his identification upon the peculiar shape of one of the horns, which was misshapen or "drooped." By other testimony it was shown that Gibson had purchased this cow from the defendant, and that the animal had shortly thereafter been mysteriously shot, from the effects of which it died within a few days. It appeared that the defendant had from time to time, for a number of years, been in the employ of Mrs. Elliott, and that he was in her employ at the time when the two cows were missed from the herd. Lammers testified that all of the cows which he leased to Mrs. Elliott, but one, were without horns, and that he had agreed with Mrs. Elliott that she might

dehorn that animal, and that he would allow her \$1 therefor, which he afterwards paid. Mrs. Elliott testified that the animal was dehorned by the defendant at her order, and that she saw the "bloody horns" after the operation had been performed and also milked the cow after her horns had been removed. The father of the defendant testified to having sold to defendant a cow answering the description of the one which defendant sold to Gibson. This statement does not include all of the evidence, but sufficient is shown to make it appear that there was a decided conflict in the testimony as to whether the cow which defendant had sold to Gibson was the cow of Lammers. If the testimony as to the dehorning of the animal was true, then, of course, the head and horns inspected by Lammers could not have been those of either of the animals which had been separated from the lot of 11 cows leased to Mrs. Elliott.

[1] Under this state of conflict of evidence, we think the court committed prejudicial error in allowing certain testimony to be admitted over the objection of the appellant. It appeared that defendant had several brothers. While a witness named Dunegan was on the stand the district attorney asked the following question: "Q. Did you obtain from the Cuin boys a light-colored Jersey cow?" This question was objected to, and the court inquired as to whether this related to any of the stock that had been referred to, and the district attorney replied: "Yes, sir; this is in regard to that light-colored Jersey cow which Mr. Lammers said disappeared at the same time this cow that Mr. Gibson got." The court thereupon overruled the objection, and the witness answered the question: "A. Yes, sir." When asked what became of that cow, he answered that she had been removed from his pasture and taken about a mile away and shot and killed. The prosecution had not in any way connected the appellant with the theft of the second cow, and the effect of this testimony was to intimate to the jury that some of the Cuin brothers had stolen that cow. The fact that she had also been shot in a mysterious way, as intimated by the witness, would have a tendency to cause the jury to assume that the defendant was in some way connected with the theft of the other cow when he was not charged with having stolen it. The same witness testified that he had sworn to a complaint charging another one of the Cuin boys with having stolen this second cow. It is altogether probable that the jury took into consideration this testimony as indicating the guilt of defendant, because it appeared that some other members of his family had had a part in disposing of the second cow belonging to Lammers.

[2] Objection was made at the trial, and it is renewed here as illustrating error, that

the district attorney was guilty of misconduct in his examination of certain witnesses. It does appear that improper questions were asked of Mrs. Elliott tending to impute to her illicit relations with the defendant, which method of impeaching the credibility of a witness is not permissible.

[3] However, as to all of the matters wherein misconduct of the district attorney is charged, it does not appear that at the trial appellant specifically assigned misconduct as the basis for his objections. These errors, therefore, are not reviewable. *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256, and cases therein cited.

[4] It was within the discretion of the court to allow a witness to be called in rebuttal and to give testimony which more properly should have been introduced on the main case for the prosecution, where the defendant was allowed an opportunity to rebut such testimony, if he desired. It does not appear that he was denied that right.

[5] We do not think that the failure of the court to give an instruction specifically defining reasonable doubt, in the absence of a request therefor, was error.

[6, 7] Among the instructions given are two, which are justly subject to the criticism which appellant makes of them: One was to the effect that if the jury believed from the evidence that the defendant was found "with the stolen property in his possession," etc. This instruction improperly assumed that the cow had been shown to have been stolen, when the fact was one directly in issue and, under the testimony, a debatable question. Another instruction given was as follows:

"The jury is instructed that, to constitute larceny, there must be a felonious and fraudulent taking of the property with the intent to deprive the owner of its use. The taking must be accompanied by the removal, but such removal is sufficient."

This instruction is ambiguous and may have been misleading to the jury. In a clear case it should not perhaps be said that these errors in the instructions were sufficient to warrant a reversal, but taking the matter of the improper introduction of the testimony mentioned, together with the other errors noted, we think it is evident from the entire record that there has been in this case a miscarriage of justice.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

27 Cal. App. 271

GOLDEN v. FISCHER et al. (Civ. 1336.)

(District Court of Appeal, Third District, California. April 28, 1915.)

1. CORPORATIONS ⇨123—TRANSFER OF STOCK—PLEDGE—COMPLAINT—SUFFICIENCY.

A complaint which alleges the transfer of stock to secure a note, and that the payee refused to accept payment of the note or return

the stock, and prays for cancellation of the note and a retransfer of the stock, states a cause of action on the theory that the transaction was a pledge and not a sale of the stock or as invoking the equitable remedy of cancellation, and does not state a cause of action in claim and delivery.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. ⇨123.]

2. REPLEVIN ⇨58 — COMPLAINT — SUFFICIENCY.

A complaint in claim and delivery, which alleges that plaintiff's assignor was the owner of the personalty in question up to and including the time he assigned the property and his right to sue for it to plaintiff, and which shows that plaintiff brought his action the day following the assignment, alleging that the property had been previously assigned to him, states a cause of action in claim and delivery, good against a general demurrer.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 211-214; Dec. Dig. ⇨58.]

3. CORPORATIONS ⇨123—STOCK—ABSOLUTE TRANSFER AS PLEDGE—EVIDENCE.

Evidence held to sustain a finding that a transfer of corporate stock by the maker of a note to the payee was not a sale, but a pledge.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. ⇨123.]

4. CORPORATIONS ⇨123 — STOCK — PLEDGE DISTINGUISHED FROM SALE.

Where a maker of a note executed an instrument which recited the indebtedness and the pledge of certain stock to secure it, and which provided that it was mutually agreed that the debt should be canceled and that the maker should have the right to purchase the same, at any time prior to a designated future date, for the amount of the debt and interest, the instrument did not evidence a sale of the stock, or, if so, the maker had the absolute right to repurchase it within the time specified.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. ⇨123.]

5. CORPORATIONS ⇨123—STOCK—PLEDGE—PLEADING—EVIDENCE.

A complaint, praying for the cancellation of a note and the retransfer of corporate stock pledged to secure it, need not allege actual fraud by the payee in securing the signature of the maker to an instrument transferring the stock to the payee, subject to an option to the maker to repurchase within a specified time, to permit evidence that the instrument was not intended to evidence a sale, for the act of the payee in claiming ownership of the stock was an essential ingredient of the action, and the fraud, if any, of the payee, could be proved, provided the complaint pleaded the facts of the transaction sufficient to raise the implication of fraud, or showing that the claim of the payee, if sustained, would work a fraud on the rights of the maker.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. ⇨123.]

6. MORTGAGES ⇨37 — ABSOLUTE DEEDS AS MORTGAGES—EVIDENCE.

Parol evidence is admissible to show that a deed absolute in form is in fact a mortgage, though there was no actual fraud imputed to the mortgagee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 97-107; Dec. Dig. ⇨37.]

7. CORPORATIONS 123 — STOCK — SALE OR PLEDGE—EVIDENCE.

Parol evidence is admissible to show that a transaction on its face a sale of corporate stock was but a pledge thereof to secure a debt.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. 123.]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Albert E. Golden against Oscar Fischer and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

West & de Journal, of San Francisco (T. C. West, of San Francisco, of counsel), for appellant. Jas. H. Boyer, of San Francisco, for respondent Golden. Seidenberg & Davis, of San Francisco, for respondent National Wireless Telephone & Telegraph Co.

HART, J. The object of this suit is to obtain a decree for the cancellation and surrendering to the plaintiff of a certain promissory note, executed and delivered to the appellant by the plaintiff's assignor, and for the retransfer of 80,000 shares of stock in the Aerial Telephone & Power Company, a corporation, which were pledged by the plaintiff's assignor to the appellant to secure the payment of said note. The action was tried by the court sitting without a jury, and the plaintiff was given judgment, from which this appeal, supported by a bill of exceptions, is presented by the defendant Fischer.

The complaint states that the plaintiff's assignor, Frank J. Golden, on or about the 23d day of June, 1911, borrowed from the defendant Oscar Fischer the sum of \$1,000, gave the latter his promissory note as evidence thereof, payable on the 23d day of September, 1911, and as security for its payment pledged, assigned, and delivered to said Fischer 80,000 shares of the capital stock of the Aerial Telephone & Power Company; that on the 1st day of April, 1912, the said Aerial Company by due legal proceedings had in the superior court in and for the city and county of San Francisco, was dissolved, and the directors thereof ordered to distribute its property to its stockholders, in proportion to the amount of stock held by said stockholders; that prior to the dissolution so effected the Aerial Company transferred and conveyed to the defendant National Wireless Telephone & Telegraph Company all its assets and property for and in consideration of the transfer to said Aerial Company of 700,000 shares of the capital stock of said defendant Wireless Company, and that in the distribution of the assets of the Aerial Company the plaintiff's assignor became entitled to 80,000 shares of said Wireless Company; that the stock pledged to the defendant Fischer, as above explained, entitled the plaintiff's assignor to 80,000 shares of the capital stock of the said Wireless Company.

It is further alleged that the said Frank J. Golden was the sole and exclusive owner of said stock on the 23d day of June, 1911, on which day, as seen, he transferred the same as a pledge to Fischer to secure said note; that the appellant has never sold said stock or foreclosed said pledge; that on the 23d day of August, 1912 (the day immediately preceding that upon which this action was instituted), said Frank J. Golden tendered to Fischer the amount of the indebtedness then due on said note, but that Fischer then refused "and still refuses" to accept payment of said indebtedness or to return the said stock to the said Frank J. Golden or to the plaintiff; that, on said 23d day of August, 1912, said Golden assigned to the plaintiff said stock and any cause of action accruing in his favor and against the defendants by reason of the transaction described in the complaint. The complaint also contains averments entitling the plaintiff to pendente lite injunctive protection against the sale or other disposition of the stock by Fischer.

The complaint was not challenged on special grounds, but the defendant Fischer interposed thereto a general demurrer, which was overruled, and thereupon he replied to the complaint by way of a plea in confession and avoidance. Thus he admitted that the stock referred to in the complaint was pledged to him by Frank J. Golden to secure the latter's promissory note, mentioned in the complaint, but alleged that, on or about the 7th day of June, 1912, "the said Frank J. Golden, by an instrument in writing, in consideration of the cancellation of the said debt then due, owing, and unpaid by him to this defendant as aforesaid, sold, conveyed, transferred, and delivered to this defendant all his right, title, and interest in and to the said stock." Certain other allegations of the complaint, to wit, that Fischer, after the note became due and payable, agreed to extend the time for its payment from month to month, that on the 23d day of August, 1912, there remained due Fischer on said note the sum of \$1,100, or any other sum, that said Golden, on the 23d day of August, 1912, tendered Fischer full payment of said note, and that said Golden demanded the cancellation and return of said note, are denied.

[1, 2] The point first submitted by the appellant is that the court erred in overruling the demurrer to the first amended complaint. The contention is that this is an action in claim and delivery, and that, to state such a cause of action, it is essential that the complaint should expressly aver that the plaintiff is the owner or entitled to the possession of the property so sought to be reclaimed, and that the complaint here nowhere contains such an averment. As we view this action, the ultimate purpose thereof is, substantially, to secure a decree declaring that the transaction involved here constituted a

pledge, rather than the sale of the property in dispute, and is analogous to an action to have a deed, absolute upon its face, declared to have been intended by the parties to operate as a mortgage only. But, if this view of the nature of the relief here sought be, strictly speaking, incorrect, it is nevertheless true that the remedy invoked by the prayer of the complaint and which is justified by the averments thereof, while necessarily having the effect, upon the granting of the relief appropriate thereto, of establishing in the plaintiff the ownership of the stock and the right to the return thereof (conditioned, of course, upon the payment of the indebtedness for which it was pledged) is not appropriate to claim and delivery but is the equitable remedy of cancellation. We therefore conclude that in no view is the action claim and delivery in form.

Conceding, however, for the purposes of this decision, that the action is in claim and delivery, still we believe that the complaint, as against a general demurrer, meets the requirement of such an action in the particular as to which it is thus challenged. All through that pleading it is alleged that Frank J. Golden was the owner of the stock in question up to and including the 23d day of August, 1912, when, it is alleged, he assigned the stock and his right to sue for it to the plaintiff, and the plaintiff brought this action the day following said assignment, alleging that the stock had previously been assigned to him. This case, therefore, comes squarely within the rule as laid down in the cases of *Irish v. Sunderhaus*, 122 Cal. 308, 54 Pac. 1113, and *Krieger v. Feeny*, 14 Cal. App. 543, 112 Pac. 903, wherein it is held that, where a complaint alleges that the claim upon which the plaintiff declares "was duly assigned to this plaintiff before the commencement of this action," the pleading, while perhaps insufficient to withstand the attack of a special demurrer, is good as against a general demurrer.

[3] It is next insisted that the findings are not supported by the evidence, but there is clearly no substantial ground for such an objection here, as a brief examination of the testimony will readily disclose. As stated in the complaint, Frank J. Golden, on the 23d day of June, 1911, borrowed from the defendant Fischer the sum of \$1,000, gave the latter his note therefor payable three months from its date, and, to secure the repayment of the money so borrowed, pledged to Fischer 80,000 shares of stock of the Aerial Company. This stock, so a witness testified, was worth about 15 cents per share, or \$11,000 in excess of the sum to secure the repayment of which it was pledged.

Golden testified that he paid the interest on the note and that, about the time of the date of its maturity (September 23, 1911), an oral understanding was had between him and Fischer that the time of the payment of

the principal should be postponed or extended from month to month. Agreeably to this understanding, the note was on said September 23d renewed, the interest having been paid up to that date, upon the further understanding that from that time on Golden was to pay interest on the note at the rate of \$25 per month in advance. Thus the matter stood until the 7th day of June, 1912, when Golden, at the request of Fischer, signed a document presented to him by the latter, and which purported to evidence the sale of said stock by Golden to Fischer. The instrument recited the fact of the indebtedness of Golden to Fischer, as evidenced by the promissory note of the former, the fact of the pledging of the stock in question to secure the payment of said indebtedness, and the fact that said indebtedness "was now past due and unpaid," and concluded with a statement that "it is hereby mutually agreed by and between said parties that said debt shall be and is hereby canceled, and said stock shall now become the property of Oscar Fischer," and that "said Frank J. Golden, his successors or assigns, or the bearer of the duplicate of this agreement, shall have the right or option to purchase said stock at any time to the 23d day of July, 1912, for the sum of \$1,100."

Explaining the motive for the execution of the foregoing document, Golden testified that, just prior to its execution, Fischer called at his (Golden's) office and said to him that he had been advised that, in case "anything happened" to Golden and it became necessary to enforce a collection of the note, he (Fischer) would be compelled to bring an action, obtain a judgment, and then sell the stock under an execution, and then proposed, in order to avoid the expense and trouble of an action, that Golden sign the instrument above referred to. Fischer added:

"Now, if you will sign this agreement, the matters can run on just the same as they have heretofore. You may pay the interest as you have paid it, and when you are ready, you may take up the stock."

Golden replied that he was willing to sign the agreement, but that he would consider the transaction in the same light as it always had been. Golden further said to Fischer that he had received several offers to buy the stock, but had refused them. He also said that a Mr. Goldman would lend him the money to take up the stock whenever he desired to do so. Fischer replied that he (Golden) "had just as well let this loan stand until he (Fischer) needed the money." Thereupon, with the distinct understanding that the nature of the transaction as it was originally executed should not thereby be changed or affected, Golden signed the instrument or agreement, to which Fischer also subscribed his name.

The promissory note was not, at the time of the execution of said agreement, nor at any other time, redelivered by Fischer to

Golden; the former still holding it when the trial of this action took place. Frank J. Golden testified that he received no money or property of any other kind, or was given no promise of money or other property by Fischer or any other person, for signing the agreement. On the 23d day of July, 1912, which was the last day of the time within which, under the agreement, Golden or his successors in interest might exercise the "option" of "repurchasing" the stock, Golden called on Fischer and offered to take up the note and the stock by the payment of the amount then due; but, according to Golden's testimony, Fischer refused the offer, saying to Golden: "Let it run another month. I don't want the money to-day." It was then agreed between them that the time for the payment of the money be extended to the 23d day of August, 1912. On the 22d day of August, 1912, Golden met Fischer at an office in the Mills Building, San Francisco, and, testified Golden:

"I told him that I would be ready to pay him the \$1,125 due on this loan on the following day, the 23d, the day upon which it was due. Mr. Fischer was first evasive, and then he finally said 'Frank, I don't believe I will let you have that stock; that stock is mine.' 'Well,' I says, 'how do you make that out?' 'Well,' he says, 'you didn't take it up on the 23d of July, as you agreed, and I have decided to keep the stock.'"

Golden thereupon stated to Fischer that he (Golden) had the money with which to pay the debt and would have it in his (Golden's) office between 12 and 1 o'clock the following day, August 23d. Fischer replied that he would not accept the money, but would retain the stock. Fischer, however, finally promised Golden that he would call at the latter's office the next day between the hours of 12 and 1 o'clock; but he failed to keep his promise. Thereafter, and on said 23d day of August, Golden, with the sum of \$1,125 in gold (the amount of the debt) in his possession and accompanied by the plaintiff, called at the residence of Fischer, the latter having no office at that time, for the purpose of paying off the indebtedness. Fischer was not then at his residence, according to information Golden received there, and he repeated the visit to said residence four different times thereafter on that day, with the same result. Golden then prepared a letter, addressed to Fischer, and deposited the same under the door of the latter's residence, in which he informed Fischer that he (Golden) had remained at his office between the hours of 12 and 1 o'clock that day, but that Fischer failed to keep his promise to be at said office at that time; that he thereupon visited his (Fischer's) residence, at No. 488 Frederick street, "several times this afternoon and evening to pay you the sum of \$1,125, the amount due you, * * * but received no response to the door bell"; that "I am prepared to pay you said sum of \$1,125 in United States gold coin, and also any and all other sums due you on my promissory note or otherwise, and de-

mand from you the cancellation of said note and the retransfer of said 80,000 shares of stock." The letter, continuing, concluded as follows:

"Please call at my office, 802 Hewes Building, San Francisco, and receive said money, or telephone me at my office, Douglass 832, and I will meet you at any place you designate and pay all sums of money due you and receive said note and stock."

Fischer made no reply to said letter, nor would he ever receive the money from Golden in extinguishment of the obligation evidenced by Golden's note.

Annie Miller, stenographer in Frank J. Golden's office, testified that she was present in said office on the 23d day of July, 1912, when the defendant, Fischer, was there, and that she heard the latter say to Golden, "Well, Frank, we will let our matter go until next month;" to which Golden replied, "Well, Mr. Fischer, if you need the money, I have made arrangements with Mr. Goldman, and I can get it for you." Fischer retorted, "Oh, that's all right; you have got enough trouble this month [referring to a death which occurred in Golden's family a few days previously]; I won't need it until next month."

We have now presented a synopsis of all the testimony introduced in the case, and to which the appellant affirmatively vouchsafed no reply by way of proof. The defendant Fischer moved for a nonsuit on the close of the plaintiff's case, and the same was denied.

[4] There is hardly any necessity for a discussion here of the effect of the testimony, for it plainly speaks for itself. No one can read it and find any possible reason for doubting that it not only amply supports, but that it justified, the finding that the transaction of June 7, 1912, whereby the parties to this appeal executed the agreement purporting to be evidence of the sale of the stock by Golden to Fischer, did not in fact constitute a sale, and that it was not intended or understood to operate as such. The character and the language of the instrument itself seem to us to sustain the testimony of Golden upon that point. It is not, in form, strictly a bill of sale, which is ordinarily the mode of evidencing the transfer of title to personal property, even though such an instrument as the one here might, under certain conceivable circumstances (not present here), properly be so construed. It is a bilateral agreement and between a pledgor and pledgee of the stock, and, considered by the light of the only testimony in the case, undoubtedly it was intended to mean that, within the time specified, Golden or his successors or assigns, "or the bearer of the duplicate of this agreement," may secure a return of the stock by paying the amount of Golden's indebtedness to Fischer.

But even if the agreement, upon its face, might be construed according to the view of the appellant, it is very plain that such a construction, under the testimony as to the

value of the stock, would lead to an obvious absurdity, and the rule is that, where the language of a contract is not altogether free from ambiguity as to its meaning, such language must not be given an interpretation which would involve an absurdity. Section 1638, Civ. Code. The disparity between the value of the stock, as fixed by the witness Leon Goldman, a stockbroker, and the amount for which Fischer claims to have purchased it from Frank J. Golden, is so great as to irresistibly lead to the conclusion that the latter could not have intended the transaction as a sale. It is scarcely necessary to suggest that no one in his right senses would transfer the title to property of the approximate value of \$12,000 to another in consideration of a promissory note for the sum of \$1,125. Nor is it probable, if the transaction had been intended as a sale that the vendor would not have insisted upon a cancellation and redelivery to him, at the time of the sale, of his promissory note, which constituted, according to the agreement, the sole consideration for the alleged transfer. But, even if the transaction was intended as a sale, Golden had the absolute right or option to repurchase the stock within the time specified in the agreement; and that he offered to "repurchase" it within said time, as the court found was true, is borne out by the undisputed testimony of Golden, the appellant himself, however, at that time insisting that the matter of the "repurchase" be postponed for another month from the last day of said time, and Golden agreeing thereto, and renewing his offer at the time to which it was thus extended.

But we have sufficiently dwelt upon the point that the evidence does not support the findings of fact vital to the support of the judgment. As before stated, there is no possible ground to support the claim that it does not. In fact, so far as this claim is concerned, this appeal is not even within the shadow of a foundation for its support.

[5] It is next claimed that the court seriously erred, with resultant damage to the rights of the appellant, in allowing parol evidence showing that the transaction of June 7, 1912, did not involve a sale, or was not intended to change the legal relations of the parties as they had up to that time existed. It seems to be the view of learned counsel that, to render parol testimony admissible for the purpose of showing that an instrument of the character of the one here was not intended to have the effect which its language might imply, it is necessary to charge in the complaint actual fraud or coercion or some other illegal means in the procurement of the execution of the writing. But we hold this to be an erroneous view so far as it is sought to be applied to the case at bar. It was not requisite to plead actual fraud or a resort to other illegal methods in securing the signature of Golden to the agreement to justify

the admission of testimony, extrinsic to the agreement itself, showing or tending to show that said instrument was not intended to stand as the evidence of a sale. Indeed, there was no evidence to support allegations of actual fraud or coercion in the procurement of the execution of the agreement, and the agreement, in its conception, inception, and execution, so far as the evidence gives any direct information on the subject, might have been characterized by perfect good faith on the part of Fischer and with the intention in him then that it should operate as Golden testified was the understood purpose of the parties with respect thereto at the time of its execution. The fraud, so far as there is any direct disclosure upon that subject by the proofs, arose in the subsequent act of Fischer in attempting to treat the agreement as an evidence of a sale of the property rather than as a pledge thereof to secure a debt vastly less in amount than the value of the property. The facts as to his conduct in claiming ownership of the stock upon his construction of the agreement speak for themselves, and, if fraud was an essential ingredient of the action, it was only necessary to plead the facts of the transaction as they occurred to raise the implication of fraud, or to show that the claim of Fischer, if sustained, would work a fraud upon the just rights of Golden.

[6] But it is as firmly settled as any rule of law may be that parol testimony is competent to show that a deed, absolute upon its face, was not, as a matter of fact, intended to convey the absolute fee, but to operate only as a mortgage, and this relief is available in such a case, even if there was no actual fraud imputed to the mortgagee in the transaction. It is only necessary to refer to a few cases lucidly explaining and aptly applying this principle. See *Peninsula, etc., Co. v. Pacific S. W. Co.*, 123 Cal. 694, 56 Pac. 604; *Woods v. Jensen*, 130 Cal. 206, 62 Pac. 473; *Couts v. Winston*, 153 Cal. 690, 96 Pac. 357.

[7] There is no reason in principle why the same rule should not appropriately be applied where the subject of the transaction is personal property, and we hold that it does, and that the rulings complained of did not contravene the rule forbidding the alteration, or variation, or modification of a written instrument by parol testimony, and were therefore legally proper and correct.

There are some other rulings admitting certain testimony to which exceptions were reserved, and which are here urged as having been of sufficient force to exert a prejudicial influence in producing the result arrived at by the trial court. We have examined these rulings, and are convinced from such examination that their effect was only to admit into the record relevant, competent, and peculiarly pertinent testimony under the theory of the action as we understand and have explained it.

The motion for a nonsuit was properly denied, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

27 Cal. App. 288

PEOPLE v. SOULEOTES. (Cr. 574.)

(District Court of Appeal, First District, California. April 30, 1915.)

1. INFANTS $\hookrightarrow$ 20—CRIMINAL RESPONSIBILITY—INDECENT ASSAULT.

In a prosecution for committing a lewd and lascivious act with a child 13 years old, evidence held not to warrant setting the verdict aside as having been rendered under the influence of passion or prejudice.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 20; Dec. Dig. $\hookrightarrow$ 20.]

2. WITNESSES $\hookrightarrow$ 372—CREDIBILITY.

Questions on cross-examination to a witness in a criminal case, eliciting testimony that she had been intimate with defendant, are proper as tending to show her interest in defendant, affecting credibility.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1192-1199; Dec. Dig. $\hookrightarrow$ 372.]

3. CRIMINAL LAW $\hookrightarrow$ 1036—APPEAL AND ERROR—RESERVATION OF OBJECTIONS.

Where an objection to a question in a criminal case is sustained and its asking is not objected to as misconduct, defendant cannot on appeal complain thereof.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. $\hookrightarrow$ 1036.]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

John Souleotes was convicted of committing a lewd and lascivious act with a child 13 years old, and from the judgment and from denial of a new trial he appeals. Affirmed.

See, also, 146 Pac. 903.

Albert L. Johnson and F. J. Schuhl, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. The defendant was informed against for committing a lewd and lascivious act with a child 13 years of age. He was found guilty, and sentenced to 15 years in the state prison. This appeal is taken from the judgment and from an order denying defendant's motion for a new trial.

The prosecutrix and the defendant lived on the same floor in a hotel on Third street in San Francisco. According to her testimony the defendant on December 20, 1913, at about 4 o'clock in the afternoon, came into the kitchen of a 3-room suite, in which she lived with her parents, and asked her to go outside in the hall with him. Arriving there, and while near the kitchen door and also near the door of his own room, he raised the child's clothes and committed the act complained of. Neither the father nor mother were present when the defendant invited the child to go into the hallway with him. She

testified that while she resented the defendant's conduct she made no outcry because he asked her not to do so, and that she was not afraid of him. The hallway was dimly lighted. She did not report the incident to her parents, and never in fact told any one about it until about nine months later, when, upon request, she told the whole story to detectives of the San Francisco police department.

[1] While we are satisfied that the act charged did not occur exactly as narrated—in the daytime, in the hallway of a big hotel, between two rooms to which the defendant had access, and in either of which the act could have been performed with some security against discovery—and while we feel that the story told by the girl does contain certain elements of improbability, which were doubtless argued to and considered by the jury, still we are not prepared to say that the story as a whole is so inherently improbable as to require the setting aside of the verdict upon the ground that it must have been rendered under the influence of passion or prejudice.

[2] We find no error in the rulings of the court on the cross-examination of the mother of the prosecutrix. She was the only witness called for the defendant; and she testified on direct examination that her daughter had admitted to her, after the information against the defendant had been filed, that the defendant had never tampered with her. On cross-examination she denied that she was friendly with the defendant; but later, in answer to several questions over objection, she admitted that she was intimate with the defendant, and had had on a number of occasions sexual intercourse with him. Such questions were plainly proper as tending to show her interest in the defendant, and thereby affecting her credibility as a witness.

[3] The district attorney also asked the witness this question: "You are proud of it, are you? In other words, you also took sides with him when he was prosecuted for committing rape upon your other daughter?" The objection to this question was sustained; and as the asking of it was not assigned as misconduct, we are at a loss to understand how the defendant can be heard now to complain, even if it be conceded that the question was improper, which of course is not done.

The judgment and order are affirmed.

27 Cal. App. 285

PEOPLE v. FERNS. (Cr. 541.)

(District Court of Appeal, First District, California. April 30, 1915.)

1. BURGLARY $\hookrightarrow$ 41—BREAKING—SUFFICIENCY OF EVIDENCE.

In a prosecution for burglary, evidence held sufficient on the point of unlawful breaking to support a conviction.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 94-103, 109; Dec. Dig. $\hookrightarrow$ 41.]

2. BURGLARY — UNLAWFUL ENTRY.

Where defendant entered a lodging house keeper's room for the purpose and with the intent to commit grand or petty larceny, he was guilty of burglary under Pen. Code, § 459, providing that every person who enters any room with intent to commit grand or petty larceny, or any felony, is guilty of burglary.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 6-12; Dec. Dig. —9.]

3. BURGLARY — VALUE OF PROPERTY TAKEN.

Where defendant had entered a lodging house room with intent to steal, he was guilty of burglary, whether or not the property taken was of sufficient value to make the taking a felony, since Pen. Code, § 459, defining the offense of burglary, provides that every person who enters any room with intent to commit grand or petty larceny, or any felony, is guilty of "burglary."

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 1-3; Dec. Dig. —2.

For other definitions, see Words and Phrases, First and Second Series, Burglary.]

4. BURGLARY — EVIDENCE — MILK CHECKS.

In a prosecution for burglary, where defendant was charged with stealing articles from a lodging house room, among them milk bottle tickets, such tickets found on his person, at his house, identified by the prosecuting witness as his own property, were admissible in evidence for the jury's consideration in passing upon the issue of defendant's guilt, although not sufficient in themselves to sustain a conviction.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 91; Dec. Dig. —38.]

5. WITNESSES — PRIVILEGE OF ACCUSED—STANDING UP FOR IDENTIFICATION.

In a prosecution for burglary, where the court compelled the defendant to stand up to be identified by a witness, there was no violation of Const. art. 1, § 13, providing that no defendant in a criminal case may be compelled to be a witness against himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1042, 1042½; Dec. Dig. —300.]

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Ben Ferns was convicted of burglary, and he appeals. Affirmed.

T. L. Christianson, of Oakland, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of the crime of burglary in the first degree, and this appeal is from the judgment and from an order denying the defendant's motion for a new trial.

The facts of the case pertinent to the decision of the points made in support of the appeal are substantially as follows: On the 2d day of February, 1914, the defendant occupied room 12 of a lodging house in Oakland kept by one Charles Fong. In the room were a number of articles, including a suit case, a small camera case, an overcoat, a pair of shoes, a steamboat ticket, and some milk bottle tickets. The defendant left the place at about 9 o'clock the next morning. At about 12 o'clock he reappeared, and asked Charles Fong if he might occupy the same room that night. Fong replied that he would

be using the room in the evening until 12 o'clock, and that probably for this reason the defendant would not want it. To this the latter made no reply, and the two separated. Later the defendant went to the wife of Fong, and told her that her husband had rented the room to him; whereupon Mrs. Fong delivered to him the key of the room. The next morning the defendant was seen leaving this room, and going in the direction of the street carrying a dress suit case, and about 8 o'clock in the evening the articles enumerated above were missing. When arrested, milk bottle tickets were found in the possession of the defendant, which he claimed belonged to him.

[1, 2] It is urged on behalf of the appellant that a breaking is an essential element of burglary; that the evidence shows that the entry was lawful, and hence that there could be no breaking. But the defendant resorted to a subterfuge to get possession of the room; he was seen leaving the place under suspicious circumstances, and when arrested he had in his possession certain personal property belonging to the prosecuting witness and taken from the room occupied by the defendant. The jury was justified in inferring from this evidence that the defendant entered the room with the intention of committing larceny. Consequently, as to this element of the crime of burglary called in question by the appellant, the proof was sufficient. No matter what may be said of the character of his entry, as to whether or not it was lawful, if he entered the room for the purpose and with the intent to commit the crime of grand or petty larceny, a perfect case of burglary was established. Penal Code, § 459; People v. Barry, 94 Cal. 481, 29 Pac. 1026; People v. Brittain, 142 Cal. 8, 75 Pac. 314, 100 Am. St. Rep. 95. In the former case the court held that one who enters a store with the intention of committing larceny is guilty of burglary, although the entry was made through the public entrance during business hours. Such person is not one of the public invited, and he has no right of entry.

[3] There is no merit in the appellant's next contention that there was no evidence to show that the property taken was of sufficient value to make the taking thereof a felony, for the reason that the statute defining the offense provides that every person who enters a room with intent to commit grand or petty larceny or any felony is guilty of burglary.

[4] Equally without merit is the appellant's assertion that the milk checks were not sufficiently identified to warrant their admission in evidence. They were identified by the prosecuting witness as his property; and they, having been found on the person of the defendant at the time of his arrest, were admissible in evidence, not as being sufficient in themselves to warrant or sustain his con-

viction, but as a circumstance which it was proper to place before the jury for their consideration in passing upon the guilt or innocence of the defendant. *People v. Lang*, 142 Cal. 482, 76 Pac. 222.

[5] It is next urged by counsel for the appellant that, by compelling the defendant to stand up at the time of the trial for the purpose of being identified by a witness, defendant was obliged to be a witness against himself, contrary to article 1 of section 13 of the state Constitution. It is settled law in this state that an order of court compelling the defendant to stand up for identification by a witness is proper, and does not compel the defendant to become a witness against himself. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Oliveria*, 127 Cal. 376, 380, 59 Pac. 772. There is therefore no merit in this contention of appellant.

There is no pretense that the appellant was not fully advised by the information as to the precise charge against him, and we have no doubt that the information sufficiently stated a public offense to support the judgment.

No error was committed by the trial court in its instructions to the jury.

The judgment and order are affirmed.

170 Cal. 408

BRILES et ux. v. PAULSON. (Sac. 2129.)
(Supreme Court of California. June 11, 1915.)

1. APPEAL AND ERROR ◊1011 — REVIEW—
FINDINGS OF FACT.

Where there is a substantial conflict in the evidence, the findings of the court below must be upheld.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ◊1011.]

2. VENDOR AND PURCHASER ◊18—OPTIONS
—TERMINATION—NONPERFORMANCE OF CON-
DITIONS.

Plaintiffs gave an option for the purchase of land for a specified price, the option requiring the holder thereof to do certain work upon a reservoir dam within a given time, and providing that on default of the holder of the option the plaintiffs might terminate the agreement and take possession, that the holder of the option should receive possession and continue in possession while the agreement remained in force, and that a specified rental should be paid. *Held* that, on the failure of the holder of the option to perform the required work within the time allowed, his rights ended, and plaintiffs could terminate the option; the provision for possession of the land not affecting the right to terminate the option.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. ◊18.]

Department 1. Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by John Briles and wife against A. J. Paulson. From a judgment for plaintiffs, defendant appeals. Affirmed.

Cornish & Robnett, of Alturas, for appellant. W. Lair Thompson, of Lakeview, Ore., and Jamison & Wylie, of Alturas, for respondents.

SLOSS, J. Appeal by defendant from a judgment in favor of the plaintiffs. The case presents a situation very similar to that recently considered by this court in *Briles v. Paulson*, 149 Pac. 169. Thomas Briles had there sued for the annulment of a contract whereby the defendant's predecessor was given an option to purchase certain lands. One of the provisions of the contract was that the holder of the option should, within a given time, do certain work upon a reservoir dam. The contract provided that, if the proposed purchaser should fail to carry out any of the stipulations on his part, the owner might declare the agreement terminated. The action sought a judgment declaring such termination by reason of the alleged failure of the defendant to do the required work on the dam. The judgment forfeiting the defendant's rights under the option was affirmed, the court deciding that the evidence supported the findings that the work on the dam had not been done within the prescribed time, and holding, further, that such failure warranted the judgment declaring the agreement terminated. The same points are involved in the present action, and they, without regard to other grounds upon which the plaintiff herein sought relief, are sufficient for an affirmation of the judgment.

The contract which forms the basis of this suit was made on December 5, 1910, between John Briles and Irene Briles, his wife, as parties of the first part, and J. J. Payseur, as party of the second part. Paulson, the defendant and appellant, is the assignee and successor of Payseur. By the contract the parties of the first part granted the party of the second part "the option of purchasing for the sum of eighty thousand (\$80,000) dollars, * * * at any time from the date of this agreement up to and until the thirty-first (31st) day of December, 1915, subject to the conditions herein contained," certain real estate situated in Modoc county. Provisions for the making of surveys and subdivisions and for the sale of subdivisions separately were made in terms similar to those contained in the contract between Thomas Briles and Payseur, involved in the former decision to which we have referred. The contract now before us refers to the dam on the land of Thomas Briles, and contains, with respect to that dam, the same stipulations found in the Thomas Briles contract. The subsequent modification of that stipulation mentioned in the former opinion covered the contract here involved as well as the contract between Thomas Briles and Payseur. The present contract also provides for the right of the parties of the first part to terminate the agreement and take possession of the prop-

erty on the failure of the party of the second part to "carry out and perform each and every agreement herein contained to be performed by him."

In all the particulars to which we have adverted, the contract upon which this action is based is virtually the same as the Thomas Briles contract. The present contract contains, in addition, a provision that the defendant shall receive possession of the lands on March 1, 1911, and shall continue in possession "while this agreement remains in force," farming the lands and taking all products therefrom, paying as rental for the use of said property "while he remains thereon and in possession thereof under this agreement" an annual rental of \$1,700. There is also a provision against the commission of waste by the party of the second part.

This action, like the one instituted by Thomas Briles, was brought to obtain a decree declaring the rights of the defendant under the agreement to be terminated for failure to perform the conditions undertaken to be performed by him. The plaintiffs also asked for the recovery of the possession of the premises. Judgment went in their favor as prayed.

The plaintiffs in their complaint counted upon three violations of the agreement by the defendant, to wit: The failure to pay the stipulated rent; the commission of waste; and failure to do the required work upon the dam within the time allowed by the agreement as modified. The court found in favor of the plaintiff upon all three grounds.

[1,2] It is unnecessary to consider the questions of waste and nonpayment of rent. The evidence fully sustains the finding that the work agreed to be done upon the dam was not done within the stipulated time. On this issue the evidence was substantially the same as that presented in the Thomas Briles Case, and it is therefore held here, as it was there, that there was a substantial conflict, and that the findings of the court below must be upheld. That the effect of such failure to perform the agreement relative to the dam authorized a termination of the contract is also settled by the decision in the former case. The agreement was plainly an option under which the defendant had a right to purchase upon compliance with certain conditions. Failing to comply with those conditions, his rights ended. It is argued that the agreement in this case is to be distinguished from the one considered in the other case because the present agreement gave the defendant a right to possession, subject to the payment of rent. The contention is that the present agreement is therefore not only an option, but also a lease. This argument implies that the defendant's rights as a defaulting tenant would be greater than his rights under an option to purchase. But, assuming the legal correctness of this position, it is

quite clear, from a reading of the agreement as a whole, that its principal object is to grant to the defendant the right to purchase the lands. The right of possession is subordinate and incident to the right to purchase. The party of the second part is to have possession of the land only "while this agreement remains in force," and he is to pay rental while he remains in possession "under the agreement." Plainly it was not intended to create a tenancy which should exist independently of the right of the defendant to purchase under the option. When the right to purchase the land was gone, the right of occupancy went with it. This is the more apparent upon a consideration of the clause authorizing the plaintiffs to terminate the agreement upon any breach by the defendant. Under this clause the plaintiffs are expressly authorized, upon terminating the agreement, to enter upon and take possession of the lands.

The case is therefore in all material respects like that of *Thomas Briles v. Paulson*, and must be decided in the same way.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J. ; SHAW, J.

170 Cal. 411

FRESNO CANAL & IRR. CO. v. PERRIN
et al. (S. F. 6473.)

(Supreme Court of California. June 11, 1915.
Rehearing Denied July 8, 1915.)

1. PLEADING 138—COUNTERCLAIM—STATUTE.

Under Code Civ. Proc. § 438, subd. 2, providing that a counterclaim must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, in an action arising upon contract, any other cause of action arising also on contract and existing at the commencement of the action, where defendants, when sued by an irrigation company to recover for water furnished, filed a cross-complaint alleging that they owned the land, that there were certain water right agreements attached to such land as appurtenances, whereby the plaintiff had agreed to furnish for such land all necessary water, and that plaintiff, though requested to do so, had failed for eight years to furnish water, whereby the defendants were unable to raise any crops upon the land, although such pleading was denominated a cross-complaint, it was technically a counterclaim under the statute.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 286; Dec. Dig.  138.]

2. PLEADING 195—COUNTERCLAIM—SUFFICIENCY.

Where plaintiff irrigation company sued to recover for water furnished defendants' land, and such defendants filed a cross-complaint alleging failure to furnish water, as plaintiff was obligated to do by contract, for eight years, such cross-complaint was not open to attack by demurrer, as failing to allege that defendants had performed all the conditions and the covenants of the contract; since the presumption could not be indulged, in support of the demurrer, that the agreement to furnish water mentioned in the cross-complaint was the same as that set forth in the complaint, or that there

were mutual dependent covenants and conditions, the performance of which the defendants should have alleged in order to show that they were entitled to recover damages for the alleged breach by the plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 447, 448; Dec. Dig. ☞195.]

3. WATERS AND WATER COURSES ☞257—IRRIGATION CONTRACT—DEPENDENT COVENANTS—BREACH.

Where plaintiff irrigation company contracted to furnish water, and defendant landowners to pay for the same, the covenant of the plaintiff to furnish, and that of the defendants to make annual payments, being dependent, each annual payment being a condition precedent to the furnishing of water, where plaintiff did not avail itself of its right to terminate the contract for default in payment of 30 days, but continued to recognize the contract and to deliver some water in pursuance thereof, such conduct of the plaintiff operated as a waiver of its right to terminate the contract for defendants' failure to pay annual installments, so far as concerned the rights of the defendants to demand and receive water thereafter, and to claim damages for the failure of the plaintiff to furnish it.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 312; Dec. Dig. ☞257.]

4. CONTRACTS ☞173—IRRIGATION CONTRACT—INDEPENDENT COVENANTS—BREACH—EFFECT.

Where the contract of plaintiff irrigation company was to furnish water, when ordered, continuously from February 19, 1897, to February 16, 1921, while defendant landowners promised to make annual payments therefor, the covenants of the parties were not dependent or concurrent, since, where covenants are to be performed at different times, they are independent, and breach by one party does not relieve the other of his duty of performance, so that, for failure of the defendants to make payments, the plaintiff, itself in default in furnishing water, could only claim the right to recover the payments due it, and to have the amount thereof set off against damage to the defendants from its own failure to deliver water.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 762-764; Dec. Dig. ☞173.]

5. WATERS AND WATER COURSES ☞263—IRRIGATION CONTRACT—BREACH—MEASURE OF DAMAGES.

For breach of a contract to furnish water for purposes of irrigation, the measure of damages, where there has been total failure to deliver as contracted for, is the difference between the rental value of the land with water, and its value without it, less the lawful price of the water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 324; Dec. Dig. ☞263.]

6. WATERS AND WATER COURSES ☞263—IRRIGATION CONTRACT—DAMAGES—SUFFICIENCY OF EVIDENCE.

In an action against an irrigation company for failure to furnish water to defendants' lands, evidence as to the extent of lands left unirrigated held sufficient to support verdict, under the proper measure of damages, for \$500 above the \$3,193.75 owed the irrigation company for water furnished.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 324; Dec. Dig. ☞263.]

7. WATERS AND WATER COURSES ☞263—IRRIGATION CONTRACT—BREACH—MEASURE OF DAMAGES.

Where all the land contracted to be furnished with water by an irrigation company is supplied with some water during a substantial part of the year, the rule of damages that, for total failure to deliver water, the measure of damages is the difference between the rental value of the land with water and its value without it, less the price of the water, has no application, and evidence is inadmissible to show comparative rental value; but, where there was evidence that a large portion of the land was left without any water, such evidence was properly allowed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 324; Dec. Dig. ☞263.]

Department 1. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Fresno Canal & Irrigation Company against Lilo M. Perrin and E. B. Perrin. Judgment for defendants on their cross-complaint, and plaintiff appeals. Affirmed.

F. H. Short and F. E. Cook, both of Fresno, for appellant. L. L. Cory, of Fresno, and G. W. Cartwright, of Sacramento, for respondents.

SHAW, J. The plaintiff appeals from a judgment in favor of the defendants and also from an order denying its motion for a new trial. The judgment further provided that the defendant Lilo M. Perrin should recover of plaintiff the sum of \$500.

The plaintiff's complaint contained four counts for the recovery of annual payments, amounting in the aggregate to \$3,193.75, upon four separate water right contracts executed by the plaintiff, all dated February 19, 1897, in each of which plaintiff agreed to furnish water from its canal for the irrigation of certain tracts of land belonging to the defendant Lilo M. Perrin, from the date thereof until February 16, 1921. Each contract provided that the annual payments due thereon for water furnished should constitute a lien upon the land. They were of the same form as the contracts which were held to create a lien upon the land by the decisions in Fresno Canal & Irrigation Co. v. Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112, and Fresno Canal & Irrigation Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275. The complaint asked for a foreclosure of this lien and the sale of the respective tracts of land to satisfy the amounts due. The answer admitted that the defendants had not made the annual payments sued for. The defense was that the plaintiff had not performed the covenants required to be performed by it, and that, in consequence of plaintiff's failure, there was no sum of money due or payable by the defendants to the plaintiff under said contracts.

[1] The defendants also filed a cross-complaint alleging that Lilo M. Perrin was the owner of the lands in controversy, that there were certain water right agreements attach-

ed to said lands as appurtenances thereto, whereby the plaintiff had agreed to furnish for said land all water that might be required for the irrigation thereof, that without the use of the water the lands were worthless for the purpose of raising crops thereon, that the plaintiff, although requested so to do, had failed and refused to furnish any water for or upon said lands during the years from 1897 to 1904, inclusive, by reason whereof said defendant Lilo M. Perrin was unable to raise any crops of any kind upon the land, to her damage in the sum of \$20,000. E. B. Perrin is the husband of Lilo M. Perrin. Although this pleading is named a cross-complaint, it is a cause of action arising upon contract for the recovery of money and existing at the commencement of plaintiff's action, and it is therefore technically a "counterclaim" as defined in subdivision 2 of section 438 of the Code of Civil Procedure. There is no allegation showing that it arose out of the transaction set forth in the complaint as a foundation for the plaintiff's claim, or that it was connected with the subject of the action of the plaintiff. There is nothing to show that the agreements referred to are the same agreements as those upon which the cause of action is founded. Consequently it does not, upon its face, show that it is a counterclaim within the first subdivision of the aforesaid section.

A jury was called to try the case. A verdict was returned in favor of the defendant Lilo M. Perrin for the sum of \$500, and judgment was rendered accordingly.

[2] The first point urged in support of the appeals is that the so-called cross-complaint does not state facts sufficient to constitute a cause of action. A demurrer thereto, based on that ground, was overruled. The plaintiff claims that it was necessary for the defendant to allege that she had performed all the conditions and covenants of the contract which it required of her. In support of this proposition, plaintiff assumes that the water right agreements mentioned in said cross-complaint are the same as those set forth in the complaint, and that there were mutual dependent covenants and conditions therein, the performance of which the defendant should have alleged in order to show that she was entitled to recover damages for the alleged breach of covenants by the plaintiff. This presumption cannot be indulged in support of the demurrer. The sufficiency of the cross-complaint or counterclaim must be determined wholly from its own allegations. It purports to state the contracts sued on according to their legal effect, and it contains nothing to show that there are any covenants or conditions therein other than those of the plaintiff to furnish water. So far as appears therefrom, there was no obligation in said contract except that of the plaintiff to furnish water for the lands owned by the said defendant. This being the case, there was no occasion for an allegation that said defendant

had kept and performed the covenants of the contract. That question would arise only when, upon the proof, it appeared that there were dependent conditions which said defendant must perform, prior to or concurrent with her right to demand performance by the plaintiff. The demurrer was properly overruled.

[3] Upon the trial it appeared that the agreements upon which the counterclaim was predicated were the same as those mentioned in the complaint. The plaintiff contends that the admitted fact that the defendant has failed to make the annual payments thereon precludes her from relief by way of damages for the alleged failure of plaintiff to furnish water as the agreement required. By the terms of the agreements, the annual payments were to be made on the first Monday of September of each year and, in case of default thereon for 30 days, the plaintiff, at its option, might terminate the agreement. The evidence shows that the plaintiff did not avail itself of this option, but that, on the contrary, it treated the agreements as still in force and continued thereafter to deliver some water in pursuance thereof, as before, and to recognize the contracts as obligatory upon itself. It claimed that it had delivered all the water demanded. If it were conceded that the covenant of the plaintiff to furnish water and that of the defendant to make the annual payments were dependent, or that the annual payment was a condition precedent to the furnishing of the water, we think this conduct of the plaintiff would operate as a waiver of its rights to terminate or avoid the contract for failure to pay the annual installments, so far as it affected the right of the defendant to demand and receive water thereafter and to claim damages for the failure of the plaintiff to furnish it. *Los Angeles, etc., Corp. v. Amal. Oil Co.*, 168 Cal. 143, 142 Pac. 46; *Cincinnati, etc., Co. v. Baker*, 130 Ill. App. 416.

[4] But the covenants are not dependent or concurrent. The water was to be furnished, when wanted, continuously from February 19, 1897, to February 16, 1921, while the payments were to be made annually as aforesaid. The furnishing of the water for the first six months could not be dependent upon or concurrent with the payment to be made in the following September. The same would be true of each succeeding year, upon the plaintiff's election not to terminate the agreements by reason of the failure of the defendant to pay. Where the covenants of the respective parties are to be performed at different times they are held to be independent and the breach by one party of his covenant does not excuse the performance by the other of his covenant or relieve him of liability for damages for a breach thereof. *S. P. R. R. Co. v. Allen*, 112 Cal. 461, 44 Pac. 796; *Front St. M. & O. R. R. Co. v. Butler*, 50 Cal. 577; *Bank of Woodland v. Duncan*, 117 Cal. 412, 49 Pac. 414; *Deacon v. Blodget*, 111 Cal. 418, 44

Pac. 159. Upon these facts, the most that the plaintiff can claim on account of the failure of the defendant to make the payments is the right to recover the same and to have the amount thereof set off pro tanto against such damage as the defendant has shown from the failure of the plaintiff to deliver water.

[5, 6] The only evidence offered regarding the measure of damages was proof of the annual rental values of the lands with water for irrigation and of the rental values without water. The measure of damages in such cases, where there has been total failure to deliver water as contracted for, "is the difference between the rental value of the land with water and its value without it, and the lawful price of the water should also be taken into consideration and deducted." *Crow v. San Joaquin*, 130 Cal. 314, 62 Pac. 562, 1058; *Pallett v. Murphy*, 131 Cal. 197, 63 Pac. 366. The court upon this subject instructed the jury as follows:

"It appears in the evidence, without dispute, that certain waters were during each year supplied by the plaintiff to the defendants under contracts for use upon said lands, and that the defendants either used or had the opportunity to use the same. Therefore the defendants cannot recover on their cross-complaint upon the basis of the difference that would have resulted from an entire absence of water for the irrigation of said lands, but only, if at all, for such detriment as is shown by the evidence to have actually resulted from the failure of the plaintiffs to supply water in compliance with the said contracts."

The evidence supports the statement in the first sentence of this quotation. Upon that the plaintiff contends that inasmuch as there were no facts proven upon which to estimate damages, except the difference between the rental value in the case of the entire absence of water and such rental value where the full supply was furnished in accordance with the contracts, the jury had no basis upon which they could calculate the damages, and therefore that the verdict allowing \$500 to the defendant as damages, over and above the \$3,193.75 due for the annual payments, was without support in the evidence. Upon an analysis of the evidence, however, we find it sufficient to show that, although some water was delivered and used each year, yet that each year parts of defendant's lands, amounting to 500 or 600 acres in some years, were left without any water for the entire year. Testimony was given to the effect that there was never water sufficient to irrigate more than about 320 acres of the 1,000 acres of the defendant's land which the plaintiff had agreed to supply with water. It is true that the evidence as to the land supplied with water was somewhat confusing and conflicting but it was for the jury to resolve the conflicts and uncertainties and estimate the area that was left without any supply. If the jury found, as they might have done from the evidence, that even one-third of the

1,000 acres of land to be supplied was left without water because of the failure of the plaintiff to furnish it, when it had water available, there would be sufficient basis, upon the measure of damages given, to support the verdict.

[7] The plaintiff objected to the introduction of evidence of comparative rental values, with and without water, basing his objections on the ground that the rule of damages referred to above has no application where the water supply is not entirely withheld. If the evidence showed that all the land was supplied with some water during a substantial part of each year, this contention would be meritorious. But, as there was evidence from which the jury might have concluded that a large portion of the land of the defendant was left without any water for each of the five years to which the jury were confined by the instructions of the court in estimating the damage suffered by her, the evidence was properly allowed.

No other points are advanced in support of the appeals.

The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

170 Cal. 362

In re COWELL'S ESTATE. (S. F. 6823.)
(Supreme Court of California. June 7, 1915.)

EXECUTORS AND ADMINISTRATORS $\Leftarrow$ 194—
FAMILY ALLOWANCES — DISCRETION OF COURT.

Where a testator left an estate valued at approximately a million, a family allowance of \$1,000 a month made to the widow after inventory cannot be held an abuse of the probate court's discretion.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 713-723; Dec. Dig. $\Leftarrow$ 194.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

In the matter of the estate of Ernest W. Cowell, deceased. Petition by Alice M. Cowell against Alexander F. Morrison and another, as executor and executrix, opposed by S. H. Cowell and others. From an order granting plaintiff a family allowance, the opponents appeal. Affirmed.

See, also, 164 Cal. 636, 130 Pac. 209.

Mastick & Partridge, of San Francisco, for appellants. J. F. Shuman, W. I. Brobeck, and P. F. Dunne, all of San Francisco, for respondent.

LORIGAN, J. This is an appeal from an order granting a family allowance of \$1,000 a month to the respondent, Alice M. Cowell, widow of the deceased, made by the court after the return of an inventory showing the estate to be valued at \$972,992.44.

The only point made on this appeal is that the allowance was excessive, and hence there

was an abuse of discretion on the part of the superior court in making it.

This is the second appeal taken by appellants from an order for a family allowance in favor of the widow of deceased. Before the return of the inventory in the estate the superior court made an order granting a family allowance to the widow of \$1,500 a month from the date of the death of the testator until an inventory in the estate should be returned. An appeal from that order was taken to this court, one of the grounds urged for a reversal being that the allowance was excessive. *Estate of Cowell*, 164 Cal. 637, 130 Pac. 209. We held on that appeal, and as to that matter, that the fixing of an allowance reasonably necessary for the support of the widow out of the estate of her deceased husband was a matter largely left to the discretion of the judge in probate, and that, in view of the circumstances and condition of this estate and the reasonable wants and necessities of the widow as disclosed by the evidence presented in support of the order, this court could not say that any abuse of discretion on the part of the trial court was shown in making the allowance it did and therefore affirmed the order.

The present order for \$1,000 a month made after the return of the inventory, and to be paid pending the settlement of the estate, is for \$500 less than the previous order. There is practically no difference between the evidence offered and contained in the record on appeal in the present case than was presented in the former one, and as, in view of the evidence presented on the former appeal, we could not say that within the wide discretion given to the trial judge in the matter of a family allowance there had been any abuse of it in allowing the widow \$1,500 a month, so we cannot say that this discretion was abused in making the allowance of \$1,000 a month questioned on this appeal.

The order appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

(170 Cal. 364)

In re COWELL'S ESTATE. (S. F. 7041.)
(Supreme Court of California. June 7, 1915.)

1. WILLS ⚡503—BEQUESTS TO EMPLOYÉS—CONSTRUCTION.

Where a testator made bequests to all employés of a concern in which he was interested who had been in its employ for ten years, the date to be as of January 1, 1911, the bequests cannot, in view of the testator's knowledge that the men did not work on January 1st, be deemed payable only on condition that they were engaged on that day.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1071; Dec. Dig. ⚡503.]

2. APPEAL AND ERROR ⚡1008—FINDINGS—EVIDENCE.

In reviewing the findings, all conflicts in the evidence are resolved in favor of the successful party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. ⚡1008.]

3. WILLS ⚡503—CONSTRUCTION—EMPLOYMENT.

A testator bequeathed a legacy to each employé of a company who had been in its service for ten years, the date to be as of January 1, 1911. The company engaged kiln laborers, paying them by the month, but without making any formal contracts and discharging them at its pleasure. A laborer who had been in the company's service for over ten years was paid off on December 31st. The kiln was not in operation on January 1, 1911, and owing to wet weather was not operated for some time thereafter. When operated the laborer went back to work. *Held*, that he was entitled to the legacy; it appearing that, while there was no formal contract, the laborers without any new orders took up their old duties after the end of each month.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1071; Dec. Dig. ⚡503.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

In the matter of the estate of Ernest W. Cowell, deceased. Petition by F. A. Berio, as administrator of the estate of Frank Tralago, known also as Frank T. Traolo, deceased, substituted in place of his intestate, for partial distribution opposed by S. H. Cowell and others. From an order granting the petition, the opponents appeal. *Affirmed*.

Mastick & Partridge, of San Francisco, for appellants. I. F. Chapman, of San Francisco, for respondent.

LORIGAN, J. This is an appeal from an order made in the above estate granting the application of Frank Tralago for a partial distribution.

The will of said E. W. Cowell, deceased, among other provisions, contained the following:

"Fifth. To all employés of the Henry Cowell Lime & Cement Company now working for said firm as Santa Cruz and who have been in said employ for twenty years, the sum of one thousand dollars each, and to all who have worked over ten years, the sum of five hundred dollars each. * * * In all cases these dates are as of January 1st, 1911."

Frank Tralago filed a petition in said estate for partial distribution to him of \$1,000 under the above provision of the will of deceased, alleging that he was an employé of the said company and worked for it at Santa Cruz for more than 20 years prior to the 1st day of January, 1911, and was so employed upon said 1st day of January, 1911. The court found that the petitioner was an employé and worked for the company at Santa Cruz for more than 10 years prior to the 1st day of January, 1911, and was so employed on the 1st day of January, 1911, and ordered a distribution to him of \$500 as coming within the clause of said will relating to 10-year employés.

There is no question but that Frank Tralago had worked for the company at Santa Cruz for more than 10 years prior to January 1, 1911, and up to that date. The point

made on this appeal is that he was not in the employment of or working for the said company on January 1, 1911. There were but three witnesses who testified on the hearing, and their condensed testimony as contained in the record is not as clear and definite upon matters which were involved in and being considered on the hearing as it might have been made. The petitioner, an unmarried man, testified that he had started to work for the company in 1884, quitting work for it, as he stated, "at the end of December last year." As the hearing in this matter was held in 1913, this reference of the witness to "December last year" meant December, 1912. Continuing, he testified that he worked for the company all the time from 1884 until last year (1912) with the exception of a few years; that he was working up to the 1st of January, 1911, and was working for the company when the testator died in March, 1911. A fellow workman with petitioner for the company testified, among other things, that petitioner was working for the company in January, 1911, and up to the time the witness quit working for it in June, 1911. The only other witness—the manager of the company—testified to data from the time books of the company kept by its foremen while petitioner worked for the company, showing he had worked for it for more than 10 years. It does not appear plainly in what branch of work the petitioner was employed, although it is fairly inferable from the testimony that he was doing kiln work. Further, the manager stated that petitioner was in the employment of the company during December, 1910, but that his name did not appear on the pay roll of the company as being employed by it in January, 1911; that the first of the year being a holiday every man took a rest; that on the 31st of December every man was given his time up to then; that Tralago was not hired any longer; that the kiln could not be worked in the rain; that petitioner worked 23 days in December, 1911; that he quit at that time and went somewhere for a holiday and did not return to work for the company again, as far as the pay roll indicated, until February, 1911; that the company had no contract with a man employed by it; that it employed one any day it wanted and discharged him any time it desired to do so; that the men were all paid a specified rate per day for all days of actual work in a month based on a fixed amount as monthly wages and were paid off at the end of every month; that the kiln men lived at the kiln and were boarded by the company.

[1] This was all the evidence in the case, and the claim of appellants is that it shows petitioner was neither working for nor an employé of the company on January 1, 1911, so as to bring him within the terms of the testamentary clause. It is, of course, conceded that the petitioner was not actually working for the company on the 1st day of

January, 1911. Under the evidence, its employés were not expected to, nor did they, work on the 1st day of the year. But it was obviously not the intention of the testator that in order to be the recipient of his bounty that an employé, in addition to showing that he had worked for the period of years required, should show in addition that he was actually working on the 1st day of January, 1911. The testator, it is to be assumed, knew that by reason of the first of the year being a holiday the employés of the company would not be actually working on that day. The intention of the testator was to reward such employés as had served the company in which he was largely interested for specified long periods of service and who were still with it on January 1, 1911. This latter requirement only applied to employment with the company on that day. If this were not so, then there must be ascribed to the testator according to the construction claimed by appellants an intention to defeat his main purpose of rewarding employés for long service by prescribing in addition to such service that they should be actually working on a day when he must have known by the custom of the company and the character of the day as a generally observed holiday the employés would not be doing so.

[2, 3] Nor do we think that it can be said under the evidence that petitioner was not in the employment of the company on the 1st day of January, 1911. He had worked up to that date and was paid off with the other employés, as it was its custom so to do at the end of every month. Of course, his further employment ended then if the company saw fit to so consider it. It was not required to take him on again unless it wished to do so. But it cannot be said that he was fully discharged as an employé. It appears that the custom of the company was to pay off the men at the end of each month. This payment then was not considered by the company as a discharge from employment of such employés, nor so considered by the men. The latter resumed work each following month without any formal engagement by the company. Their employment was treated as a continuous employment which mere payment by the month did not affect. It is true that the petitioner was paid off with the other men on the last of December, 1910; but this transaction, it is apparent, was not intended as a discharge of the men from any further employment or connection with the work of the company. It was merely a temporary cessation of work in the kilns on account of rain and, as the manager puts it, petitioner went away for a holiday, returning in January (as in the conflict of the evidence on this point we must assume to be true), and resumed his work for the company. It was evidently not the intention of the company to discharge the petitioner as one of its old employés, nor the intention of the petitioner to abandon his employment with

it. There was simply a temporary suspension of the particular work of the company in which petitioner had been engaged and a temporary laying-off of the men engaged therein, including petitioner, until work should be resumed. While, strictly speaking, the petitioner was not in the employment of the company during the period from December 31, 1910, to some time in January following—that is, not actually working for it on January 1, 1911—still, in a qualified sense, we think he was in such employment on that date. His connection with the company had not been completely severed by a discharge. He had only been temporarily laid off awaiting the resumption of the work in which he had theretofore been employed and apparently with the tacit understanding that he should resume work with the company when it was ready to resume it.

The order appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

170 Cal. 357

LINCOLN COUNTY BANK v. FETTERMAN. (L. A. 3472.)

(Supreme Court of California. June 5, 1915.)

1. PLEADING ⚡259 — **AMENDMENT** — **SHAM PLEAS.**

In an action in California by a foreign corporation on a note executed in the state of the corporation's domicile, a trial amendment alleging that defendant is informed and believes, and upon such information and belief alleges, that plaintiff is doing business in the state without having filed its articles of incorporation or designated a process of agent, is on its face a sham and is properly refused.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 783-792; Dec. Dig. ⚡259.]

2. BILLS AND NOTES ⚡470—**NOTES—ACTIONS.**

A complaint on a note alleging that part of the interest and principal had been paid, leaving due and owing a stated sum, sufficiently avers nonpayment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1462; Dec. Dig. ⚡470.]

3. CONTINUANCE ⚡30—**RIGHT TO CONTINUANCE—AMENDMENT OF PLEADING.**

Code Civ. Proc. § 432, declares that the amendment or the complaint, as amended, must be answered within 10 days or such other time as the court may direct. In an action on a note, plaintiff was at trial allowed to amend its complaint, so as to make more certain the allegations of nonpayment. *Held*, that the amendment did not introduce any new matter and could not have taken defendant by surprise; and hence, as the statute did not absolutely authorize defendant to answer anew upon amendment, the denial of his motion for a continuance, so as to plead to the complaint, as amended, was not error.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 99-112; Dec. Dig. ⚡30.]

4. APPEAL AND ERROR ⚡518—**REVIEW—RECORD.**

Where the complaint amended, so as to make more definite and certain allegations of nonpayment of the note in suit, the answer did not become functus officio; and, the court having refused defendant a continuance to plead or to allow the filing of a new answer, the

one on which the case was tried was part of the record and should on appeal be incorporated in the judgment roll.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342-2355; Dec. Dig. ⚡518.]

5. APPEAL AND ERROR ⚡528—**RECORD—AUTHENTICATION.**

The motion for new trial, though printed in the transcript, cannot be considered, where not authenticated by any statement or bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2374, 2384-2388; Dec. Dig. ⚡528.]

Department 2. Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by the Lincoln County Bank against George C. Fetterman. From a judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

F. E. Davis and H. C. Millsap, both of Los Angeles, for appellant. Thomas A. Sanson, Duke Stone, and Phil Cass, all of Los Angeles, for respondent.

HENSHAW, J. This action was brought against R. J. Pace, J. W. Pace, and Sid Pace upon their promissory note for \$3,500 in favor of defendant, George C. Fetterman. The complaint charged the execution of the note by the Paces to Fetterman and his indorsement of the note over to the plaintiff before maturity. It pleaded:

"That demand has been made by plaintiff upon the said defendants and each of them, for the payment of the amount due upon the said promissory note; that there has been paid plaintiff upon the principal sum of said note the sum of \$1,526.65, and the interest thereon has been paid up to and including the 20th day of June, 1911, leaving due and owing thereon to plaintiff from defendants the sum of \$1,973.35, with interest thereon at the rate of 1 per cent. per month from the 20th day of June, A. D. 1911, until paid, and which amount the said defendants and each of them refuse and neglect to pay to plaintiff, although oft requested so to do."

Plaintiff is a Nevada corporation, and the note was executed in the state of Nevada. Judgment passed for plaintiff, and defendant appeals from that judgment and from the order denying its motion for a new trial.

Under the answer filed to this complaint, the cause came on for trial. At the time of the trial defendant offered the following amendment:

"This defendant is informed and believes, and upon such information and belief alleges, the fact to be that plaintiff is doing business in this state, and there has never been filed in the office of the secretary of state of the state of California a designation by the plaintiff of some person residing within the state of California upon whom process issued by authority of or under any law of this state may be served; and there has never been filed in the office of the secretary of state of the state of California a certified copy of plaintiff's articles of incorporation, if any there are, or of its charter, if any, it has, or of the statute or statutes, or legislative, or executive, or governmental act

or acts creating it, if any there are, duly certified by the secretary of state, or other officer authorized by the law of the jurisdiction under which such corporation is formed, if formed at all, to certify such copy; and there has never been filed a certified copy thereof, duly certified by the secretary of this state, in the office of the county clerk of the county where its principal place of business is located, and also where such corporation owns property."

[1] The court refused defendant leave to file this amendment. It was not an abuse of discretion. The action was a simple action by a Nevada corporation upon a promissory note executed in Nevada against a defendant found in California. Without regard to the legality of the prohibition of section 410 of the Civil Code upon foreign corporations from maintaining actions in any of the courts of this state, it is sufficient to say that the amendment here offered was properly refused. It bears evidence upon its face that it is sham. It is not even alleged that plaintiff was doing business in the state before or at the time of the commencement of this action. The amendment alleges merely that defendant is informed and believes that plaintiff is now doing business in this state. The denial upon information and belief that the plaintiff corporation has complied with the law is insufficient. *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144; *Zany v. Mining Co.*, 15 Cal. App. 295, 114 Pac. 1026.

[2] Upon the trial of the case, when plaintiff sought to introduce its evidence, defendant objected upon the ground that the complaint failed distinctly to aver nonpayment. It would appear from the paragraph quoted that even under the very strict rule adhered to in this state and expressed in *Barney v. Vigoreaux*, 92 Cal. 631, 28 Pac. 678, *Ryan v. Halliday*, 110 Cal. 335, 42 Pac. 891, *Richards v. Lake View*, 115 Cal. 642, 47 Pac. 683, *Hurley v. Ryan*, 119 Cal. 71, 51 Pac. 20, and *Knox v. Buckman*, 139 Cal. 598, 73 Pac. 428, there was a sufficient pleading of nonpayment to pass a general demurrer.

[3] As a matter of precaution, however, plaintiff sought and obtained leave to amend by adding to his complaint this language: "Which amount is due and remains wholly unpaid." Upon the court granting leave to plaintiff so to amend, defendant's counsel moved the court for a continuance that he might plead to this amended complaint, stating that "he is not prepared to plead and meet the new issue raised at this time." The court denied this motion, and its action in this regard constitutes the gravamen of the complaint upon this appeal.

Appellant's complaint in this matter is founded upon his assertion of an absolute right to plead anew to the complaint because it was amended. He founds this right upon section 432 of the Code of Civil Procedure and upon the general rule as stated in the cases (see *French v. Stewart*, 22 Wall. 238, 22 L. Ed. 854) that an amendment of a bill gives a defendant a right to answer as if he had not answered before. He relies still

further upon our own decisions. *Elder v. Spinks*, 53 Cal. 294; *Morton v. Bartning*, 68 Cal. 306, 9 Pac. 146; *Chamberlain v. Loewenthal*, 138 Cal. 50, 70 Pac. 932. The rule governing the right to plead to an amended complaint is not as broad as appellant would have it. Nor yet is it so broad as is implied in *Morton v. Bartning*, supra.

Section 432 of our Code of Civil Procedure, in declaring that the amendments, or the complaint as amended, must be answered by the defendant within ten days, or such other time as the court may direct, is but a direction to compel the joining of issues within a reasonable time, so as to expedite the trial of actions. It still rests within the sound discretion of the court as to whether any time shall be allowed to the defendant to answer, and whether or not time will be allowed will depend upon the nature and character of the amendment to the complaint. It states the rule too broadly, therefore, to say that because a complaint is amended, even in most trivial and unimportant particulars, the defendant has the absolute right to time and to the postponement of the case to plead to this amendment. The underlying proposition to be decided upon the facts of each case where the court has refused to allow time to the defendant or to allow an amendment is whether or not the court's discretion was abused and the defendant injured thereby. In the present case all that the plaintiff asked leave to do and did was to make more specific an allegation of nonpayment of a promissory note, which allegation was certainly sufficient to pass a general demurrer. It could not have taken defendant by surprise to have had this allegation of nonpayment made more specific. It could not have introduced any new element in the case which he was not prepared to meet. It could not have necessitated the procurement by him of witnesses or evidence which should not have been at hand. Defendant was not surprised. He does not here assert that he was surprised, but asserts merely that he had the right to time and to file a new pleading. But to this respondent makes further answer that the issue of nonpayment had been joined by the answer on file, which answer in terms pleaded payment. This plea of payment, coupled with the allegation of the complaint, presented the issue of payment or nonpayment, and cured whatever defect in this regard may have lain in the complaint. This being so, then the amendment raised no new issue and presented no new proposition which the defendant was called upon to meet, and the court was absolutely justified in refusing leave to the defendant to amend.

[4] But appellant has not seen fit to bring up his original answer, standing upon the mistaken technicality that, because the court allowed the plaintiff to amend in this trifling particular, his answer became functus officio, was absolutely superseded, was

as though it had never been filed, and formed no part of the judgment roll. This appeal presents propositions of a narrow and technical nature, supported by no showing or offer to show hardship or injury. It may well be met, therefore, by the technical, but eminently sound, response which respondent makes, that the judgment roll presented by the appellant is radically defective in failing to present the answer upon which the case was actually tried, and in presenting as a substitute an answer which the court refused to allow the defendant to file. The original answer was not only not eliminated by virtue of the amendment to the complaint, but was the answer joining the issues upon which the action was tried. It was an essential part of the judgment roll. *Redington v. Cornwell*, 90 Cal. 60, 27 Pac. 40.

[5] Still further appellant's notice of intention to move for a new trial has not been authenticated and brought before this court by any statement or bill of exceptions. The mere fact that it may have been printed in the transcript without proper authentication will not authorize this court to consider it. *Pico v. Cohen*, 78 Cal. 384, 20 Pac. 706; *Paige v. Roeding*, 96 Cal. 390, 31 Pac. 264; *Skinner v. Horn*, 146 Cal. 63, 79 Pac. 597; *Muzzy v. McEwen Lumber Co.*, 154 Cal. 686, 98 Pac. 1062. In the absence of proper authentication there is presented no record upon the appeal from the order denying the motion for a new trial which can here be properly reviewed. *Willow Land Co. v. Goldschmidt*, 11 Cal. App. 297, 104 Pac. 841.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(170 Cal. 384)

HORTON v. REMILLARD BRICK CO.
(S. F. 6420.)

(Supreme Court of California. June 8, 1915.
Rehearing Denied July 8, 1915.)

1. MASTER AND SERVANT ⇨70—COMPENSATION—NET PROFITS AND BONUS—TIME OF COMPUTATION.

Under a 10-year contract entered into in December, 1906, whereby plaintiff became the manager of the defendant company at a monthly salary, and in addition was to receive a bonus of \$1,200 upon the yearly profits equaling 12 per cent. of the defendant company's invested capital and \$600 for each additional 1 per cent. profit, the bonus, if any, was not postponed until the end of 10 years, nor based upon a full account of profits and losses at the end of such period, but was to be allowed upon the net profits as ascertained annually, even though the contract was entire in respect to the term of service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 82-86; Dec. Dig. ⇨70.]

2. MASTER AND SERVANT ⇨80—NET PROFITS AND BONUS—SUFFICIENCY OF EVIDENCE—DEPRECIATION.

In an action to recover a certain share of the net profits earned by defendant in its business for 1907, based upon a written contract employing plaintiff from December, 1906, for a

10-year term at a monthly salary, and in addition a bonus of \$1,200 on profits equaling 12 per cent. of the company's invested capital, and \$600 for each additional 1 per cent. profit, evidence held not to show that there was any agreement as to the method of making inventories, or any custom as to depreciating inventories which the court should have found had become a part of the contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. ⇨80.]

3. EVIDENCE ⇨354—ADMISSIONS—TRIAL BALANCE.

In such action certain exhibits, as "Profits and Loss Sheet," "Surplus Sheet," "Assets and Liability Account of '07," and "Surplus Account" were properly admitted on the theory that they constituted at least prima facie admissions by defendant as to the amount of the profits of its business upon the closing of its books for 1907.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. ⇨354.]

4. MASTER AND SERVANT ⇨80—COMPENSATION—SUFFICIENCY OF EVIDENCE—AMOUNT OF NET PROFITS.

In an action to recover a certain share of the net profits earned by defendant company in its business for a certain year, based upon a written contract employing plaintiff as manager for that year, evidence held to sustain finding that the net profits for that year were \$74,806.09, being over 18 per cent. on a capital stock of \$408,167.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. ⇨80.]

5. APPEAL AND ERROR ⇨1056—CONTRACT OF EMPLOYMENT—ACTION FOR SHARE OF NET PROFITS—EVIDENCE.

In such action, where all the facts were before the court and it was its duty to decide the issues, the sustaining of an objection to questions to an expert witness as to his opinion upon the correctness of the statement of profits, was not prejudicial to the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. ⇨1056.]

6. CONTRACTS ⇨349—ACTION FOR SHARE OF PROFITS—EVIDENCE.

In such action, where the issue was as to the amount of profits shown at the end of the year 1907, evidence as to the selling price of the company's products for 1908 was immaterial.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1809, 1811-1814, 1817, 1818; Dec. Dig. ⇨349.]

Department 2. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Edward H. Horton against the Remillard Brick Company. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order affirmed.

Sullivan & Sullivan and Theo J. Roche, all of San Francisco, for appellant. Wright & Wright & Stetson, of San Francisco, for respondent.

PER CURIAM. Upon consideration of the petition for the hearing of this cause before this court, after decision in the District Court of Appeal, this court, while well satisfied with the soundness of the reasoning and

conclusions reached by the Court of Appeal, in all other respects, considered one question of sufficient gravity to justify further consideration of it here. That question was whether, under the terms of the contract between Horton and the defendant, the profits were to be the actual profits, or whether by convention and agreement it was understood that the profits should be estimated profits. The point becomes one of great importance in the case because it was shown that, while in the statement estimating the profits the bricks of defendant carried over into the year 1908 were appraised at cost, they were, owing to business depression, sold for much less than cost in 1908. We are, however, convinced that the Court of Appeal was right in the conclusion it reached upon this question, and that under their contract the parties agreed to an annual estimate of profits as the basis of plaintiff's claim for compensation. The opinion and decision of the District Court of Appeal is therefore adopted as the opinion and decision of this court, and the judgment and order appealed from are affirmed. The opinion and decision is as follows:

CHIPMAN, P. J. This is an action to recover a certain share of the net profits earned by defendant in its business for the year 1907, and is based upon a written contract between plaintiff and defendant bearing date December 14, 1906. The essential part of this contract reads as follows: "The party of the second part agrees to enter the employment of the first party and to continue such employment until the 14th day of December, 1916, he to discharge such duties as may reasonably be required of him by the directors of first party; second party agrees during the said period to devote his time during business hours, his best abilities and energies to the business interests of the first party; first party hereby agrees to employ second party for said period and as compensation for such services to be so rendered first party promises to pay to second party a monthly salary, same to be at the rate of three hundred dollars per month, from date hereof to the 1st day of January, 1907, and thereafter at the rate of five hundred dollars per month, same to be paid at the end of each current month, first party further agrees in addition to the monthly salary as hereinbefore specified to pay to second party for further compensation for such services a bonus upon the yearly profits, if any, of the business of the first party, after December 31st, 1906, that is to say, if commencing January 1st, 1907, the annual net profits on the capital invested in the business of party of the first part equals twelve per cent., party of the first part agrees to forthwith pay unto party of the second part a bonus of twelve hundred dollars, and if such annual profits exceed said twelve per cent., then the bonus to be paid by first party to second party shall in addition to said twelve hundred dollars be the sum of six hundred dollars for each additional one per cent. profit above said twelve per cent. It being understood and agreed that as a basis for the estimation of said profits the capital invested in the said business shall be taken at the sum of four hundred and eight thousand one hundred and sixty-seven dollars in accordance with inventory as shown by the closing of the books of said business December 31st, 1905."

The cause was tried by the court without a jury and judgment passed for plaintiff for the sum of \$4,800, with interest from January 1,

1908. Defendant appeals from the judgment and from the order denying its motion for a new trial.

The court found that, for the period commencing January 1, 1907, and ending December 31, 1907, "the defendant's annual net profits on the business transacted during that period, based on the capital invested in its said business, to wit, the sum of \$408,167, amounted to the sum of \$74,806.09, being over 18 per cent. upon the amount of such capital," and by reason thereof there became due plaintiff, on January 1, 1908, the sum of \$4,800 "as a bonus upon said yearly profits for the year 1907," for which the aforesaid judgment was given. It seems not to be disputed that plaintiff's bonus amounted to the sum awarded him if the court was justified in finding that the net profits of defendant's business for 1907 were correctly arrived at.

Some errors are assigned arising out of rulings of the court in receiving and refusing evidence but the principal errors complained of relate: First, to the construction placed upon the contract by the trial court; and, second, to the method adopted in making up the inventory of defendant's property for 1907 and its influence upon the profit and loss account.

It is contended by defendant that "the contract was entire—if profits of one year were offset by losses of other years intervening before suit on the contract, plaintiff could not recover."

As to the inventory for 1907 the claim is that it made no allowance for depreciation; "that the proven business custom of making annual allowance for depreciation of plant and equipment was the law of Horton's contract and regulates his rights."

We find these two objections at the threshold of the discussion. If the trial court was wrong in disregarding the results of the business for subsequent years up to the time plaintiff ceased to be employed under the contract, prejudicial error is shown, because had the net profits of 1908 and 1909 been considered together with those of 1907, the combined result would not have warranted the judgment.

Upon the second proposition, the net profits for 1907 depended largely upon the integrity of the inventory for that year, and unless it was unassailable, the profit and loss account would lack a proper or correct basis.

Defendant became incorporated in December, 1879, the business having been carried on previously by Remillard Bros. the owners of four-fifths of the stock in defendant at its incorporation. The capital at this time, as shown by the articles, was \$200,000, which had increased, when the 1905 inventory was taken, to \$408,167. The company owned considerable real estate at different points where its brickyards were located and elsewhere, some farming land and some city land in Oakland and Alameda, besides the equipment for three large brickyards and their kilns. It was engaged chiefly in manufacturing brick and dealt also in lime, plaster, and cement, and carried on some farming in a small way. In part its operating property consisted of wagons, horses, harness, steam propelled schooners, steam engines, and boilers, electric motors, locomotives, brick molds, brick machines, steam pumps, dump carts, kilns, blacksmith shops and equipment, numerous tools, railroad tracks and cars, and many other articles used in the business. The buildings used were many and of considerable value. Without further enumeration the foregoing will indicate the character of the property entering into the inventory.

On August 9, 1906, an executive committee consisting of three directors was created, "with full authority to have charge of all details as of the company business, and making any and all alterations, changes, and improvements in detail as to the systems or methods, etc., in their judgment desirable." This was about one month after Horton had entered defendant's em-

ployment. He had been chosen as one of the directors and he, with Messrs. Metcalf and Gelinas, were made the members of this executive committee. On December 13, 1906, by consent of more than two-thirds of the stockholders, among them Cordule Remillard, 1,020 shares; Charles Simard, 30 shares; J. P. Gelinas, 5 shares; E. H. Horton (plaintiff), 40 shares; Lamoureux estate, 200 shares; George D. Metcalf, 5 shares; P. H. Simard estate, 100 shares; and Maria Biltz, 50 shares—the by-laws of the corporation were amended. The amendments provided that “the board of directors shall, when in their judgment it is to the interest of the corporation so to do, have power to enter into a contract of employment with any of its agents, superintendents, managers, or other employes, for a definite period not exceeding ten years, provided that before such contract shall become binding upon the corporation, it shall be ratified at a duly convened meeting of the stockholders.” Plaintiff was at this time a director. The contract involved in the action was made 11 days later (December 14, 1906), and was signed for the corporation by Geo. D. Metcalf, president, J. P. Gelinas, secretary, and by E. H. Horton in his own behalf. The validity of the contract is not disputed, and there is no evidence that in its making the company was overreached or deceived by plaintiff in any way. At the meeting of the stockholders February 4, 1907, plaintiff was elected a director for the ensuing year, together with Mrs. Remillard, Messrs. Metcalf, Gelinas, and Simard, and, at the meeting of the directors, held later, on that day, Horton was elected president and manager. Plaintiff, as he testified, entered defendant's employment “about July 1, 1906, and continued in such employment until April 1, 1910.” The minutes of March 18, 1910, read: “Resolved that for good cause, the services of Mr. Edward H. Horton are hereby dispensed with.” Nothing in the record shows the reason for this action. It appeared that plaintiff made no claim for any bonus until after he was discharged. Other facts in the case will be noticed as occasion may require.

[1] Turning now to the contract and in response to appellant's contention first above stated, it seems to us that it was not contemplated by the parties that Horton's bonus, should there be any, was not to be enjoyed until the end of 10 years, nor was it based upon a full accounting of profits and losses as they might appear at the end of the period for which he engaged his services, nor at the termination of his services at a period less than 10 years. We have nothing to do with the cause of his quitting. For the purposes of this case his services terminated by mutual consent and, if not, nothing appears in the record which would prevent his having his rights determined under the contract in accordance with what may seem reasonably certain to have been the intention of the parties in making it.

The contract provides that plaintiff was to receive \$500 salary, “to be paid at the end of each current month,” and “in addition to the monthly salary” he was to receive “for further compensation for such services, a bonus on the yearly profits, if any, of the business * * * that is to say, if commencing January 1st, 1907, the annual net profits on the capital invested * * * equals 12 per cent., party of the first part [defendant] agrees to forthwith pay unto party of the second part [plaintiff] a bonus of \$1,200, and if such annual profits exceed said 12 per cent.,” he was to be paid an additional bonus of \$600 for each additional “one per cent. profit above said 12 per cent.” It seems to us that if the parties contemplated measuring the profits by the result shown only at the end of the 10-year period they failed so to express their intention. The language used indicates that the net profits were to be ascertained annually for the purpose of determining whether Horton should receive annually, “for

further compensation for such services,” the bonus provided for. The object was to stimulate his activities by promising a bonus on a certain definite sum should he succeed in producing a certain definite result annually. If he made the company earn 12 per cent. annually upon a certain capital fixed by the company, he was to receive annually \$1,200, and for each additional one per cent. over 12 per cent. he was to receive \$600. The profit sharing feature of Horton's contract must have been intended as an inducement to him in engaging his services for 10 years and it hardly seems reasonable to suppose that no bonus was to have been allowed him until the expiration of the 10 years, and then only upon a showing that he had earned as net profits for the company each year at least \$48,980, or 12 per cent., on a fixed capital the earning capacity of which might, in the course of events, greatly diminish. The contract may be regarded as entire in respect of the term of Horton's service and at the same time reasonably construed to mean that he should be paid the bonus promised at the end of any year when earned. In using the word “forthwith” in connection with the payment of the bonus when the annual net profit equals 12 per cent. we think it fair to assume that the bonus was to be paid whenever in any year the net profits on the fixed capital amounted to the sum named. Nor can it be reasonably said that a contrary construction should be given the contract because Horton made no claim for bonus until he was discharged. There is nothing in the record tending to show that this delay in making his claim was intended as giving a construction to the contract.

Appellant cites certain cases in support of its contention, reliance being placed particularly upon *Thomas v. Columbia Phonograph Co.*, 144 Wis. 470, 129 N. W. 523, 524. Respondent cites *Jennery v. Olmstead*, 90 N. Y. 363, as fully supporting his contention.

In the Wisconsin case the question arose upon the construction of a contract reading as follows: “May 7, 1904. Confirming my personal interview of this date with you, you are hereby appointed manager of our Milwaukee office to take effect May 1, 1904, at a salary of \$25 per week, with a commission of one-half (½) of one per cent. (1%) on the cash receipts of your office from sales, and ten per cent. (10%) of the net profits of the office up to a total profit of \$2,000 per month; and thereafter on the basis of five per cent. (5%) of such profits; the profits in question to be determined at and by our executive office, and notice thereof to be duly sent you by such office as determined by them.”

It appeared that plaintiff entered upon the performance of his services May 1, 1904, and continued until early in the year 1908. Each month he sent a report to the executive office of the cash receipts during the month from sales at the Milwaukee office, and received from the executive office a statement showing receipts of the office, certain deductions therefrom and the net profits for the month on which his commission was to be based. The court held that “the true construction of this contract is that the fiscal period for computation of net profits is the month, but that the real period to which net profits refers is the period of plaintiff's service.” Said the court: “And this is the construction which the parties themselves have put upon the contract as shown by competent evidence consisting of monthly statements rendered to the plaintiff and the statement of commission account from May 1, 1905, to July 31, 1906, also that of March 5, 1907, in which the net profits of one month were offset against the losses of other months. The plaintiff acquiesced in this mode of computation.” The opinion concludes as follows: “On the whole case there was no question to go to the jury, no disputed issue of fact, merely the construction of the written contract and the effect of subse-

quent written statements upon the practical interpretation given to it by the parties. The plaintiff showed no right to recover on the evidence."

It is not possible to say how far "the effect of subsequent written statements upon the practical interpretation given it [the contract] by the parties" influenced the minds of the judges in their construction of the contract. Indeed, the parties themselves having given a practical interpretation to the contract, the court would have been fully justified in following it without attempting an interpretation of its own.

The New York case was where defendant Olmstead entered the service of the Saratoga Savings Bank as actuary, August 19, 1867, under a contract the only part of which appearing in the report was as follows: "That as compensation for his [Olmstead's] services in that capacity [general actuary] he receive such sum or sums from the net profits of the institution, as such profits, after paying all incidental expenses, may warrant, not to exceed \$1,000.00 per annum." It appeared that Olmstead's services were terminated about January 14, 1873. The action was by the assignee of the bank upon Olmstead's bond against him and his sureties, growing out of certain funds drawn out by Olmstead about January 1, 1873, which the bank claimed was in excess of his earnings. The trial court found, in the accounting, that, on July 1, 1869, the bank had earned \$648.43 net profits, but for the purpose of fixing the sum to which Olmstead was entitled, the court took into account the whole period of five years, during which he was in the bank's employment, not making annual rests, but reducing the profits of one year by losses in a subsequent year, and this method of computation was sought to be justified on the ground that the contract was entire for the whole period of service, and that nothing became due to Olmstead until the expiration of his employment, however long it might continue. This was held not to be a reasonable construction of the contract. Unfortunately the report does not disclose whether or not Olmstead engaged his services for any definite period of time which makes it of uncertain application here. However, it was said on appeal: "The natural interpretation of the transaction is that the bank was willing to pay a salary of \$1,000 a year, out of the net profits of the year, and Olmstead was willing to serve, taking the hazard of the profits being sufficient to pay his salary. If profits were not earned, he would get no compensation, and it would not become a charge on future earnings. If earned, he was entitled to be paid, and the bank could not charge against the profits of one year the losses of a succeeding year. We think therefore the court erred in not crediting him with the whole profits of 1869. * * * Nor does the fact that the defendant Olmstead did not credit himself with the year's profits at the time, or the other circumstances, show a practical construction of the contract contrary to its natural meaning."

Without regard to the light which may be thrown upon the question by these cases, we think the construction given by the trial court to the contract here involved was justified by the language used in the contract itself, and that the court properly confined itself to the profits for the year 1907.

[2] We are next to notice appellant's point that the inventory of 1907 made no allowance for depreciation of plant and equipment, and this although plaintiff had, as is claimed, said that such depreciation was customary and would be made by him. There was evidence that before this contract was entered into, and while plaintiff was in defendant's employment, he gave it as his opinion that there should be made in the books of the company depreciation of the plant and equipment. Witness Gelinis, secretary of the company, testified to a conversation he had with Horton "shortly after he be-

came connected with the company." "Mr. Horton said that all manufacturing companies allowed so much for depreciation annually, and as near as I can remember, I think that he fixed it at about 10 per cent. He said that an allowance for depreciation should have been made by the Remillard Brick Company in the years prior to that time. He recommended that on his coming into the company. He said that it was the custom of manufacturing companies. I gathered from what he said that that would be the method pursued hereafter. He said that it was customary, that it was generally done with manufacturing concerns, and he wanted to know why we had not done it prior to that time."

Witness Miller, defendant's bookkeeper, testified: That Horton became connected with the company in July, 1906. "Subsequent to that time I had several talks with Mr. Horton on the subject of depreciation of the property and plant of the defendant. To the best of my recollection we had one of these conversations in the latter part of 1906. Mr. Horton, in looking at things, explained to us that in his business in San Francisco he had written off so much for depreciation every year. * * * To the best of my recollection he said that that was what he proposed to do with Remillard Brick Company's affairs and with their plant. To write off a certain amount to 'Profit and Loss' for depreciation every year, which I am pretty sure he said would be 10 per cent."

Witness Walker, superintendent of brickyards and sales agent, testified to conversations he had with Horton in which the latter said that "the inventory of 1906 was incorrect, that it should have been depreciated, and that it was the mode of procedure of manufacturing concerns to depreciate their inventory, and now since he had become identified with the company he proposed to depreciate that inventory about 10 per cent. until he had marked it off to what he called velvet. * * * The reason that he gave for his intention to mark off for depreciation was that that was the mode of procedure in all manufacturing business."

The claim of defendant is that when the inventory for 1907 was made, not only was it the custom among manufacturing concerns to depreciate articles in their inventories, but that Horton had agreed so to make defendant's inventory, and that this understanding, as well as the custom, entered into and formed part of the contract sued upon. The trial court had Horton's version of these conversations before it and what he did in the matter and why he did it. Horton testified: "Some time in September, 1906, I had a conversation with Mr. Walker on the local train in Oakland. I told Mr. Walker that I had been talking with Mr. Gelinis about the inventories. I mentioned that I noticed that each year for the past years the brickkilns had been taken at the same price, and that Mr. Gelinis had said that Mr. Remillard considered that was all right, because the kilns were kept in first-class repair annually, and that they did not depreciate with age; that they were as good at that time as when they were built, and further than that Mr. Walker said that the kilns were built at a time when the price of labor was very low, and that they would cost a very much higher price to build them at the present time, and therefore Mr. Remillard thought that the price that he set upon them was right. Mr. Walker further remarked that at about what the price of labor would be at the time we were talking that the kilns were worth all that they were taken at. I said that the items of machinery and many other things were held by the company at the same price from year to year in the annual inventory. Mr. Walker said that everything had been kept up in first-class condition, and that Mr. Remillard had always put those prices in the inventory up to the time of his death because, as Mr. Remillard said, he considered them

fair prices, and that the increase in the value of the real estate would more than offset any depreciation. Mr. Walker said that there was a great increase in the value of the real estate. I said to him that his statements agreed with what Mr. Gelinas had told me. I do not remember of Mr. Walker being there at any time when I was writing up the inventory. I was a part of two or three days in making up the inventory of 1907. I made up that inventory in my office and partly at home nights. I assisted in making the inventory of 1906 at Mr. Gelinas' request, and the prices for that inventory were obtained from Simard, Gelinas, and Walker, Harry Walker, and Frank Miller. Simard was general superintendent of the three brickyards of defendant. Harry Walker was a salesman and shipping clerk in the Oakland office, dispatcher of teams, and had general supervision over the stable. I did not suggest the declaration of the \$25,000 dividend of the corporation under the resolution of January 21, 1909. I had a conversation with Mr. Gelinas with reference to the inventory of 1906. I told him that there were certain inventory prices, particularly the prices on the kilns, that had been taken at the same amount each year, and I asked him the reason. He replied by saying that they were built years ago at a time when labor was cheap; that they had been kept up annually in first-class repair. He said they were as good to-day as ever; that at the present time it would cost more to build them than what they were inventoried at. He said that as to other items they had been passed upon by Mr. P. N. Remillard, and as everything had been kept up in good condition, the various articles had been inventoried for that reason at the price indicated. He said, as an offset to that, some of their properties had increased largely in value. He said that the three-quarter block bounded by Second, Third, and Clay streets in Oakland increased in value, which would more than offset any depreciation in value in other articles. I said that I thought he was right. That it was a family concern and a close corporation, and that such course was very often pursued by such corporations. He said that the water front property that the company had just previously purchased was a good purchase, and that it would be very valuable in the course of time; that the company should have bought it years before when they could have bought it for a very low figure as compared with the price for which it was purchased. This was about all that he said in that conversation."

Further explaining his connection with the 1907 inventory, speaking of a conversation with Mr. Gelinas, he testified: "I had a conversation with him in January, 1908, as to the inventory of 1907 brick. I told him that the brick had been taken in the inventory of 1907 at their cost as figured out by Mr. Frank Miller. He said that he thought Miller's cost was all right, because Mr. Miller said that he had checked back and proved all of his figures which were his costs. I did not make that inventory of 1907. I did not help figure the cost of brick in that inventory, and I was not present when Miller figured the cost of brick. In December, 1907, Mr. Gelinas said that it was a busy time of the year, and asked me to assist them with some of the work. He asked me to write out the inventory for them." He further testified that he had a conversation with Mr. Miller in the fall of 1906, when he told Miller that in his business "we had a system of marking off depreciation, and that everything had been marked off; that some houses had a way of marking off depreciation, some 5 per cent., others 10 per cent., others 15 per cent." He explained that he found, in looking over the books, "that the manner in which they had been kept would not permit the profits to be shown on an individual article, such as cement, lime, plaster, and other items, that I thought they should be

segregated so that the books would show as to whether we were making or losing money on those articles. * * * I told them we could deal with the subject of brick and other articles in the same manner." He made similar suggestions as to keeping the cost of making green bricks, the cost of burning the bricks, and delivering them to the cars, also a separate account with the boarding house, another for the stable, and another for the real estate. The reform suggested by Horton in these particulars was carried out in making up the 1907 inventory, but while some articles were either depreciated or no value at all carried out, other items, as they appeared in the 1906 inventory, were carried into the 1907 inventory without change, following what had been the method pursued by the company in previous years—the method adopted in making up the 1906 inventory which was taken as fixing the capital on which Horton was to earn his bonus.

We think the evidence was such as left the trial court at liberty to reject the claim of defendant that there was any agreement between plaintiff and defendant as to the method to be pursued in making inventories. Nor was there evidence of a custom as to depreciating inventories from which the court as matter of law should have found had become a part of the contract. There was testimony of expert accountants to the effect that many large and important manufacturing concerns in this and other countries very generally depreciate their inventories annually, the ratio depending upon the character of the business and of the articles inventoried, but not always the same ratio by concerns carrying on similar business. In some cases the depreciation is made upon individual articles, the ratio necessarily varying as the character of the article varies in its tenacity, its actual value, or as to its continued usefulness. In other cases the companies make a certain horizontal depreciation on the entire inventory. Appellant has, with much industry, brought together in its brief the opinions of many authors on this subject. But we find it hopeless to deduce any fixed, unchanging rule of depreciation by consulting these writers on accounting. Prof. Hatfield, of the chair of accounting, University of California, in his recent work on Modern Accounting, differing with some other writers, very sensibly, we think, says that the value of property must be the value to the owner of a going concern. We quote, at page 80, his remarks upon revaluations: "Shall they be put down at the original acquisition price or at some other valuation? If at some other value, shall it be the current market price, the present value to the concern, or the price they would bring in liquidation? The general principle, which, with various applications, is now universally accepted, is: The inventory should be on the basis of the value of the assets to the present holder as a going concern. The proper value is that which they have to the holding concern, and not that which they might have to other persons, whether these persons are ordinary customers, or those who might bid in the assets at a liquidation sale." At page 134 the author says: "Where the courts prescribe depreciation they have generally allowed the basis and, indeed, the period to be left to the discretion of the company's authorities." It is not possible to formulate a universal rule of depreciation which must, as matter of law, be followed by the courts. Companies have the right to establish their own method of arriving at their profits. One of the expert witnesses testified that where depreciation is charged against equipment at the end of the year, it "is part of the manufacturing and becomes absorbed in the cost of the article produced; it is a part of the cost of production, in other words, it is added to the cost value of the article produced, added in the inventory to the cost value

of the article." This illustrates how widely systems differ in making inventories.

There is not sufficient evidence that the parties contracted with reference to the custom contended for by defendant. On the contrary, the inference would seem to be justified that if they had any custom in mind, it was that of the company itself, pursued about 30 years without variation. This disputed inventory of 1907 was the basis for the profit and loss account for that year. It was well known to the directors, and it cannot be doubted that the executive committee knew all about it. The results were carried forward into the inventories and profit and loss accounts for succeeding years, and there is no evidence of any objection having been made by the directors or the executive committee or the finance committee to the correctness of these accounts, and none at all until the question arose in this action. The integrity of the 1907 inventory is not to be discredited solely on the ground that plaintiff was president and manager, and on a suspicion that he took advantage of his office to impose upon the company. Fraud or bad faith, or unduly inflating the inventory, or of having amended the by-laws permitting a 10-year contract, cannot be imputed to him without some evidence of it, and there is none. Besides, it is not to be overlooked that the governing power of the corporation resided in the directors, and ultimate responsibility was upon them. There was an executive committee charged with the duty of making "alterations, changes, and improvements in detail as to the systems or methods" to be adopted in conducting the business, and no change was recommended by this committee. The fact that the capital on which Horton was to earn his bonus was determined by the 1905 inventory, prepared in this previously adopted way, subsequently followed, would seem to indicate that the company was content to abide by the old way of making inventories. These inventories contained many important items which would have disappeared long before had the depreciation method contended for been adopted. The kilns inventoried in 1906 and 1907 at the same value (one at \$15,000, one at \$18,000 and two at \$20,000 each) would not have appeared at all as assets had they been depreciated annually even 5 per cent. in previous years; and so of many other expensive parts of the equipment.

The reason for this course, given by the company's officers, that there had been a large increase in the value of the real estate owned by the company, which had not been carried into the inventories, thus offsetting any apparent depreciation of the equipment, is by no means unsound. Then, too, it was shown that many perishable things were replaced and their cost charged to expense account—for example, brick molds, it was testified, wore out in a season and were replaced yearly. A large number of horses was used for teaming purposes, but the required number was kept full by purchase. So of many things which might be mentioned. The truth is that the rule of depreciation is largely theoretical, and is adopted by merchants and manufacturers as a protection against being deceived as to their assets, and in effect amounts often to accumulating what might not inaptly be called a surplus, if not in money, still in money value. As an illustration, we have these brick-kilns. They passed into the inventories unchanged in value, and were proven to be as good as new and to have an actual value of something like \$75,000, and yet, had the inventories been depreciated from the time they were built, they would have stood on the books at \$1 long before 1905. Had all the items of equipment been similarly treated, the books would have shown but few assets except the land, the outstanding accounts, brick on hand, and cash, and yet the company would have a completely equipped and operating plant worth many

thousands of dollars. The rule of depreciating inventories, no doubt, has its advantages, and the wisdom in following it is not to be questioned. It is very comfortable for a manufacturer to know that he has, by his earnings, been able to keep his plant running for 10 years and, while he has depreciated his equipment annually 10 per cent., and until it stands on his books at \$1, he has made the plant earn enough to give him dividends equal to his original capital invested, pay the cost of running, repairs, and replacements and have remaining an active factory. This would be what Horton said was "getting on velvet," but we cannot see that his contract required of him any such accomplishment, or that he promised to achieve it. It would seem altogether unreasonable for the court now to say that Horton ought to have instituted a new system of accounting, not contemplated by the parties—a system which if enforced in this action would deprive him of any bonus, and which would violate the principle upon which the basis of the company's capital rested. In short, the court is asked to hold that for the purpose of this case the alleged unscientific method of fixing the values found in the 1905 inventory shall stand unchanged as the measure of defendant's capital, but in ascertaining profits for 1907 a radically different method of fixing values must be adopted. Obviously, in all fairness, if we are arbitrarily to depreciate the inventory of 1907, we should go back and readjust the capital by treating the inventory of 1905 in the same manner. We can do neither, in our opinion, without violating the contract.

We come now to consider some of the specific objections to the inventory of 1907, and to notice how and by whom it was prepared. We cannot hope to consider all the items entering into this inventory of more than 100 exhibits.

[3] There were certain exhibits introduced by plaintiff, being respectively, "Profit and Loss Sheet," "Surplus Sheet," "Assets and Liability Account of '07," and "Surplus Account," which showed the profits for 1907 to be \$75,786.56. The trial court, rightly, as we think, admitted these exhibits (which showed the profits as just stated) on the theory that they constituted at least prima facie admissions by defendant of the profits of its business upon the closing of the books December 31, 1907.

[4] Plaintiff's contention, as to depreciation, is "that the annual statement of its business condition December 31, 1907, made by defendant and acted upon by it, must stand, except in those particulars in which it has been shown to be in error by defendant's evidence." At a meeting of the directors, held February 3, 1908, all present—

"The secretary submitted the regular annual statement of the resources and liabilities of the company, which report, summarized, shows net results as follows:

Total assets, Dec. 31, 1907.....	\$567,284 39
Total liabilities	491,497 83

Net profit for year 1907..... \$ 75,786 56

"Attest: J. B. Gelinis, Secretary."

Plaintiff introduced the inventory of 1907 and some further exhibits of the proceedings of the directors and stockholders found in the minutes and rested. The court opened the door to defendant to dispute the correctness of this inventory, and it is with defendant's objection and evidence in support thereof we are next to deal.

Defendant introduced witnesses who testified to what in their opinion should be the depreciation on certain named kinds of property. With the exception of witness Smith and witness Walker, the other witnesses had no personal knowledge of the property. They simply testified to what the ratio of depreciation should be on the property found in the inventory. Smith visited the plant, in January, 1911, and, judging from its character and then appearance, he fixed a

ratio of depreciation for 1907 on the buildings and some of the machinery. Walker was in defendant's employment, and his testimony related to a number of articles, some he thought worthless, but none of them of much value. These witnesses thus testified as to wagons and harness, machinery, boilers, and other things of that character in brickyards, the schooners operated in shipping bricks, brick machinery, boilers, engines, and other equipment, also as to the worthlessness and worn-out character of clay dumps, molds and some other articles in defendant's three brickyards, which were located at Pleasanton, San Jose and Green Brae.

Witness Barber, an expert accountant, "relying on the testimony of these several witnesses, and not on any arbitrary annual rate or percentage of depreciation fixed by himself," as stated in defendant's opening brief, "prepared Defendant's Exhibit N, showing the depreciation which should be made at these several yards and in equipment other than manufacturing—these latter including horses, harness, and wagons, the schooners, a hay cutter and electric motor. This exhibit N bears the following caption: "Estimated depreciation and obsolescence on equipment, etc., used in connection with manufacturing, based on inventory of December 31, 1906." The witness took the 1906 inventory and placed the then inventory value of the property in the first column, in the second the per cent. of depreciation, and in the third the amount. The plan of this exhibit was to ascertain the value of an item in the 1906 inventory, depreciate it as the witnesses had testified it should be, and then depreciate the same item in the 1907 inventory to make it conform to his rule of depreciation. The exhibit shows that the witness wrote off values at rates from 5 to 20 per cent. Summed up the exhibit shows:

San Jose yard depreciation.....	\$ 4,067 51
Pleasanton yard depreciation.....	5,772 85
Greenbrae yard depreciation.....	3,273 71
Equipment other than manufacturing at various yards.....	3,737 80

Total \$16,851 87

Outbuildings and improvements he wrote off 5 per cent. The kilns were depreciated 10 per cent. and most of the remaining items in about equal numbers were depreciated 10 per cent. and 20 per cent. He next wrote off:

For clay taken from the land.....	\$ 4,304 55
For rebates on sales of bricks in 1907.....	432 00
An item relating to 1906 business improperly credited to 1907 business.....	333 05
Purchase of lime in 1907 not entered until 1908	420 00
Two other similar items.....	99 20
Accounts of 1907 not collected.....	2,238 00
Difference in certain 1907 brick when valued at 1906 rates.....	3,231 65
Error in misplacing a decimal in this brick item	1,390 49

Total \$12,448 94

To these errors add depreciation..... 16,851 87

Gives total to be deducted from apparent surplus \$29,500 81

These figures reduce the profits below \$48,980, which had to be earned before any bonus was allowed.

Of plaintiff's connection with the making of this inventory we have already given some of the testimony. It was the work of Gelinas, Miller, Walker, Simard, and Revolta, all in responsible positions with the company, some of them stockholders, assisted by Horton, as explained by him. Horton was examined at great length; his attention being directed to the inventory, item after item. His testimony shows that the handwriting was by different of these persons and sometimes by himself; that the values were given by the persons apparently best informed as to the item, sometimes by one, some-

times by two or more, and sometimes by Gelinas or another in consultation with Horton. As heretofore stated, the evidence was that some articles were depreciated to accord with their value, but some also were set down at the value shown in the 1906 inventory. We do not, however, attach significance to these details further than that the evidence shows that the inventory was mainly the work of trusted employes of the company who had been long in its service, and who were not only familiar with the property and its value, but were also familiar with the method adopted and practiced by the company for many years in making its annual inventories. We do not feel disposed to add much to what has already been said with respect to the contention that the trial court erred in not following defendant's proposed rule of depreciation. The evidence shows that the inventories had been taken upon a physical appraisalment of the properties rather than by a horizontal depreciation method. As illustrating what was done, the inventory of the Oakland stable account, consisting of horses, wagons, harness, etc., may be given. The inventory of 1907 shows a depreciation of \$1,175 as against the value of 1906.

There is a fundamental error, it seems to us, in the basis of expert Barber's schedules. He proceeded on the assumption that the inventory of 1906 was a correct starting point from which to develop his method and ascertain values. The reason given by him was as follows: "I used the inventory of 1906 as a basis of the valuation for the reason that the property purchased during 1907 might have been purchased so near the end of the year as not to be properly considered as having depreciated at all during that year." This is not satisfactory. A very large per cent. of the property had been in use many years, and, as we have pointed out, should, on Barber's theory, long before have been written off. For example, he took the kilns at the valuation of 1906, whereas they had been in use more than 20 years. Most if not all the real estate was purchased prior to 1906, and it amounted to more than one-third of the entire values. Obviously, if his method should be applied in making the 1907 inventory, he should have started with one framed in accordance with his method, inasmuch as he was dealing with plaintiff and his rights under the contract, and not alone with the company's rights. It might not have mattered, if only the defendant was concerned, where and when he found his basis to work from; although, it seems to us, it would have been but fair to the company, in starting a new system, either consistently to keep in mind the old method, or to begin with a physical appraisalment of all assets. We have already seen that to apply Barber's method to the past years of defendant's business the capital of \$408,167, on which Horton was to earn 12 per cent. net profits, before sharing in any surplus, would have been reduced far below the original capital with which the corporation started. Our conclusion, as to the schedule of depreciations prepared by Barber, is that it should be disregarded.

Turning now to the schedule of miscellaneous items charged off, amounting to \$12,448.94, let us discover whether there is merit in the claim. One of the large items of this schedule was \$4,304.55 for clay used. Barber testified: "The manner in which the entry was handled was such as to make its effect zero, the debit canceling any effect. I mean the credit canceling the effect of the debit." He testified, however, that "there was no reduction made at the end of the year in the value of the real estate," from which he concluded that there must be a depreciation made to the amount he finds the clay was worth. The answer to this is that the company had not, in previous years, depreciated the real estate on this account and in 1907 the old method of valuing the real estate persisted.

The method adopted by the company applied alike to all its property. Furthermore, the expense account was burdened with the taxes and other expenses attending, not only the land producing clay, but all the real estate and its improvements in addition to such land, and there was a good deal of it. It was shown that the real estate had increased in value. These considerations would seem to account satisfactorily for the defendant's adhering to the values given in former inventories.

The items, rebates on goods sold, \$432, railroad rebates, \$333.05, lime purchased in 1907 charged in 1908 at \$420, and other similar items, \$99.20, were, as we understand plaintiff's reply brief, conceded as proper corrections. Of these purchases in 1907 (\$519.20) Barber testified: "There was a much larger amount of business charged in 1907 so as it more than offset this amount. I did not go much further into it."

Of the item, \$2,238, uncollected personal accounts, Barber testified: "A portion of that should have been used in reducing the profit account for 1907, and my figures show the amount that should be so charged." Miller, defendant's bookkeeper, testified: "I will say that giving credit to the 1907 account for the amount originated prior to 1907 and charged off during 1907, it would show a net balance of \$458.98 that should still be absorbed in 1907. That sum should be charged off"—not, as we read Barber's schedule, \$2,238.

The remaining item is \$2,261.67, to which is added error in the account \$1,390.49, making overvaluation of brick in 1907 inventory as compared with prices used in 1906 inventory, as we understand the claim, the sum of \$4,556.51. Barber's attention was called to this item on cross-examination, and he corrected his testimony in chief as follows: "I omitted to figure in some Oakland brick; taking this error, which amounted to \$1,354.86, into consideration, the correct difference would be \$3,231.37; that is to say, the brick in the 1907 inventory figured at the 1906 inventory prices would amount to \$3,231.67 less than the figures appearing in the 1907 inventory, that is after taking into consideration the \$1,354.86 error in that inventory, that is on the basis of figuring all the brick in the inventory." We can see no reason why the brick should have been valued, in December, 1907, the same as in December, 1906, unless all the surrounding conditions were the same, which does not appear to have been the case. Horton testified that the market price of hard-burned brick at San Francisco and Oakland at the end of 1907 was "\$10 per thousand, ex cars or dock, delivery to be upon freight cars or dock, at the expense of the parties sold to." Hard brick were inventoried 1907 at \$6 per M at the Pleasanton yard; at the San Jose yard, \$6.178 per M, and at the Greenbrae yard, \$6.385 per M. The average price at the three places combined was \$6.18 per M.

We have already quoted Horton's testimony in which he stated "that the brick had been taken in the inventory of 1907 at their cost as figured out by Mr. Frank Miller. * * * Miller said that he had checked back and forward all his figures which were his costs." Horton testified: "I did not help figure the cost of brick in that inventory, and I was not present when Miller figured the cost of brick." Barber ascertained from the books the total cost of burned brick to be \$63,014.53 and the number on hand at close of 1907 to be 10,200,000, an average per M of \$6.17, within less than one-tenth of a cent of the average inventory value.

Barber figured the green brick, 10,715,000, cost, \$34,435.36. Of these nearly one-half were inventoried at \$2.728 per M, over one-third at \$3.377 per M, nearly one-fifth at \$4.146, an average but little more than Barber figured the cost.

We do not think that the contention of overvaluation of the brick is sustained by the evidence. They were inventoried by defendant's bookkeeper at cost, and we have shown that his estimate is so near that of Barber's as to make the difference negligible.

Without going further into these accounts, we think it satisfactorily appears that when defendant is allowed the corrections or mistakes shown in its favor, which were sustained by the evidence, and some mistakes concededly in plaintiff's favor, the corrected profit is well within the amount found by the court.

As to the claim that there was an overproduction for the year 1907, which should have been taken into account in figuring values, something in reply should be said. In round numbers, defendant had on hand, at the close of the year, 22½ millions of bricks, about equally divided between burned and green. The amount carried over from 1906 was something over 16,000,000. It will be recalled that the great fire in San Francisco created an abnormal demand for building material, and, although in rebuilding, a much greater proportion of cement than ever before was used, still the demand for brick was large, and the directors might reasonably have supposed it would continue. Bricks sold in 1907 as high as \$13.50 per M. That a period of temporary depression later curtailed sales could not have been anticipated. Conditions so changed that in 1908 the company manufactured no brick. But this reaction, which could not have been foreseen, cannot be invoked to affect conditions at the close of 1907. Defendant suggests that it is not a fair construction of the agreement "to hold that defendant should be required to pay Horton a percentage on the material of all properties remaining on hand at the end of the year 1907," for example, this large quantity of carried over bricks. We think the quantity not abnormally great when the conditions are considered. As to its effect upon the accounts the quantity was immaterial. The cost of manufacturing the brick on one side of the account equalized the carried over value—the credit and debit entries neutralizing one another.

We have endeavored to consider all the objections made to the findings and judgment which seem to call for notice, and there remains to dispose of alleged errors in rulings of the court at the trial in refusing to allow certain questions.

[5] Expert witness Barber was asked several questions as to his opinion upon the correctness of the statement of profits. He was asked: "Was your investigation of the books, records, and accounts of the Remillard Brick Company for the year 1907 so thorough as to enable you to state what the profits of that business were for that year if proper accounting methods had been pursued?" He was also asked whether the account of profit and loss was correctly stated, and some other similar questions, calling for his opinion as to whether the "surplus figures \$75,786.56 is a correct statement of the corporation for the year 1907." Objections that the questions were immaterial, irrelevant, and incompetent were sustained. We cannot see that the defendant was prejudiced by the court's refusal to accept the conclusions reached by the witness instead of its own upon a full consideration of the evidence and the law.

All the facts were before the court, and it then became its duty to decide the issues, and no rule of evidence or of law would compel the court to accept the opinion of the witness as to the conclusions to be drawn from the facts. It certainly was discretionary with the court to avail itself of the witness' opinion deduced from the evidence, and in declining to accept it defendant was not prejudiced, even if the testimony was admissible.

[6] But one further error of this character is called to our attention. Witness Barber was asked whether or not the bricks sold in 1908

were not on an average sold at a loss of \$1.59 per thousand. Objection was sustained.

The average price received in 1908 could only be ascertained in closing the books at the end of that year. If, as we have held, plaintiff was entitled to the fruits of his contract as they appeared at the end of the year 1907, it was wholly immaterial what happened in the year 1908.

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PEOPLE v. CREEKS. (Cr. 1924.)

(Supreme Court of California. June 7, 1915.)

1. CRIMINAL LAW $\hookrightarrow$ 207 — COMMITMENT — "MAGISTRATE"—WHO ARE.

A justice of the peace, declared by Pen. Code, § 808, to be a magistrate, is still a magistrate entitled to commit offenders, regardless of the amendment of 1911 (St. 1911, p. 2161) to Const. art. 6, §§ 1, 11, 15.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 414, 418, 440, 472-475; Dec. Dig. $\hookrightarrow$ 207.]

For other definitions, see Words and Phrases, First and Second Series, Magistrate.]

2. INDICTMENT AND INFORMATION $\hookrightarrow$ 137—VACATION—GROUNDS FOR.

Under Pen. Code, § 995, providing for the setting aside of informations, and information cannot be set aside because the evidence adduced on the preliminary examination before the magistrate did not sufficiently show probable cause to warrant the commitment for trial; that objection being cognizable only in a proceeding in habeas corpus in accordance with section 1487, subd. 7.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. $\hookrightarrow$ 137.]

3. JURY $\hookrightarrow$ 131—IMPANELING—QUESTIONS.

A question on the voir dire examination of jurors whether they would follow the court's instructions cannot be held improper.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 561-582; Dec. Dig. $\hookrightarrow$ 131.]

4. CONSPIRACY $\hookrightarrow$ 41—ESCAPE—PRINCIPALS.

Pen. Code, §§ 105, 106, make it a felony for a prisoner confined for a term less than life to escape or attempt to escape from the state prison. Section 31 declares that all persons concerned in the commission of a crime, whether it be felony or misdemeanor, are principals. *Held*, that persons conspiring with a prisoner for a term less than life to effect his escape are principals in the felony.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 74; Dec. Dig. $\hookrightarrow$ 41.]

5. CONSPIRACY $\hookrightarrow$ 28—ESCAPE—PRINCIPALS—WHO MAY BE.

A prisoner serving a life term in the penitentiary may be a principal under Pen. Code, § 31, in the felony of attempting to effect the escape of another prisoner serving a term of less than life.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 40, 41; Dec. Dig. $\hookrightarrow$ 28.]

6. ESCAPE $\hookrightarrow$ 5—OFFENSES.

Under Pen. Code, § 109, it is an offense punishable by imprisonment in the state prison to assist a prisoner to escape.

[Ed. Note.—For other cases, see Escape, Cent. Dig. § 6; Dec. Dig. $\hookrightarrow$ 5.]

7. CONSPIRACY $\hookrightarrow$ 41—ESCAPE.

Where accused, who was serving a life term, and another convict serving a less term unlawfully conspired to assist one another in escaping from a state prison, each was criminally responsible for the acts of the other committed in the furtherance of the common design, and hence accused was responsible as a principal

for the act of his co-conspirator in killing one of the guards; such willful killing being a natural and probable consequence of the execution of the design.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 74; Dec. Dig. $\hookrightarrow$ 41.]

8. CRIMINAL LAW $\hookrightarrow$ 1036—APPEAL—OBJECTIONS.

Error cannot be predicated on the admission of testimony, where accused's objections were withdrawn, and it was received without objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. $\hookrightarrow$ 1036.]

9. CONSPIRACY $\hookrightarrow$ 48 — ESCAPE — TRIAL — INSTRUCTIONS.

In a prosecution for the killing of a guard by one of two convicts who were attempting to escape from prison, instructions on the liability of one conspirator for the acts of his co-conspirator are warranted.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 108-111; Dec. Dig. $\hookrightarrow$ 48.]

10. CRIMINAL LAW $\hookrightarrow$ 1172—APPEAL—HARMLESS ERROR.

In a prosecution for the killing of a guard by convicts who were attempting to escape, an instruction that, if a convict is informed of an expected attempt to escape, and he does not desire to assist therein, it is his duty to report it, but, if he fails to do so, and willingly joins in and aids, abets, and assists the escape, he is responsible for all the consequences following the conspiracy, is harmless, though it was erroneous in informing the jury that the convict should report the expected attempt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. $\hookrightarrow$ 1172.]

11. CRIMINAL LAW $\hookrightarrow$ 753—TRIAL—INSTRUCTIONS.

An instruction correct in law cannot be held erroneous because, under the evidence, it practically directed the jury to convict accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713, 1727-1739; Dec. Dig. $\hookrightarrow$ 753.]

12. CRIMINAL LAW $\hookrightarrow$ 1160½ — APPEAL — HARMLESS ERROR.

In a prosecution for the killing of a guard by convicts who were attempting to escape, the reading of a section of the Penal Code relating to the liability of convicts for assaulting guards, while erroneous, was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. $\hookrightarrow$ 1160½.]

13. WITNESSES $\hookrightarrow$ 277—CROSS-EXAMINATION—SCOPE.

Accused, who was charged with the murder of a guard killed when accused and another convict attempted to escape, took the stand and testified that he in no way participated in the attack upon the guard. On cross-examination he was asked whether he did not leave his cell with his co-conspirator, intending to overcome the guards and escape, and whether he did not strike the other guard with the intention of aiding his co-conspirator to escape. *Held* that, while Pen. Code, § 1323, provides that a convict cannot be compelled to be a witness against himself, yet, if he offer himself as a witness, he may be cross-examined as to all matters about which he was examined in chief, the cross-examination was not improper, being germane to the examination in chief, and also to the prose-

cution's theory that the killing took place as a result of the conspiracy.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. ☞ 277.]

14. CRIMINAL LAW ☞ 1170½ — APPEAL — HARMLESS ERROR.

In such case, as accused was liable as principal in attempting to assist his co-conspirator, a convict serving less than a life term, to escape, regardless of whether he knew the term, cross-examination bringing out that he knew the term for which his co-conspirator was incarcerated was harmless, if erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. ☞ 1170½.]

In Bank. Appeal from Superior Court, Sacramento County; Herbert E. White, Judge.

Frank Creeks was convicted of murder in the first degree, and he appeals. Affirmed.

J. S. Clack, of Visalia, and J. T. Fuller, of Lindsay, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

ANGELLOTTI, C. J. The defendant was convicted of murder in the first degree upon an information charging him with the murder of one J. P. Drewry, in October, 1914, in Sacramento county. This is an appeal from the judgment of death given upon such conviction, and from an order denying defendant's motion for a new trial.

[1] 1. Before entering his plea of not guilty defendant made a motion that the information be set aside on the ground "that before the filing thereof the defendant had not been legally committed by a magistrate." Section 995, Pen. Code. This motion was denied. It was claimed that he had never been committed for trial by a "magistrate." The commitment was by a justice of the peace of Granite township, in Sacramento county. Justices of the peace are magistrates. Section 808, Pen. Code. The claim is that justices' courts were abolished by the amendments of sections 1, 11, and 15 of article 6 of the Constitution, adopted October 10, 1911. The same claim was made in the matter of Woods, 161 Cal. 238, 118 Pac. 792, and we held that the amendments had no such effect. We adhere to the views there expressed.

[2] It was further claimed that the evidence adduced on the preliminary examination before the magistrate did not sufficiently show probable cause to warrant a commitment for trial. Such an objection is not available on motion to set aside an information. By reason of an express statutory provision so declaring (Pen. Code, § 1487, subd. 7), such an objection may be raised on habeas corpus, if timely made, and we know of no other other way in which it can be raised. It is not included in the grounds specified in the statute for the setting aside of an information. The subdivision relied on, that

providing for such a motion on the ground that the defendant has not been "legally committed by a magistrate," has no reference to the matter of the sufficiency of the evidence upon which a magistrate has acted. See *People v. Beach*, 122 Cal. 37, 54 Pac. 369. The trial court did not err in denying the motion to set aside the information.

[3] 2. Complaint is made that the trial court erred in overruling objections to a certain question put to two jurors on their voir dire by the district attorney. Substantially, the question was: If the court instructed the jury in a certain way as to the law, would the jurors follow the instruction? It is claimed that the law would not sanction any such instruction. There is nothing in the nature of the question or in the record to indicate any misconduct on the part of the district attorney in asking the questions, and we are utterly at a loss to perceive how the defendant's cause could have been prejudicially affected by either the questions or the answers thereto.

[4-7] 3. It is claimed that the evidence was insufficient to warrant a conviction of defendant on the charge against him, viz., the murder of J. P. Drewry. To a proper understanding of the claim of defendant in this regard, and also of certain other claims relative to the instructions given or refused, a brief statement of some of the facts is essential. The homicide was committed a few minutes after 8 o'clock on the evening of October 16, 1914, in the California state prison at Folsom. The deceased, Drewry, was an officer of the prison, being sergeant of the first night watch. Defendant was serving a life term therein, adjudged upon conviction of the crime of murder. He was and for about two years next preceding had been occupying a cell with a convict named Phelps, who was serving a term less than life. By 8 o'clock on the evening referred to, all of the prisoners, including defendant and Phelps, had been locked in their respective cells. Through the wicket in the door of their cell defendant and Phelps had a view of the inside gate. About that hour a guard looked into their cell and saw them both therein. Very shortly after 8 o'clock Capt. Drewry, in accordance with his custom, came to the outside from within to obtain certain firearms to distribute among the inside guards; such weapons being allowed to such guards only after the prisoners had been locked in their cells. He obtained the weapons, four revolvers, and with one Kerr, a guard who had charge of the outer gate, walked along the passageway from the outer to the inside gate, which was open, and which Kerr was to close and lock after Drewry had passed through. They were talking as they walked along to the inside gate, and paused a moment as they reached it, apparently to finish the conversation. Here they were attacked

by defendant and Phelps, who in the meantime had obtained egress from their cell and reached the gate. It was subsequently ascertained that their cell door had been unlocked from the inside by means of a key fitted in the end of a piece of wire, prepared for that purpose by one or both of them. Phelps had a knife in his possession when they left their cell. Defendant had a dumb bell, and probably also a knife. Defendant attacked Kerr, striking him on the head with the dumb bell and knocking him down or partly down to the floor of the passageway, while Phelps engaged in a struggle with Drewry. Defendant, after so striking Kerr, attempted to pull him inside the inner gate, but Kerr managed to break away, and finally reached the outside gate, which he was unable to lock, not being able to find the key. He shut this gate, defendant reaching it about this time, and threatening to shoot him with one of the revolvers dropped by deceased when attacked. Kerr ran and gave the alarm and returned. In the meantime defendant and Phelps had come through the outside gate into the yard, both armed with revolvers. Shooting ensued between the two convicts and the guards in the yard, with the result that Phelps was shot and killed, and a guard named Maher was shot in the hip and died within a few days. Defendant ran down towards the river and escaped, but was recaptured the next night at a place named Loomis, a few miles from the prison. Drewry was found a few minutes after the struggle at the inside gate, on the inside, lying near one of the cells, mortally wounded, and died a few minutes thereafter. An examination disclosed two wounds, one on the scalp and one on the back of the neck below the skull, both inflicted by some sharp instrument or instruments, and both fatal. His death was caused by these wounds, which clearly had been inflicted in the struggle near the inside gate. A pocketknife belonging to defendant was found in the yard along the route taken by him as he escaped. Drewry was a larger and more powerful man than Phelps. No prisoner except defendant and Phelps was at any time after 8 o'clock out of his cell, or participated in an effort to escape.

It may be assumed for the purposes of this decision that the evidence fails to sufficiently show that defendant personally inflicted any wound on Capt. Drewry or personally assaulted him in the conflict near the inside gate, and that in such conflict he devoted his efforts exclusively to Kerr; and, further, that it fails to show any express specific agreement between Phelps and himself to kill anybody in their previously conceived and concerted plan to escape from the prison. This is a matter of no moment in this case. The evidence does clearly show that defendant and Phelps had conspired and combined together to commit an unlawful act, viz., to accomplish their es-

cape, the escape of both Phelps and defendant, from the state prison, and in the accomplishment of that purpose to use such force as was found to be necessary. It was such that a jury could not reasonably conclude otherwise. The law made it a felony on the part of Phelps, a prisoner confined in a state prison for a term less than for life, to escape or to attempt to escape therefrom (sections 105 and 106, Pen. Code), and any person aiding and abetting in the commission of this felony would be a principal therein (sec. 31, Pen. Code). So that it is immaterial here that the law does not make it a crime for one undergoing a life sentence in a state prison to himself escape or attempt to escape. The conspiracy included, as a part of the joint purpose, the accomplishment of something admittedly unlawful and a felony, namely, viz., the escape of Phelps. Of course, there is no force whatever in the suggestion that defendant could not, by reason of his status as a prisoner for life in a state prison, be held as a principal under the provisions of section 31, Penal Code. The conspiracy likewise included the commission by defendant of the felony defined by section 109, Penal Code, which provides that "any person who willfully assists * * * any prisoner confined in any prison or jail * * * to escape, or in an attempt to escape from such prison or jail, * * * is punishable as provided in section 108 of the Penal Code," viz., by imprisonment in the state prison not exceeding ten years and by a fine. The willful killing of any person standing between defendant and Phelps and the consummation of their escape was an ordinary, probable and natural consequence of the execution of their common design.

The law applicable in such cases is well stated in *People v. Kauffman*, 152 Cal. 331, 334, 92 Pac. 861, 862, where it is substantially said that, under the well-settled rule of law governing the criminal liability of each of several engaging in an unlawful conspiracy or combination, if several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. It was further said:

"In contemplation of law the act of one is the act of all. Each is responsible for everything done by his confederates which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan."

Of course, as said in the case just referred to, if one member of the party departs from the original design as agreed on by all the members, and does an act which was not only not contemplated by those who entered into the common purpose, "but was not in furtherance thereof, and not the natural or legitimate consequence of anything con-

nected therewith, the person guilty of such act, if it was itself unlawful, would alone be responsible there." But there is no reasonable basis in the evidence for the application of this doctrine here. Not only was the killing of any officer or guard standing between defendant and Phelps and their escape a probable and natural consequence of their plan to escape, as that plan is shown by their acts and conduct, but the evidence shows quite clearly that their plan contemplated the overcoming of Drewry and Kerr by such force and to such an extent as was necessary at the very place where they attacked them, and, these men having been rendered powerless to resist them or impede their movements, their subsequent escape through the gates into the yard. Under such circumstances, Creeks would be equally guilty with Phelps of the murder of Drewry even if he did not personally inflict any wound on him, for under the law the acts of Phelps in the matter were the acts of the defendant also. The verdict of the jury in this regard is not only sufficiently sustained by the evidence, but we do not see how any other verdict could have been given. See, also, *People v. Ford* (App.) 143 Pac. 1075.

[8] 4. To the claim that the statement or confession made by defendant very shortly after his recapture was improperly admitted in evidence, it is sufficient to note that the objections made to its introduction were withdrawn by his attorneys, and that it was received in evidence without objection on their part.

[9] 5. In view of what we have said as to the rules of law applicable to such a case as this, we find no prejudicial error in the matter of instructions of the court to the jury.

It was proper to instruct the jury that any prisoner confined in the state prison for a term less than life who attempts to escape therefrom is guilty of a felony, to acquaint them with the fact that any conspiracy or combination including among its purposes the accomplishment of the escape of Phelps was a conspiracy for the accomplishment of an unlawful act. The instruction that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, are principals in the crime, was, as we have seen, a correct statement of the law applicable to this case, as also was the instruction that one who aids, abets, and assists a convict confined in the state prison for a term less than life to escape therefrom is guilty of a felony.

[10] The following instruction was given: "If a convict is informed of an expected attempt to break or escape from a state prison to be made by a convict confined therein for a term less than life, and his help is sought by said convict so planning it, if he in good faith does not desire to assist therein, it is his duty to report the same to the proper officer of the

prison. And if he fails to do so and willingly joins in and aids, abets, and assists such escape, he is responsible for all the consequences that follow said conspiracy."

This instruction is somewhat loosely drawn, and we cannot commend it. The court should not have instructed the jury that it was the duty of a convict informed of a proposed attempt to escape to report the same to the proper officers of the prison. No question relating to any moral obligation resting on defendant was involved in the issues being tried, and the defendant was violating no law in failing to give information of the proposed escape. But we do not see how, in view of the context, this statement could have prejudiced defendant. It was immediately followed by the statement:

"And if he fails to do so, and willingly joins in and aids, abets, and assists such escape, he is responsible," etc.

This purported to define the only circumstances under which defendant could be held criminally liable under the facts stated in the instruction, whatever his failure to give such information to the officers. He must go further, and willingly join in and aid, abet, and assist, etc. It would be unreasonable to assume that any prejudice resulted to defendant from this instruction.

[11] The instruction stating substantially that, if the jury were satisfied beyond a reasonable doubt by the evidence of certain specified things, the defendant must be held guilty of murder, even though he did not personally inflict the fatal wound, correctly state the law. If, as suggested by counsel, the giving of this instruction "was about the same thing as telling the jury to convict the defendant of the crime charged," this is so only because the evidence so clearly shows the elements essential to conviction as to leave no reasonable doubt of their existence.

[12] The court might well have omitted to read to the jury section 246, Penal Code, for it had nothing to do with the case. We are unable to see, however, how it could have misled the jury, or in any way prejudiced defendant's cause.

One or two other instructions complained of require no notice here, as they were unquestionably correct.

Certain instructions requested by defendant were properly refused. The first referred to in his brief did not correctly state the law, inasmuch as it substantially involved the proposition that it was not a crime on the part of one confined in a state prison for life to aid and assist one confined therein for a term less than life to escape or attempt to escape therefrom. The second requested instruction referred to did not correctly state the law, inasmuch as it declared substantially that defendant could not be convicted of murder unless he actually struck the fatal blow that killed Drewry, or unless it was specifically agreed between Phelps and defendant, as a part of a conspiracy to

escape "entered" into by them, that they would "kill and murder any one who interfered" with their escape. As we have seen, no such specific agreement to kill was essential to defendant's guilt. The same objection exists as to the third requested instruction referred to.

[13] 6. It is claimed that, under the rulings of the trial court, defendant was compelled to be a witness against himself, in that on his cross-examination he was examined, over his objection, as to matters about which he had not testified on his direct examination. On his direct examination he had testified that he was present at the conflict in the corridor, near the inside gate, saw part of the fight between Phelps and Capt. Drewry, saw Phelps strike Drewry, did not participate "in any manner" in that fight, and did not have his hands on Drewry in any way; that at the end of that fight between Phelps and Drewry he picked up from the floor his own knife and a "gun," and that he had last seen this knife in his cell that same evening and had not brought it from there; that he left his cell that evening just ahead of Phelps; that Phelps had his own knife in his hand when they came out of the cell. The whole purpose of his testimony on direct examination was to show that he was in no way a participant in the attack on Capt. Drewry, and had absolutely nothing to do with it; that he was, in fact, an innocent spectator taking no part, so far as his testimony showed, in any attack on either Drewry or Kerr. He did not in his direct examination say anything about his attack on Kerr. The prosecution claimed, and there was considerable foundation for the claim, that not only was defendant a co-conspirator with Phelps in a plan to escape together, using such force as was necessary to accomplish their purpose, but also that in the attack made on the officers, having temporarily disposed of Kerr, he personally took part in the struggle of Phelps with Capt. Drewry, who was a larger and stronger man than Phelps, and that with his own knife, already referred to, he inflicted the fatal wound found on the back of Capt. Drewry's neck, below the skull. On cross-examination defendant was asked, among other things, "Well, you left the cell with Phelps with the intention of overcoming the guards and escaping from the jail, did you not?" to which he answered, "Yes, sir." "In accordance with the agreement made by you and Phelps before leaving the cell, you struck Kerr?" to which he answered, "Yes, sir." "Your object in striking Kerr was to overpower him and aid Phelps in getting out of the prison?" to which the answer was, "That was the object under the circumstances." We are at a loss to see why that was not proper cross-examination, in view of his testimony given on direct examination.

The well-settled rule in this state as to cross-examination of a defendant is stated in

People v. Gallagher, 100 Cal. 475, 35 Pac. 80, 83. While a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, if he offer himself as a witness "he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." Section 1323, Pen. Code. The statute places no limitation or restriction upon the extent or character of his cross-examination "as to all matters about which he was examined in chief," and upon these matters he may be cross-examined as fully as any other witness.

"Any question which would have the tendency to elicit from him the whole truth about any matter upon which he had been examined in chief, or which would explain, or qualify, or destroy the force of his direct testimony, whether it be to give the whole of a communication or transaction of which he had given only a part, or to show by his own admission that he had made contrary statements, or that his conduct had been inconsistent with the statements given in his direct testimony, and thus throw discredit upon them, would be legitimate cross-examination."

Again, in People v. Dole, 122 Cal. 486, 491, 55 Pac. 581, 583 (68 Am. St. Rep. 50), it was said by the late Chief Justice Beatty, a majority of the court concurring in his views, that:

"Any fact may be called out on cross-examination which a jury might deem inconsistent with the direct testimony of a witness, and a defendant testifying in his own behalf is in this respect put upon the same plane with other witnesses."

In the light of these declarations, we are of the opinion that no error was committed in allowing this cross-examination. One of the matters regarding which defendant testified on his direct examination was the attack on Capt. Drewry near the inside gate, and his own absolute lack of participation therein. The matters called for on cross-examination tended to show that the assault was, in fact, a joint assault by defendant and Phelps on both Kerr and Drewry, undertaken and carried into execution by them, for the purpose of accomplishing their escape from the prison, and they were of such a nature that the jury might well deem them inconsistent with the direct testimony of the witness as to the part played by him in the encounter near the inside gate, and, under the circumstances shown, even as to his statement to the effect that he did not personally assault Capt. Drewry. It was at least very unlikely that in such a joint assault made under such circumstances as were disclosed by the cross-examination the defendant, armed with a knife, as the jury had the right to conclude from the evidence he was, refrained from assisting Phelps in his struggle with Capt. Drewry, when he had the opportunity to do so. The cross-examination thus tended to discredit and destroy the force of the testimony given by defendant on his direct examination as to this very matter.

[14] The question asked defendant on cross-examination, "You knew that Phelps at

the time was serving a term in the state prison of less than life?" to which he answered "Yes, sir," was probably not proper cross-examination. However, the allowance of this question was not error sufficiently grave to warrant a reversal. Such knowledge on the part of the defendant was not essential to his guilt as a principal in the matter of the escape or attempted escape of Phelps, or to his guilt under section 109, Penal Code, in the matter of willfully assisting "any prisoner confined in any prison * * * to escape," and, this being so, we do not see how it could have otherwise prejudicially affected his cause.

We find no other matters requiring notice.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.

(170 Cal. 351)

THE YAMATO v. BANK OF SOUTHERN CALIFORNIA. (L. A. 3464.)

(Supreme Court of California. June 5, 1915.)

1. CORPORATIONS — 123 — PLEDGE OF STOCK — ACTION AGAINST SUBSEQUENT PLEDGEE — SUFFICIENCY OF EVIDENCE — NEGLIGENCE.

In an action to recover possession of a certificate of plaintiff's capital stock, pledged to it by its secretary as security for his note, which the secretary thereafter abstracted and pledged to defendant as security for a note, evidence held not to sustain a finding that the plaintiff's negligence and sufferance had permitted and made possible the repledge to defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. — 123.]

2. CORPORATIONS — 123 — PLEDGE OF STOCK — REPLEDGE — ESTOPPEL.

In an action to recover possession of its certificate of stock which had been pledged to plaintiff by its secretary, and thereafter abstracted by him and pledged to defendant as security for a note, where it appeared that the secretary, after his pledge to plaintiff, had access to the certificate; that defendant held it for over a year before demanding a transfer on plaintiff's books—the mere fact of plaintiff's trust in its secretary was not negligence estopping plaintiff from asserting a claim to the certificate as against the defendant, especially where it did not appear that defendant's position would not have been bettered if plaintiff had not permitted the secretary to possess the certificate, or had noted the pledge to it on the stub of its stock book.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. — 123.]

3. NEW TRIAL — 138 — MOTION — TIME.

Where appellant served and filed its notice of intent to move for a new trial on August 12, 1912, prior to the entry of the judgment on August 14th, and on August 23d served a new notice of intention within the 10 days after the entry of judgment allowed by Code Civ. Proc. § 659, the first notice was premature and a nullity, but the second notice was effective.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 354-370; Dec. Dig. — 138.]

4. NEW TRIAL — 136 — MOTION — NOTICE OF ENTRY OF JUDGMENT — WAIVER.

Formal notice of the entry of judgment may be waived by proceedings in support of a motion for new trial without any notice of intention to move therefor.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 277-353; Dec. Dig. — 136.]

Department 2. Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by The Yamato against the Bank of Southern California. Judgment for defendant, motion for new trial overruled, and plaintiff appeals. Judgment and order reversed.

Parker & Moote, of Los Angeles, for appellant. Lucien Gray, of Los Angeles, for respondent.

HENSHAW, J. Plaintiff brought this action to recover possession of 50 shares of its capital stock, alleged to be wrongfully in the possession of the defendant. The right of plaintiff's possession, as pleaded, rested in a pledge of the stock by one Inui as security for the payment of his promissory note to the plaintiff in the sum of \$4,175. Inui at that time and thereafter was the secretary of the plaintiff. The defendant asserted the right to possession of the stock as collateral security for a promissory note which Inui made to it some six months after the date when the stock was pledged and delivered to plaintiff. The evidence leaves no doubt over the facts that Inui did give his promissory note to plaintiff as pleaded and secured this note by the pledge of the 50 shares of stock in question. Six months thereafter he executed his promissory note for \$1,800 to defendant and pledged as security the same certificate of 50 shares of stock of plaintiff. Inui was not authorized by plaintiff to take the stock. He had not paid his debt to plaintiff. Plaintiff had not, in any way, released the pledge, and unquestionably the stock was illegally abstracted—in short, stolen—from the plaintiff and pledged with defendant. To overcome the prior and superior right of plaintiff to the possession of this stock under these circumstances defendant pleaded that plaintiff permitted Inui to retain possession of and access to the certificate of stock after it was pledged with it, "and thereby enabled said Inui to have and take and deliver said certificate of stock to this defendant"; that at the time that defendant made its loan to Inui it had no notice or knowledge of the pledge to plaintiff; that Inui—

"was the secretary of plaintiff and transacted with defendant a large amount of business for and on behalf of said plaintiff, and said Inui was at such times one of the managing officers and agents of plaintiff; that at the time of the institution of this suit, and for a long time prior thereto and for some time thereafter, said Inui was dangerously sick and ill and confined to his bed, and later died of said sickness and illness, and affiant has been unable to learn of or find or locate any property or effects of said Inui, other than said certificate of stock; that plain-

iff suffered and permitted this defendant to have and continue in the peaceable and undisturbed possession of said certificate of stock from June, 1910, until November, 1911, without in any way asserting its alleged claim thereto or advising this affiant of said alleged claim, and did not assert said alleged claim to or advise this defendant thereof until after said Inui was dangerously sick and was unable to testify or participate in this controversy; that it was by the negligence and sufferance of plaintiff that the state of facts of which it now complains happened; that plaintiff ought to be and is stopped by its negligence and conduct herein in asserting a claim to said certificate of stock prejudicial to this defendant; that it is specifically provided by section 3543 of the Civil Code of this state that where one of two persons, both innocent, must suffer by the act of a third, he by whose negligence it happens must be the sufferer, and this defendant pleads above acts and said provision of said Code in bar of plaintiff's alleged cause of action."

The court found in the precise language of this averment, and concluded that it was—"by the negligence and sufferance of plaintiff that the state of facts of which it complains happened, and that the plaintiff is estopped by its acts and conduct from asserting a claim to said certificate of stock pledged to plaintiff bank."

[1] The findings are here attacked for the insufficiency of the evidence to support them. They are not supported. As has been said, the evidence is abundant to establish the pledge of the stock with the plaintiff. The bank's evidence is that it had come to know Inui as "the active managing official of the company" in the matter of attending to the security and the financial matters; that he was the financial representative of the company, even to the extent of borrowing money for the company from the bank. The plea of the bank that it was induced to place reliance and trust upon the representations of Inui because of his position with plaintiff and because plaintiff intrusted him in the management of these delicate and confidential affairs would have great weight if the matter here in controversy in any way grew out of Inui's position, or was within the actual or ostensible powers of his agency. But admittedly in this matter Inui was dealing with the bank in his private personal capacity, and the bank in turn was dealing with him in a like capacity, and not at all as the representative of the plaintiff. It would be an extraordinary proposition to hold that a corporation was responsible for the private, personal acts of its officers, wholly independent of any business of the corporation, because the corporation had employed and placed these officers in positions of power and trust. True, such positions of power and trust may give the men who hold them a higher reputation for honesty and integrity than perhaps they would otherwise have, but this is very different indeed from saying that because the corporation employs them in such capacities it is in any way warranting or guaranteeing the honesty and integrity of their independent, personal business transactions, and the transaction in which Inui gave his promis-

sory note and pledged this stock to the defendant was strictly a transaction of that character.

[2] As little foundation is there for a finding of estoppel against the plaintiff. All that appears is that Inui, the trusted secretary, had or obtained access to the safe in which the note with its collateral was deposited. He abstracted this stock and pledged it with the defendant. Plaintiff did not discover this abstraction until some time thereafter. Indeed, the bank, it appeared, held the stock for more than a year before it carried the first notification to plaintiff of its possession by a demand that it be transferred upon the books of the company; that is to say, it was in January, 1910, that the plaintiff received the stock in pledge; it was in June, 1910, that defendant received it in pledge, and in November, 1911, defendant presented the certificate to plaintiff for transfer, and thereafter plaintiff made its demand upon defendant for possession of the stock. It is not contended that plaintiff did any affirmative act touching the rights of the defendant by reason of which an estoppel could be raised in the latter's favor. Its acts are said to be acts of negligence. They are defined as negligence in not keeping possession of the certificate; negligence in permitting Inui, the debtor, to have charge of the certificate; negligence in not getting the certificate indorsed and delivered to it by Inui; negligence in not having its pledge noted on the stub of its stock book; negligence in not discovering the abstraction of the certificate; and, finally, "it was negligent in not being diligent." But all this amounts to no more than that the plaintiff trusted a man who occupied one of its responsible official positions. Every corporation and every business firm in the land must do and does the same thing. No business of any magnitude or consequence can be transacted without a trust imposed in somebody, and where a trust must be imposed it is always possible to violate the trust. It was therefore not negligence upon the part of plaintiff that it was possible for Inui, its secretary, to have stolen the pledged stock, and no other of the acts of negligence charged and found against the plaintiff amount to anything. It does not appear that defendant's position would have been bettered in the slightest if these acts or omissions of plaintiff had not taken place. It would not have enlightened defendant, for example, if the pledge to plaintiff had been noted on the stub of its stock book. It would not have advantaged defendant if plaintiff had discovered the theft of the stock the day after it was pledged to defendant, for the injury had then been accomplished. The defendant was not charged with notice that Inui had pledged it, and did not know that he had pledged it until the defendant, in turn, offered it for transfer, and defendant itself waited more than a year before so doing. *Janin v. London & San Francisco*

Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82. No evidence whatever was offered from which even an inference could be drawn that knowledge acquired by the bank at any time after the contract of pledge was completed would have enabled it to have bettered its financial condition in the matter of the Inui loan.

[3, 4] Appellant served and filed its notice of intention to move for a new trial on August 12, 1912. This was prior to the entry of the judgment. Thereafter, on the 14th day of August, 1912, the judgment was entered, and upon August 23d appellant served a new notice of intention to move for a new trial. Appellant's first notice of intention filed prior to the entry of the judgment was premature and a nullity. Its second notice of intention, served and filed upon August 23d, was within 10 days after the entry of the judgment, and therefore from any point of view, whether or not appellant had notice of the entry, was within time. Section 659, Code Civ. Proc. This precise question has not heretofore been passed upon by this court, but has received consideration in Montana under a Code section identical with ours, and we are in accord with the views of the Montana court in its construction of the statute. That is to say, the first notice was premature and a nullity, since the judgment had not been entered. *Power v. Turner*, 37 Mont. 521, 97 Pac. 950. And though formal notice of the entry of the judgment may be waived by the moving party by instituting his proceedings in support of the motion, without such notice, as was here done under the second notice of intention, it will not be held that the mere fact that a premature notice was inadvertently given is a waiver such as will compel the appellant to stand upon the premature notice and forbid him giving a later and proper one. *McIntyre v. MacGinniss*, 41 Mont. 87, 108 Pac. 353, 137 Am. St. Rep. 701.

The judgment and ordered appealed from are therefore reversed.

We concur: LORIGAN, J.; MELVIN, J.

(170 Cal. 418)

In re CLARK'S ESTATE.

TRAVIS et al. v. STRAUS.

(S. F. 7202.)

(Supreme Court of California. June 11, 1915.)

1. WILLS ⚭55—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.

In a proceeding to revoke the probate of a will of a man 84 years old, executed by him on his deathbed while very feeble, evidence held to support a finding of testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-158, 161; Dec. Dig. ⚭55.]

2. WILLS ⚭108—EXECUTION—INDICATION OF DESIRES BY SIGNS.

That, on the execution of a will, some of the testator's wishes were expressed by affirma-

tive signs made in response to questions, did not invalidate the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 249-258; Dec. Dig. ⚭108.]

3. WILLS ⚭302—EXECUTION—SUFFICIENCY OF EVIDENCE.

Where, upon the execution of a will, the testator's wishes are expressed by affirmative signs made in response to questions, the court will always use care to require proof of spontaneous action and volition on the part of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 575, 581, 700-710; Dec. Dig. ⚭302.]

4. WILLS ⚭52—TESTAMENTARY CAPACITY—PRESUMPTIONS AND BURDEN OF PROOF.

On a petition to revoke the probate of a will, the burden of proving unsoundness of mind was on the contestants.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101-110; Dec. Dig. ⚭52.]

5. WILLS ⚭47—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.

That a testator was a very old man and very feeble did not alone establish lack of testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 94; Dec. Dig. ⚭47.]

6. WILLS ⚭166—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

In a proceeding to revoke the probate of a will giving property to a niece of the testator, to the exclusion of other nieces and nephews, evidence held insufficient to show the exercise of undue influence by the niece, or by the testator's physician or attorney in the niece's behalf.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. ⚭166.]

7. WILLS ⚭155—VALIDITY—UNDUE INFLUENCE.

To render a will invalid on the ground of undue influence, there must be that sort of pressure which overpowers the mind and masters the volition of the testator at the very moment of the testamentary act.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. ⚭155.]

8. WILLS ⚭111—EXECUTION—SIGNATURE BY MARK.

Where a testator attempted to sign his name to a will, but, being unable to control the pen or pencil, indicated a desire to have his name signed for him, whereupon some one guided his hand in making a cross, and his name was written by the attorney who drew the will, the fact that the mechanical work of affixing his name to the will was performed by another did not invalidate the instrument.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 267-275; Dec. Dig. ⚭111.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceeding by Elizabeth Johnson Travis and others against Florence Straus, to revoke the probate of the will of Robert Clark, deceased. From an order refusing to revoke the probate, the petitioners appeal. Affirmed.

Frank R. Wehe and C. S. Morbio, both of San Francisco, for appellants. J. W. Henderson and F. J. Kierce, both of San Francisco (F. J. Kierce, of San Francisco, of counsel), for respondent.

MELVIN, J. This is an appeal by certain nephews and nieces of Robert Clark, deceased, from an order of the superior court of the city and county of San Francisco refusing to revoke the probate of the will of said Clark.

The proponent and executrix of the last will of said Clark is also a niece. All of the petitioners reside outside of the state of California. Florence Straus, executrix of the will and respondent here, is and long has been a resident of Los Angeles. Appellants frankly admit that there was a serious conflict of evidence at the hearing of the petition for revocation of the probate of the will, but they ask a reversal of the order denying their prayer upon the ground that, in any aspect of the evidence, it was totally inadequate to support the conclusion reached by the probate court.

The three grounds of the contest by appellants were: (1) That the will was procured by fraud and undue influence; (2) that at the time of executing the will the testator lacked testamentary capacity; and (3) that the will was not executed according to law.

[1] The court found against all of these grounds of contest. The finding with reference to the affectionate regard in which the testator held his niece Mrs. Straus so thoroughly and briefly sums up the testimony of the witnesses who appeared for the respondent that we need do no more than quote it. The court found:

"That said Florence Straus is a niece of said Robert Clark, and the only one of his heirs residing in the state of California; that said Robert Clark held the said Florence Straus in affectionate regard, and upon the death of his wife, Mary Clark, about three weeks previous to his own death, the said Robert Clark sent a telegram to the said Florence Straus, who resided in the city of Los Angeles, state of California, advising her of the death of his said wife, and asking her to come to him at once; that said Florence Straus immediately came to San Francisco, and remained with the said Robert Clark, until his death; that the said Robert Clark did, shortly after her arrival, cause the money on deposit in the said German Savings Bank & Loan Society to be deposited in the names of Robert Clark and Florence Straus and made the same payable to the order of either or the survivor of either; that on the 13th day of April, 1912, said Robert Clark became ill, and on the 15th day of April, 1912, for the purpose of better caring for him, the said Robert Clark was, by order of his physician, removed to the Hahnemann Hospital, in which he remained until his death."

The money to which reference is made in the foregoing finding was something more than \$13,000 in the aggregate.

Robert Clark, at the time of his death, was 84 years of age, yet, according to the testimony of even some of the witnesses for the contestants, he was in good health for a man of his years up to a time within a few days of his death. On April 14, 1912, he received notice from the board of health that certain debris in the cellar of his house must be taken out and burned. He personally removed some of this material. He then took a

seat on a piece of wood or block in his back yard, and after sitting there for a short time he collapsed and sunk into a fainting condition, from which he was revived with difficulty by the neighbors who carried him into the house. On April 15th, by order of his physician, he was removed to Hahnemann Hospital, where on the evening of that day, between 5 and 6 o'clock, the instrument afterwards admitted to probate as his will was executed. He died shortly after 9 o'clock the following morning.

The will was prepared by Mr. J. W. Henderson, an attorney at law, who testified that he first met Robert Clark about three weeks prior to the latter's death. Mrs. Straus had asked Mr. Henderson to see her uncle with reference to his wife's estate. After some discussion of the affairs of Mrs. Clark's estate and of the threatened action on the part of some of Mr. Clark's relatives to have a guardian appointed for the old man, the attorney, at his client's request, asked Mrs. Straus to leave the room. They then discussed the disposition of Mr. Clark's own property, and Mr. Henderson advised the execution of a will rather than any arrangement for the passing of title by deed. Of this interview Mr. Henderson testified, in part, as follows:

"I asked him about the way he would like to have his will prepared, and he said he would like to have it go to Mrs. Straus. He was definite about it. I told him that if he desired the will that way I would prepare the will and bring it out to him for execution. He said, 'Not now.' I asked him when he wanted to do it. He said: 'After a while; I am not going to die yet.' I did not press him any further about it. I said nothing further about that matter."

After Mr. Clark was taken to the hospital, Mr. Henderson was notified of that fact by a telephone message either from Mrs. Straus or from the attending physician, and, after preparing a will in accordance with the wishes expressed by Mr. Clark regarding the disposition of his property when he should be ready to make a will, the attorney, accompanied by Mr. Botts, a gentleman connected with his office, went to see the sick man. After Mr. Henderson entered the room of Mr. Clark, the invalid spoke to him, smiled, and grasped his hand. Asked by the lawyer how they were "using" him at the hospital, he said, "All right," or something of that kind. Asked if he wanted to make his will, Mr. Clark said, "No," very emphatically. "I called his attention," said Mr. Henderson, "to the fact that he was very ill, and that if he was going to make a will at all he had better consider it now. I did not say anything further regarding it. I stepped back because I did not care to press anybody to make a will. The doctor stated to him then that he was a very sick man, and that he possibly had not 48 hours to live; that if he had any business to transact, that he desired to transact before his death, he would advise him to do so now; that, while he might live longer than that

and might recover and be well again, he could not assure him that he would. This seemed to have some influence on the old gentleman's mind, and I again asked him if he desired, under those circumstances, to execute the will in accordance with our conversation. I told him that I had prepared the will in accordance with his desire expressed to me at his home. He said then that he desired to make his will." The will was then read to him, and he was raised up, a book was placed in front of him, and he attempted to sign his name to the will which was put thereon. He seemed to be unable to control the pen which had been placed in his hand, and a pencil was substituted, but with no better results. Mr. Henderson then asked if he desired to have his name signed for him, and he indicated a desire to have that done. Some one guided his hand in making a cross, and the name "Robert Clark" was written by Mr. Henderson. According to Mr. Henderson's testimony, testator declared the instrument to be his will, and at his request Mr. Botts and Mr. Henderson signed it as witnesses with due formality. Mr. Henderson testified that Robert Clark was of sound mind at the time of executing the instrument. He was corroborated in nearly all of the essential particulars of his account of the occurrences in Robert Clark's room at the hospital by Mr. Botts, Mrs. Straus, and Dr. Freyermuth. It would serve no good purpose to quote or to summarize their testimony further, except to discuss portions of the physician's account of the mental condition of his patient at the time of the signing of the will, because appellants insist that his testimony indicates clearly a state of incompetence on the part of the testator to express any wish concerning the disposition of the property.

[2, 3] It is true that, according to the account of the witnesses who had stood at the bedside, some of Mr. Clark's wishes were expressed by affirmative signs made in response to questions, but this fact does not invalidate the will. A will made by interrogatories may be valid (Williams on Executors [7th Ed.] p. 57; 1 Underhill on Wills, § 204; Denny v. Pinney's Heirs, 60 Vt. 524, 12 Atl. 108; Robbins v. Robbins, 50 N. J. Eq. 742, 26 Atl. 673); and, while it is true that where a will has been so made the court will always use care to require proof of spontaneous action and volition on the part of the testator, we cannot say that in this case the conclusion reached was not justified.

Dr. Freyermuth, who had attended Mrs. Clark, had told him at the time of her death when the aged man was downcast that he had ten years to live. When the doctor spoke to his patient in the hospital and advised him to make some disposition of the property, he did not care to sign any will then, perhaps having in mind the physician's former assurance of a long life. However, the doctor told

him that he was a very sick man, and that the morrow might be too late. Then, according to the physician's testimony, Mr. Henderson asked Mr. Clark if he wished to sign the will as he had prepared it. So it was read aloud to the testator, section by section, very distinctly. Mr. Henderson asked him if that was what he wanted, and he nodded and spoke, "Yes." The physician's account of the sick man's efforts to affix his name to the instrument and the subsequent signing of the will by Mr. Henderson agree substantially with the testimony of the other witnesses. In answer to the usual question, "Was he of sound or unsound mind at that time in your judgment," the physician said, "He was absolutely of sound mind." The doctor stated further that, at that time, his patient's mental condition was unimpaired; that Mr. Clark was rational; and that after he had been brought to the hospital, and before the execution of the will, the condition of the old man improved slightly. It also developed in the examination of Dr. Freyermuth that frequently before the witness had ever met Mrs. Straus, and notably on an occasion shortly after Mrs. Clark's death, Mr. Clark had said that he wanted "Florence" (Mrs. Straus) to have his property. Appellants assert that all of the physician's testimony on direct examination was nullified by his admission on cross-examination that his patient was in a "partially semicomatose condition," after he had been taken to the hospital. But this testimony was quite consistent with Dr. Freyermuth's other statements, because he did not testify that the state of partial coma continued during all of the time between the arrival of the patient at the hospital and his death.

[4, 5] That testator was an old man and a very feeble man there can be no doubt, but we cannot say, as matter of law, that, in view of the testimony in all of its bearings, he was lacking in testamentary capacity. The burden of proving unsoundness of mind was on the contestants. Estate of Dolbeer, 149 Cal. 230, 86 Pac. 695, 9 Ann. Cas. 795. The infirmities of old age were not sufficient in themselves to establish lack of testamentary capacity (Estate of MacCrellish, 167 Cal. 717, 141 Pac. 257, L. R. A. 1915A, 443); and, in view of the positive testimony of the witnesses who saw the execution of the will that Mr. Clark was of sound and disposing mind, we think the finding of the court on that subject was amply supported.

[6, 7] Nor can we agree with appellants in their argument in support of their theory that, under the evidence, the will must have been procured by fraud and undue influence. It is not an unnatural will. It followed the contemplated disposition of his property which the testator had discussed with his physician and his legal adviser. Mrs. Straus was the one person for whom he sent when his wife died, and after he was taken to the

hospital, as the attending nurse testified, he was somewhat impatient until Mrs. Straus arrived, but after her advent he became quiet and apparently contented.

Much appears in the briefs of appellants on the subject of the alleged persuasions and importunities of the doctor and the attorney which, it is affirmed, must have amounted to undue influence upon the mind and volition of the testator. The evidence falls far short of establishing that sort of sinister influence which sometimes operates to produce an instrument which is not the will of its supposed maker. These gentlemen were Robert Clark's advisers. The mere advice to make a will which they gave to the old man, instead of exhibiting a desire to defraud, cajole, or mislead him, would rather indicate a laudable wish that he who was the client of one and the patient of the other, should put his affairs in order before his departure from this world, which in the nature of things could not be long postponed for a man of his age and infirmity. It can hardly be said, in view of the evidence, that these witnesses must have been co-conspirators of Mrs. Straus, trying to aid her in snatching her uncle's fortune from his other kindred. It was shown that she met them both after her aunt's death, when she came from Los Angeles in answer to her uncle's summons. When Mr. Clark wanted an adviser to aid him in the settlement of his wife's estate, Mrs. Straus was directed to Mr. Henderson by the widow of the former pastor of the church which her aunt had attended. She herself swore that she had never importuned her uncle to make a will in her favor. The fact that advice was offered to Mr. Clark, taken in connection with the activity of Mrs. Straus in securing counsel for him, fails to establish that sort of undue influence which must be shown before a court will overthrow a solemnly executed will. The evidence utterly fails to reach the dignity of proof of that sort of pressure which overpowered the mind and mastered the volition of the testator at the very moment of the testamentary act. Without such proof, no will should be held invalid on the ground of undue influence. *Estate of Gleason*, 164 Cal. 756, 130 Pac. 872; *Estate of Carithers*, 156 Cal. 428, 105 Pac. 127; *Estate of Lavinburg*, 161 Cal. 543, 119 Pac. 915; *Estate of Kilborn*, 162 Cal. 11, 120 Pac. 762.

[8] There was ample testimony to support the finding of due execution of the will, including the declaration, which Mr. Henderson said the testator made, that the instrument subsequently probated was his last will. Neither the fact that testator made his wishes known partly by pantomime and partly in answer to questions, nor the circumstance that the mechanical work of affixing his name to the will was performed by another, serves to invalidate the instrument. *In re Mullin*, 110 Cal. 258, 42 Pac. 645.

In accordance with the views expressed above, we are of the opinion that the decision of the superior court and the order made and the decree entered were without substantial error.

The order is affirmed

We concur: HENSHAW, J.; LORIGAN, J.

(170 Cal. 380)

In re BOLLINGER'S ESTATE. (S. F. 7069.)
(Supreme Court of California. June 8, 1915.)

1. HUSBAND AND WIFE ⚡262—COMMUNITY PROPERTY—PRESUMPTION.

Property in the possession of either spouse at the time of death is presumed to be community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. ⚡262.]

2. HUSBAND AND WIFE ⚡264—WIFE'S SEPARATE PROPERTY — SUFFICIENCY OF EVIDENCE.

On a widow's appeal from a decree distributing her deceased husband's estate to his three children by a former marriage, uncontradicted testimony of a surviving son that the real property had been acquired and was owned by the deceased prior to his last marriage, and that he thereafter kept the property as his own, supported a conclusion that all of the property of the estate was the testator's separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. ⚡264.]

3. HUSBAND AND WIFE ⚡263 — COMMUNITY PROPERTY—EVIDENCE.

On a widow's appeal from the distribution of her deceased husband's estate, evidence that the real property involved had been acquired and owned by decedent prior to his marriage, and had been kept as his own, was relevant on the issue whether it was community property and the mere fact that it was oral did not render it inadmissible.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 915; Dec. Dig. ⚡263.]

4. APPEAL AND ERROR ⚡231 — OBJECTION BELOW—SUFFICIENCY.

Where the objection stated to relevant evidence was merely that it was incompetent, irrelevant, and immaterial, it will not permit complaint on appeal that it was hearsay and merely the conclusion of the witness, and not the best evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. ⚡231.]

5. HUSBAND AND WIFE ⚡263 — COMMUNITY PROPERTY—EVIDENCE.

On the issue whether a decedent's property was community property, an agreement of the surviving wife, in which for a valuable consideration she absolutely waived and released the decedent from all claims and demands, executed a short time before decedent's death, was admissible to show that there had been negotiations in respect to property rights between decedent and herself before decedent's action for divorce was instituted, and that in such negotiations there had been no mention of community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 915; Dec. Dig. ⚡263.]

6. DIVORCE ⚡254 — PROPERTY RIGHTS — DECREE.

In a husband's action for divorce, alleging that there was no community property, and where there had been no appeal from the interlocutory judgment, the finding and the decree, reciting that there was no community property, irrevocably settled the property rights after the expiration of the six months allowed by Civ. Code, § 131, for appeal from the entry of the interlocutory decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 718-721; Dec. Dig. ⚡254.]

7. DIVORCE ⚡254—COMMUNITY PROPERTY—ALLEGATION AND FINDING.

An allegation in a husband's complaint for divorce that there was no community property even though a mere conclusion, is sufficient, if proved upon issue joined, to support a finding that there was no community property.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 718-721; Dec. Dig. ⚡254.]

8. DIVORCE ⚡254—JUDGMENT—COLLATERAL ATTACK—OBJECTION TO PLEADING—WAIVER.

In an action for divorce, wherein the wife did not demur to the complaint, alleging that there was no community property, she could not, for the first time, collaterally raise the question that the finding of the nonexistence of community property was a conclusion of law on appeal from the decree of distribution in her deceased husband's estate.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 718-721; Dec. Dig. ⚡254.]

Department 2. Appeal from Superior Court, Alameda County; William S. Wells, Judge.

In the matter of the Estate of Samuel Pierce Bollinger, deceased. From a decree distributing the estate to the three children of decedent by a former marriage, Emma C. Bollinger, widow, appeals. Affirmed.

L. H. Honey, of Angeles Camp, J. G. Reisner, of San Francisco, H. W. Brunk, of Berkeley, and Wm. O. Minor, of Oakland, for appellant. F. I. Lemos, of Hayward, and Philip M. Carey, of Oakland, for respondents.

MELVIN, J. Emma C. Bollinger, widow of Samuel Pierce Bollinger, appeals from a decree distributing his estate to his three children by a former marriage, who are the legatees and devisees mentioned in his will.

[1, 2] Appellant contends that the evidence before the probate court was not sufficient to overcome the presumption that all property in the possession of the testator at the time of his death was community property. Conceding that the presumption which appellant

invokes does attend the possession of property by either spouse (*Meyer v. Kinzer*, 12 Cal. 253, 73 Am. Dec. 538; *In re Bauer*, 79 Cal. 308, 21 Pac. 759), such presumption is a disputable one (*Freese v. Hibernia Sav. & Loan Society*, 139 Cal. 394, 73 Pac. 172), and in the present proceeding the proof was clear and ample that Mrs. Bollinger had no community interest in the property of which her husband was possessed at the time of his death.

The court's conclusion that all of the property of the estate was testator's separate property was supported by the testimony of one of his sons, who swore that the real property involved in this dispute was owned by his father prior to the latter's marriage to Emma C. Bollinger. The son also testified that at the time of his father's marriage to Emma C. Bollinger the former was worth \$18,000 or \$20,000, with the real estate; that all of this property was acquired by the father of the witness before his marriage; that he did not become insolvent after marriage; and that he kept the property as his own. (At the time of testator's death the estate was valued at \$12,670.80.) The testimony of this surviving son was uncontradicted.

[3, 4] To appellant's statement that this evidence was hearsay, containing merely conclusions of the witness, and not the best evidence, respondents reply that no such points were made at the hearing, counsel for appellant contenting themselves with the stock objection that the testimony sought was "incompetent, irrelevant, and immaterial." We think this answer is sufficient. The evidence was clearly pertinent to the issue involved, and if objectionable in the form in which it was offered, the ground of objection should have been clearly specified. The mere fact that it was oral did not render it inadmissible. *Killian v. Killian*, 10 Cal. App. 318, 101 Pac. 806.

[5] There was also introduced at the hearing of the petition for distribution a document, regularly acknowledged by Emma C. Bollinger, whereby for valuable considerations she admitted full payment, satisfaction, settlement, and adjustment of all claims and demands of every description against Samuel P. Bollinger. The acquittance also contained this language:

"I do hereby waive and surrender, release and acquit said Samuel P. Bollinger from any and all claim, demand, obligation and indebtedness, in the present or future from or on account of any reason, cause or condition, judgment or decree, by reason of anything that has happened between us or rising or growing therefrom, absolutely and unconditionally."

This instrument was dated less than a month prior to the death of Mr. Bollinger. Appellant construes this writing as a waiver of claims against her husband personally and not as a disclaimer of all interest in his estate, citing in this behalf *Jones v. Lamont*, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251. Courts have been unwilling to extend the scope of releases of this sort in such manner as to hold them applicable to community property in

contests arising, not in actions for divorce, but in probate proceedings, and if the finding with respect to such property in the proceeding before us were based upon a construction of the contract of waiver alone, we would probably reverse the judgment. But we need not construe the language of the agreement at all. It was admissible in evidence as a part of the showing that there had been negotiations with respect to property rights between Mr. Bollinger and his wife before the action for divorce was instituted, and that in those negotiations there had been no mention of community property. For this limited and negative purpose the contract was relevant and material.

[6] But if there could be any doubt of the sufficiency of the evidence heretofore discussed, to support the award of all the property according to the terms of the will, it would be dispelled upon inspection of the pleadings, findings, and judgment in the divorce action which were introduced in evidence at the hearing in the probate court. In his complaint for divorce Mr. Bollinger alleged that there was no community property belonging to the parties to the action. The answer of Mrs. Bollinger was a mere general denial. The court found and the decree recited that there was no community property. The testator died in less than three weeks after the entry of the interlocutory decree. As no evidence that there had been any appeal from the interlocutory judgment was offered, we must hold that the property rights had become finally and irrevocably settled upon the expiration of six months from the entry of the interlocutory decree. Section 131, Civ. Code; *Huneke v. Huneke*, 12 Cal. App. 199, 107 Pac. 131.

[7] But appellant's counsel say that the allegation that there was "no community property belonging to the parties to this action" was the statement of a mere conclusion of law; that the finding based upon such conclusion of law was of no force; that in the absence of any issue as to property rights, the divorce action abated upon the death of plaintiff, and that the property rights must be settled by subsequent proceedings. This contention is without merit. An averment that one spouse took title to property as community property is sufficient upon issue joined, if proved, to support a finding to that effect, and an allegation that there was no community property would, under like circumstances, support a negative finding such as we have in this case. *Killian v. Killian*, supra.

[8] But even if we concede that the finding of the nonexistence of community property is really a conclusion of law, appellant, who did not demur to the complaint, but joined issue on all of the allegations thereof, may not raise the question for the first time in this court.

No other alleged errors require attention. The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

27 Cal. App. 354

HICKMAN et al. v. LYNCH et al. (Civ. 1616.)
(District Court of Appeal, First District, California. May 7, 1915.)

DISMISSAL AND NONSUIT $\S$ 60 — WANT OF PROSECUTION.

Under Code Civ. Proc. $\S$ 583, providing that any action shall be dismissed on motion of the defendant, or by the court on its own motion, unless brought to trial, within 5 years after the filing of the answer, where 2½ years after the answer motion was made to set the cause for trial, and, pending hearing, the defendants asked permission to interpose a cross-complaint, which was granted after resistance by the plaintiffs, and the cross-complaint filed, to which plaintiffs answered, judgment for the plaintiffs, rendered 3 years after filing of the cross-complaint, more than 5 years after the filing of the answer, could stand, the court not having lost jurisdiction of the cause under the statute, since it had not been finally at issue for 5 years, but only for 3 years, the delay in bringing the case to trial having been caused in part by the cross-complaint, while by it the defendants became actors in the case, and chargeable in part with bringing it on for trial.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. $\S\S$ 140-152; Dec. Dig. $\S$ 60.]

Appeal from Superior Court City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by N. H. Hickman and others against M. C. Lynch and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Wm. H. Chapman, Wm. M. Abbott, Wm. M. Cannon, and Powell & Dow, all of San Francisco, for appellants. H. M. Anthony, of San Francisco, for respondents.

PER CURIAM. This action was one to recover money for goods sold and delivered. Some 2½ years after defendants' answer to the complaint was filed a notice of motion was made to set the cause for trial, and, pending the hearing of the motion, the defendants asked permission to interpose a cross-complaint. That permission was granted after the application had been resisted by the plaintiffs. The cross-complaint was filed, and a demurrer interposed to it was eventually overruled. Plaintiffs answered the cross-complaint. It also appears that the plaintiffs made an effort for trial and tried. Judgment was rendered for the plaintiffs, and also against the defendants on the cross-complaint; and the only point made now in support of the defendants' appeal is that before the trial of the action the court had lost jurisdiction of the cause by reason of the fact that plaintiffs failed to prosecute it to trial within five years after the defendants' answer to the original complaint had been filed, as required by section 583 of the Code of Civil Procedure.

Conceding the defendants' construction of the statute to be correct, nevertheless it appears that the case at bar was not fully and finally at issue for five years, but only for

a period of three years; and the delay in bringing it to trial for over five years after answer filed is attributable in part to the action of the defendants in asking for and being granted permission to file a cross-complaint. It also appears that the plaintiff made an effort to have the cause placed upon the calendar for trial within 2½ years after the original answer of the defendants had been filed, and that this cause would, in all probability, have been brought on for trial if it had not been for the intervention of the defendants. Under these circumstances there is no merit in the contention that the court lost jurisdiction of the subject-matter of the action. The appellants of course rely upon a literal interpretation of the section referred to, which provides that the court must dismiss if the action is pending untried for a period of five years after the defendant's answer to the plaintiff's complaint has been filed. But upon the filing of the cross-complaint in the present case the defendants became aggressive and interested actors in the presentation of at least one phase of the case, and therefore they were charged in part with the duty of bringing the case on for trial. *Jacot et al. v. Marks*, 26 Misc. Rep. 670, 57 N. Y. Supp. 904.

The judgment appealed from is affirmed.

27 Cal. App. 340
PANKEWICZ v. JESS, City Recorder, et al.
(Civ. 1602.)

(District Court of Appeal, First District, California. May 6, 1915.)

1. ARREST $\S$ 33—"WARRANT" OF ARREST.

A "warrant" is a process issued in the name of the state, directed to any sheriff, constable, marshal, or policeman, commanding him to arrest and take into custody the named defendant.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. $\S\S$ 73-82; Dec. Dig. $\S$ 33.]

For other definitions, see Words and Phrases, First and Second Series, Warrant.]

2. SHERIFFS AND CONSTABLES $\S$ 98—DUTIES AS TO SERVICE OF PROCESS—"REGULAR ON ITS FACE."

Within Pol. Code, $\S$ 4168, providing that a sheriff or other ministerial officer is justified in the execution of and must execute all process and orders regular on their face and issued by competent authority, whatever the defects in the proceedings upon which they are issued, process is "regular on its face" when it proceeds from a court, officer, or body having authority of law to issue process of that nature, and is legal in form and contains nothing to notify or fairly apprise any one that it is issued without authority.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. $\S\S$ 143-157; Dec. Dig. $\S$ 98.]

3. SHERIFFS AND CONSTABLES $\S$ 98 — LIABILITY—SERVICE OF UNAUTHORIZED PROCESS.

When lack of authority is apparent, an officer is not only justified, but it is his duty, not to serve illegal process, and, if he does so, it is at his peril.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. $\S\S$ 143-157; Dec. Dig. $\S$ 98.]

4. SHERIFFS AND CONSTABLES $\Leftrightarrow$ 98—PROCESS AS PROTECTION AGAINST LIABILITY.

Under Pol. Code, § 4168, an action cannot be maintained against an officer for executing process except where the lack of authority for its issuance is apparent on its face.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 143-157; Dec. Dig. $\Leftrightarrow$ 98.]

5. SHERIFFS AND CONSTABLES $\Leftrightarrow$ 168 — ACTIONS FOR FALSE IMPRISONMENT — SUFFICIENCY OF COMPLAINT.

Where an action against a sheriff and the surety on his bond for false imprisonment showed that the imprisonment was under a warrant, plaintiff was bound to set out in his complaint the fact that the warrant was irregular on its face.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 398-404; Dec. Dig. $\Leftrightarrow$ 168.]

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by J. F. Pankewicz against Clara A. Jess, as recorder of Daly City, and others. From a judgment of dismissal as to certain defendants, plaintiff appeals. Affirmed.

Joseph T. Curley and Joseph Rafael, both of San Francisco, for appellant. Albert Mansfield, of Redwood City, for respondents.

PER CURIAM. This is an action for damages for false imprisonment. The amended complaint alleges that Clara A. Jess was the recorder of Daly City; that the defendant J. H. Mansfield was the sheriff of San Mateo county; and that the American Bonding Company was surety on the bond of said sheriff. The complaint further alleges that on a certain date Clara A. Jess, as recorder, adjudged the plaintiff guilty of contempt of court, in that he, as marshal of Daly City, willfully and unlawfully neglected and refused to serve a warrant issued by the recorder's court in a certain criminal case, in which the defendant therein was charged with felony; whereupon said recorder sentenced the plaintiff to pay a fine of \$50, or, in default thereof, to be imprisoned in the county jail for one day. It is also alleged that Mansfield, the sheriff, acting upon the commitment placed in his hands by said recorder, against the will and consent of the plaintiff, took him into custody and imprisoned him in the county jail for one day. In consequence of this imprisonment plaintiff claims damages in the sum of \$25,000 for injury to his good name, to his credit, and to his reputation as marshal.

To the complaint each of the defendants interposed a general and special demurrer. The demurrer of Clara A. Jess was overruled, but the demurrers of the other defendants were sustained, and a judgment of dismissal as to them was duly entered, from which judgment this appeal is taken.

These demurrers were alike, and will be discussed together.

[1] It is conceded that the provisions of the Code applicable to justices' courts are

also applicable to recorders' courts. A "warrant" is a process issued in the name of the state, directed to any sheriff, constable, marshal, or policeman, commanding him to arrest and take into custody the named defendant. Pen. Code, § 1427. The failure to serve a warrant issued by a recorder's court, it appears, would be disobedience of a lawful order of the court, and hence a contempt thereof, for which the officer so disobeying might be punished as provided by law. Code Civ. Proc. § 906, subd. 3.

[2-5] An officer whose duty it is to serve process is bound to serve the same when such process is regular on its face. Process is said to be regular on its face when it proceeds from a court, officer, or body having authority of law to issue process of that nature, and which is legal in form, and contains nothing to notify or fairly apprise any one that it is issued without authority. *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752; *Brichman v. Ross*, 67 Cal. 601, 8 Pac. 316; 19 Cyc. 343; 2 Cooley on Torts, p. 1480; section 4168, Pol. Code. When lack of authority is apparent the officer is not only justified, but it is his duty, not to serve the illegal process; and, if he does so, it is at his peril. The only ground, therefore, upon which an action can be predicated against an officer for executing process is where the lack of authority for its issuance is apparent on its face. It may be that in an action for false imprisonment the mere allegation, standing alone, that the plaintiff had been imprisoned without warrant or authority and against his will, would be a sufficient statement of a cause of action; but where, as here, the complaint shows that the imprisonment was made under a warrant, it is the duty of the plaintiff to set out in his complaint the fact that such warrant was irregular on its face. *Barker v. Anderson*, 81 Mich. 508, 45 N. W. 1108; 19 Cyc. 357; *Barfield v. Turner*, 101 N. C. 357, 8 S. E. 115. Every allegation in the complaint in the present case may be true, and yet it may be equally true that the arrest of the plaintiff was upon a warrant regular upon its face.

For the reasons stated, the judgment appealed from is affirmed.

27 Cal. App. 343

NEWELL v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 1710.)
(District Court of Appeal, Second District, California. May 6, 1915.)

1. MANDAMUS $\Leftrightarrow$ 51—ENTRY OF FINAL JUDGMENT—DIVORCE.

Under Civ. Code, § 132, providing that final judgment in a divorce action may be entered by the court after the expiration of one year from the entry of the interlocutory judgment, on motion of either party or upon its own motion, the writ of mandate may issue at the instance of the plaintiff to require that the court grant a final decree after one year from the en-

try of an interlocutory decree from which no appeal has been taken.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 98-100; Dec. Dig. ☞51.]

2. DIVORCE ☞170 — “INTERLOCUTORY DECREE”—EFFECT.

The function of an “interlocutory decree” includes not only the establishment of the party's right to a divorce, but also includes the hearing and final determination of the rights of the parties as to property, or the matter of provision for the wife's support, and, if no appeal is taken, such decree becomes final with respect to the adjudged right to divorce and as to such property rights.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 552, 553; Dec. Dig. ☞170.

For other definitions, see *Words and Phrases*, First and Second Series, *Interlocutory Decree*.]

3. MANDAMUS ☞51—ENTRY OF JUDGMENT—DIVORCE—INTERLOCUTORY AND FINAL DECREE—STATUTES.

Under Civ. Code, § 132, providing that after a year from the entry of an interlocutory judgment the court, on motion of either party or upon its own motion, may enter a final decree of divorce, and that, if an appeal is taken, final judgment shall not be entered until such appeal has been finally disposed of, and not then if the judgment has been reversed, a writ of mandate would not lie to compel the judge of the superior court to enter a final decree of divorce after one year from the entry of the interlocutory judgment, where an appeal from the interlocutory judgment was pending.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 98-100; Dec. Dig. ☞51.]

Petition by Wm. D. Newell for writ of mandate against the Superior Court of the State of California in and for the County of Los Angeles and Chas. Monroe, Judge thereof. Petition denied, and proceeding dismissed.

Earl Curtis Peck, of Los Angeles, for petitioner. Frank P. Doherty, of Los Angeles, for respondents.

CONREY, P. J. The petitioner has applied to this court for a writ of mandate to compel the entry of a final decree of divorce in an action wherein Kate E. Newell is plaintiff and the petitioner, William D. Newell, is defendant. On the 18th day of November, 1912, in the superior court of Los Angeles county, an interlocutory judgment was entered in said action whereby it was determined that the plaintiff was entitled to a divorce, and it was ordered that the defendant pay to the plaintiff a certain monthly allowance for her maintenance and support until the further order of the court. Immediately thereafter the defendant appealed to the Supreme Court from that portion of the interlocutory decree which provided for the maintenance and support of the plaintiff. That appeal is pending in this court pursuant to an order of transfer from the Supreme Court.

In response to an alternative writ issued in this proceeding, the respondent judge of the superior court states that, on the 30th day of November, 1914, he denied the motion of petitioner for entry of a final decree of divorce in said action, and that such denial was

on the ground that an appeal from the interlocutory decree of divorce was at that time pending and undetermined.

[1] It is settled that after the expiration of a year from the entry of the interlocutory decree in a divorce action, and where no appeal has been taken, the writ of mandate may issue at the instance of the plaintiff to require that the court grant the final decree. *Claudius v. Melvin*, 146 Cal. 257, 79 Pac. 897. For the purposes of this decision we will assume that the same rule exists in favor of the defendant against whom the decree of divorce has been granted; although it is somewhat anomalous that the wrongdoer in an action in equity should be permitted to demand affirmative relief and compel the court to visit upon him the legal consequences of his wrongful acts. It is nevertheless true that the Code has provided that the final decree may be entered by the court “on motion of either party, or upon its own motion.” Civ. Code, § 132. But it is also provided in the same section that:

“If any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed.”

[2] It has been determined that in a divorce action under the provisions of our Code the function of an interlocutory decree includes not only the establishment of the right of a party to a divorce, but includes also the hearing and final determination of the rights of the parties as to property. Any disposition of property rights made in connection with the hearing of the principal cause of action is regularly included in and becomes a part of the interlocutory decree. If no appeal be taken, such decree becomes final with respect to those property rights, as well as with respect to the adjudged right to a divorce. *Huneke v. Huneke*, 12 Cal. App. 199, 203, 107 Pac. 131; *Pereira v. Pereira*, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107. Necessarily the same consequence follows where the court takes into consideration and includes in its interlocutory decree the matter of provision for the support of the wife.

[3] In the present case there is an interlocutory judgment which has become final with respect to the plaintiff's right to a divorce, but is subject to a pending appeal affecting the provisions made therein for the support of the plaintiff. Until the determination of that appeal the superior court is not in a position to know whether it will be required to make some other and different order affecting a matter closely connected with the granting of the divorce. “There is no doubt that a superior court may be compelled by mandamus to proceed, in regular course, to the trial of a cause, when without any legal reason it flatly refuses to do so. But the writ can be used for this purpose only

when the action of the lower court is a plain refusal to perform a clear duty which the law specially enjoins; and the party invoking its aid must show a case where the duty of the court to do the thing asked is pure and simple, and unmixed with discretionary power or the exercise of judgment." Tomkin v. Harris, 90 Cal. 201, 27 Pac. 202. The provision contained in section 132, Civil Code, postponing the entry of final judgment until after final disposition of any appeal from the interlocutory judgment, was adopted in recognition of the fact that in granting a divorce the court has a variety of duties to perform affecting the property rights of the parties and the future welfare of those parties and their children; and it was deemed advisable that in such cases all of those matters, as far as possible, should be finally adjusted in connection with the granting of a divorce.

The application of petitioner for a peremptory writ of mandate is denied, and the proceeding is dismissed.

I concur: JAMES, J.

I concur in the judgment: SHAW, J.

27 Cal. App. 355

PEOPLE v. MALLICOAT. (Cr. 373.)

(District Court of Appeal, Second District, California. May 7, 1915.)

1. CRIMINAL LAW  935—TRIAL—MOTION FOR NEW TRIAL.

In passing on accused's motion for a new trial, the trial court must determine whether there was evidence sufficient to support the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.    2193, 2194, 2297, 2298, 3068; Dec. Dig.   935.]

2. CRIMINAL LAW  935 — TRIAL—NEW TRIAL.

The court should not grant a new trial where the verdict rests upon substantial evidence; matters of fact being for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.    2193, 2194, 2297, 2298, 3068; Dec. Dig.   935.]

3. CRIMINAL LAW  1156—APPEAL—DISCRETION OF COURT.

An order granting or refusing a new trial will not be disturbed unless an abuse of the court's discretion appears.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.    3067-3071; Dec. Dig.   1156.]

4. CRIMINAL LAW  1134—APPEAL—REVIEW.

In reviewing the denial of accused's motion for a new trial, statements made by the lower court cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig.    2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig.   1134.]

5. WITNESSES  380—EXAMINATION—CROSS-EXAMINATION.

Where the state was taken by surprise, it may cross-examine its own witness to show that the witness had on a previous occasion made statements differing from his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig.    1210-1219; Dec. Dig.   380.]

6. WITNESSES  277—CROSS-EXAMINATION—SCOPE.

Where accused's counsel brought out that he was married, it was not error for the district attorney to cross-examine accused as to the name under which he was married, though accused tendered the marriage license, which was refused by the prosecutor.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig.    925, 979-983; Dec. Dig.   277.]

7. HOMICIDE  109—USE OF DEADLY WEAPONS—RIGHT OF ACCUSED.

The rights of a police officer to shoot in self-defense to protect himself from assault are no greater or less than those of a private citizen.

[Ed. Note.—For other cases, see Homicide, Cent. Dig.    138, 139; Dec. Dig.   109.]

8. HOMICIDE  116—SELF-DEFENSE—RIGHT OF.

Where, as a reasonable man under all the circumstances, accused was justified in believing that an assault was about to be committed on him which would inflict great bodily harm, he may shoot his apparent assailant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig.    158-163; Dec. Dig.   116.]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Ed Mallicoat was convicted of murder in the second degree, and from the judgment and an order denying a new trial, he appeals. Affirmed.

L. E. Dadmun, of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Appellant was convicted of the crime of murder of the second degree, and sentenced to serve a term of ten years in the penitentiary. He appeals from the judgment and from an order denying his motion for a new trial.

In August, 1914, four privates in the marine corps of the United States government went from their post on North Island, in San Diego county, to the city of San Diego. They arrived in the latter city during the course of the afternoon and spent their time variously at certain saloons and other resorts. By the hour of 11 o'clock in the evening they had imbibed considerable liquor, but, so far as the evidence shows, were not greatly intoxicated. While enjoying themselves in one of the saloons which they visited, they were approached by a civilian who was intoxicated and who desired to make one of their party. A marine named Brinton, being one of the four, testified that he took charge of the civilian and led him away, intending to take him to his room. While on the street, and while conducting the civilian therealong, he was stopped by appellant, who was a special police officer engaged as a chauffeur for the police department of the city of San Diego. Some articles from the pockets of the civilian were in the hands of Brinton at that time, Brinton claiming that the civilian had handed them to him, while the defendant in his testimony said that he

had observed Brinton taking the articles from the pockets of the intoxicated man. At any rate, Brinton was required by appellant to cease conducting the civilian farther, and the latter was left in charge of appellant, while Brinton returned to the saloon and rejoined his companions. After disposing of the civilian, appellant was proceeding on his way toward the police station, when he was overtaken by the four marines. Appellant testified that the marines came running after him, while Brinton's testimony was that it was time for them to catch their boat for North Island, and that they were traveling up the street for the purpose of reaching the ferry. Two of the marines, Brinton and a man named Collier, were in front, and several paces behind them came the two remaining men of the squad. Brinton and Collier approached within a distance sometimes stated in the testimony as being about 15 feet of appellant, who turned and observed them. From this point in the narrative of the occurrence there is some conflict between the testimony given for the prosecution and that of the defendant. The marine Brinton testified that, as they got within about 15 feet of appellant, the latter drew his gun and that Collier said to him, "I ain't afraid of your old gun"; that at that moment appellant fired a shot from his revolver and Collier dropped to the sidewalk with a bullet through his abdomen, from which wound he shortly thereafter died. The appellant's testimony was to the effect that the foremost men advanced upon him in a threatening manner, with arms upraised in a fighting attitude, and that those in the rear were running up at the same time, and that, believing that he was about to be mobbed, he fired, with the effect noted. There was testimony of another witness that immediately after the shooting appellant was heard to say: "If any more fools with me I will shoot them, too." There was also testimony as contradicting that of appellant wherein he said that the men were advancing upon him in a threatening manner; this testimony was that the marines were not so doing, but had their hands at their sides.

[1-4] Counsel first argues that it was error for the court to deny appellant's motion for a new trial because the evidence was insufficient to support the verdict, and he asserts the trial judge stated it as his opinion that a different verdict should have been rendered. He states that it requires an agreement of 13 men to make a verdict of guilty effectual, namely, the 12 jurors in the box and the judge on the bench, and that a verdict returned by the jury must be set aside and a new trial granted unless the court wholly agrees with the jury as to its conclusion. The trial judge, in passing upon a defendant's motion for a new trial in a criminal case, is called upon to determine whether there is evidence sufficient to support the verdict. All questions of fact being prima-

rily for the jury, this judgment of the court is not to be exercised in such a captious and overcritical way as to nullify a verdict which rests upon substantial evidence given by credible witnesses, and the mere intimation of the trial judge that, had he been a jurymen, he probably would have voted for an acquittal, is not sufficient. The judge should, in order to warrant an order for a new trial to be made, believe that the verdict is not sustained by the evidence and that, if allowed to stand, it would result in unjust punishment being inflicted. So believing, it becomes his imperative duty to order a new trial. An order made either granting or denying such new trial will not be disturbed unless an abuse of discretion is made manifest. *People v. Knutte*, 111 Cal. 453, 44 Pac. 166; *People v. Chew Wing Gow*, 120 Cal. 298, 52 Pac. 657; *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001; *People v. Elmore*, 167 Cal. 205, 138 Pac. 989. It is urged here that from the remarks made by the trial judge at the time the ruling on the motion for a new trial was entered he was of the view that the verdict as rendered was improper. The argument of the judge as showing the reasons which impelled him to make the order complained of is not proper to be considered here. *People v. Tapia*, supra. But, were we authorized to examine into the argument so expressed, nothing can be found therein inconsistent with the view that the judge concluded that the verdict found sufficient support in the evidence. The judge in one part of his statement expressly declared that there was evidence sufficient to warrant all of the findings of the jury, and with that conclusion no fault can be found, if the entire record of the evidence is examined.

[5] Complaint is next made because the district attorney was allowed to cross-examine the witness introduced on behalf of the prosecution in an attempt to show that this witness had made statements differing from those given in his testimony on a prior occasion. On the ground that he was surprised by the testimony of the witness, the district attorney was allowed considerable latitude in the direction suggested. This witness was a police officer who assumed to relate a statement made by the deceased as a dying declaration. He testified that when asked why the defendant had shot him deceased had said: "He had some trouble with a friend of mine." This statement was considered important as showing knowledge on the part of deceased that there had been trouble between defendant and the marine Brinton prior to the time of the meeting on the street when the shooting occurred. The district attorney announced that he was surprised by the statement of the witness, and proceeded, with the permission of the court, to ask leading questions to show that this witness in the office of the district attorney, when he related the statement made by the deceased, had

failed to mention that the latter had said that appellant had had trouble with his (deceased's) friend. The matter of permitting this cross-examination of the state's witness by the district attorney was one within the discretion of the court, and it does not appear that this discretion was abused. There was sufficient to show that the witness was inclined to be favorable to the defense, and also to show that the district attorney was surprised by the statement made which has been quoted. Counsel cites several authorities in support of his proposition that reversible error was committed in this regard, but, when we apply those decisions to the facts exhibited by this record, they do not sustain the contention made. In one of the cases, *People v. Creeks*, 141 Cal. 529, 75 Pac. 101, it is said:

"Where a witness called by a party has simply failed to testify to all that party expected or desired, but has not given testimony against him, it is not permissible for the party calling him to prove that such witness had previously made statements which, if sworn to at the trial, would tend to make out his case."

Here Langford did testify to matter which was "against" the prosecution. Clearly in that case it was proper for the district attorney to show that he had made contrary statements or had failed to include in an apparently full statement theretofore made the important sentence which had been added in his testimony.

[6] The objection that the district attorney asked improper questions of the defendant on cross-examination and was so guilty of misconduct in our view has no merit. The matter pointed out referred to the cross-examination wherein the district attorney inquired of the defendant as to what name he had been married under. On direct examination defendant's counsel had brought out the fact that the defendant was married, and the district attorney followed this up by inquiring as to when and where and under what name defendant had been married. Defendant's counsel, while the district attorney was cross-examining, tendered the certificate of marriage, which was not accepted by the prosecutor. Presumably the certificate of marriage showed the name the defendant had used at the time that ceremony was performed, and, if it did so show it, then certainly there could have been no error in requiring the defendant himself to state the fact upon the witness stand. His counsel made an express tender of the marriage certificate, and, even though his objection to the question asked calling for the name used was well taken, his offer to show that name by the certificate amounted to a waiver of the objection.

The strictures passed by the district attorney in his argument upon the attitude and conduct of the police department re-

specting the prosecution of appellant were severe, and, as the trial judge remarked, might well have been omitted. However, we have examined carefully the assignments of error predicated upon the ground of that official's misconduct and do not feel that a reversal is warranted on account thereof. There were suggestions made throughout the trial, having some import in that direction, which indicated that the police department felt an interest in the defense of appellant as a fellow police officer, and it was for the jury to determine whether the district attorney's conclusions were justified upon the whole evidence.

[7] The court by its instructions seems to have covered the case fully and carefully, and to have stated all of the propositions of law applicable to the charge and the evidence. It was proper for the jury to be instructed that a police officer had no greater nor less right than a private citizen to use a deadly weapon under the circumstances disclosed by the evidence. On behalf of the defendant it was proper for the jury to be advised that a police officer had as much right to defend himself as a private citizen, and on behalf of the prosecution it was proper that the jury should be advised that because defendant was a police officer he would not be justified in acting upon lesser provocation in using his weapon to kill than would a private individual.

[8] We can see no force in the criticism of the instruction which detailed the right of a person threatened with great bodily harm at the hands of another to use a deadly weapon in repelling his assailant. That defendant had the right to act upon appearances and shoot his assailant if, as a reasonable man, under all of the circumstances, he was justified in believing that an assault was about to be committed which would inflict upon him great bodily harm, was fully expressed in the instructions. The jury resolved the facts against the appellant under the evidence, and we agree with the trial judge in the statement made at the time the motion for a new trial was denied, when he said that there was plenty of room under the evidence for the jury to reach the conclusion that appellant was not justified, as a reasonable man, in believing, at the time he fired the shot which killed Collier, that he was about to suffer great bodily injury at the hands of the four marines.

From a careful examination of the whole record it appears that appellant has had a fair trial. The verdict and judgment should not, therefore, be disturbed.

The judgment and order denying to appellant a new trial are affirmed.

We concur: CONREY, P. J.; SHAW, J.

27 Cal. App. 351

PEOPLE v. KEKO et al. (Cr. 387.)

(District Court of Appeal, Second District, California. May 6, 1915.)

1. BURGLARY $\hookrightarrow$ 42—EVIDENCE—POSSESSION OF STOLEN PROPERTY.

In a prosecution under an information charging burglary in entering a room with intent to commit larceny, defendant's unexplained possession of stolen property was not of itself sufficient to justify a conviction, though admissible as a circumstance on the issue of guilt.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 80, 104-107; Dec. Dig. $\hookrightarrow$ 42.]

2. BURGLARY $\hookrightarrow$ 3—ELEMENTS—INTENT.

In a prosecution for burglary in the first degree under an information charging burglary in entering a certain room with intent to commit larceny, the intent was a primary and essential element of the charge.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 24-27; Dec. Dig. $\hookrightarrow$ 3.]

3. CRIMINAL LAW $\hookrightarrow$ 1186—MISCONDUCT OF PROSECUTING ATTORNEY—REVERSIBLE ERROR.

Const. art. 6, § 4½, provides that a new trial shall not be granted unless the court shall be of opinion that the error complained of has resulted in a miscarriage of justice. Pen. Code, § 1323, provides that accused cannot be compelled to be a witness against himself, and that his refusal to testify shall not prejudice him nor be used against him at the trial. In a prosecution for burglary, the district attorney in argument suggested that defendants had failed to explain their possession of the stolen goods, and, after the court had stated that defendants did not have to testify, again referred to the fact that it was in their power to explain such possession. *Held*, that the district attorney's conduct deprived defendants of a substantial right, and was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. $\hookrightarrow$ 1186.]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Angelo Keko and Roberto Rables were convicted of burglary in the first degree, and from the judgment and from an order denying their motion for a new trial, they appeal. Judgment and order reversed.

E. L. Johnson and A. L. Dorn, both of San Diego, for appellants. U. S. Webb, Atty. Gen., and Robert M. Clarke, Dept. Atty. Gen., for the People.

CONREY, P. J. The defendants have been convicted of the crime of burglary in the first degree pursuant to an information charging them with that crime in having entered a certain room with intent to commit larceny. They appeal from the judgment and from an order denying their motion for a new trial.

[1] It is contended on behalf of the appellants that there is no evidence which tended to connect them with the commission of the offense charged, except the mere fact that each of them was found in possession of a part of the articles which, according to the testimony, had been stolen from the room occupied by one R. F. Holmes, owner of the stolen property. While the mere possession

of stolen property, unexplained by the defendant, is not of itself and standing alone sufficient to justify a conviction of burglary, even if it be shown to a moral certainty and beyond a reasonable doubt that by some one the alleged burglary was committed, yet such possession of stolen property is a circumstance which, taken in connection with other incriminating evidence in the case, may be considered by the jury in determining the question of the guilt or innocence of a defendant so charged. *People v. King*, 8 Cal. App. 329, 96 Pac. 916. Without further reviewing the facts, it is sufficient to say that each of these defendants was found in possession of part of the stolen property under circumstances which might have justified the jury in concluding that they were the guilty parties.

[2] The court instructed the jury that:

"The question of intent is not involved in this case, for the reason that if there is any evidence against these defendants sufficient to convict at all, it establishes the fact of a larceny having been committed in connection with the burglary. The evidence if it discloses anything, discloses that larceny was committed by whoever entered the room of this complaining witness, so that no question of intent to commit larceny is involved in this case, or at least the intent is not necessary to be shown other than by the evidence that the larceny was in fact committed, so that the question for you to determine, after determining by the evidence whether or not the room of this complaining witness was entered and his goods stolen therefrom, is to determine whether or not these defendants or either of them committed the larceny and burglary."

The foregoing instruction is erroneous in its declaration that the question of intent is not involved in the case. It was one of the most primary and essential elements in the charge against the defendants.

[3] It is urged on behalf of appellants that on account of misconduct of the district attorney they are entitled to a reversal of the judgment against them. In our opinion, this contention should be sustained. The defendants did not testify in their own behalf. Section 1323 of the Penal Code provides that:

"A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself. * * * His neglect or refusal to be a witness cannot, in any manner, prejudice him nor be used against him on the trial or proceeding."

The district attorney in his argument to the jury suggested that the defendants had failed to explain why they had the stolen goods in their possession. Counsel for defendants objected to this remark, and the court responded:

"They don't have to testify in the case. I think what counsel refers to is perhaps the rule of law in reference to what force there is in the possession of stolen property unexplained. The jury will be instructed that the defendants are not required to go on the stand themselves."

A moment later the district attorney again referred to the fact that it had been in the

power of the defendants to explain how they got the goods, and further said:

"They had the opportunity; all they had to do was to take the stand and tell you; that has not been done. They have in that way refused to explain to you circumstances which would justify you in finding them not guilty. * * *

Referring to similar flagrant misconduct of the district attorney, the court of appeal in the third district held that:

"In the face of so plain a provision of law, we cannot say that it may be openly violated without prejudice to the defendant." *People v. Morris*, 3 Cal. App. 6, 84 Pac. 465.

Since the time of that decision the people have adopted section 4½, art. 6, of the Constitution, designed to prevent the reversal of judgments or the granting of new trials on account of errors in matters of procedure—"unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

In the case at bar the evidence connecting defendants with the crime is merely circumstantial. While, as above stated, we think it was sufficient to support the verdict, we do not believe that it was so far conclusive that the judgment should be sustained in the face of misconduct in the trial which deprived the defendants of a substantial right guaranteed to them by law.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

27 Cal. App. 346

PEOPLE v. LIERA. (Cr. 382.)

(District Court of Appeal, Second District, California. May 6, 1915.)

1. HOMICIDE — 236 — INFLECTION OF FATAL WOUNDS — EVIDENCE.

A third person struck decedent on the left side of the head with a beer bottle, causing decedent to fall to the ground. Immediately thereafter accused shot decedent five times, inflicting wounds sufficient to cause death. The coroner's physician who examined decedent's body stated that the immediate cause of death was probably a fracture of the skull, and that either one of the injuries would cause death. All of the physicians agreed that the blow might have caused instantaneous death, but none of them insisted that it necessarily did so. *Held* to authorize the jury to find that decedent was alive when accused fired the shots, and that the effect of the shots was to hasten death, thereby authorizing a conviction.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 495-499; Dec. Dig. — 236.]

2. HOMICIDE — 305 — EVIDENCE — INSTRUCTIONS.

Where the evidence showed that accused was present when a third person struck decedent a fatal blow, and that accused instantly shot decedent, inflicting fatal wounds, and the prosecution showed the entire transaction, including the acts of the third person, instructions authorizing a conviction of accused as an accomplice of the third person or as an accessory were proper, though the information charged accused, in the ordinary form, with murder, without reference to the act of the third person or the means by which death was produced; since, under Pen. Code, § 31, declaring that all

persons concerned in a crime are principals, and section 971, abrogating the distinction between accessory before the fact and a principal, and between principals in the first and second degrees in felony cases, the mere fact that the information charged accused solely as a principal did not prevent his conviction as principal, though he acted as an accomplice or accessory.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 637; Dec. Dig. — 305.]

3. CRIMINAL LAW — 815 — INSTRUCTIONS — IGNORING EVIDENCE.

A requested charge which ignores and excludes from the consideration of the jury any evidence is properly refused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1922, 1986; Dec. Dig. — 815.]

4. CRIMINAL LAW — 789 — INSTRUCTIONS — REASONABLE DOUBT.

Where on a trial for murder the only doubt that could have been produced by the evidence as to the cause of decedent's death would be a doubt as to the results of a blow inflicted by a third person and of shots fired by accused, an instruction that, if there was any reasonable doubt as to what caused decedent's death, accused was entitled to an acquittal, was properly refused, for such doubt might have existed without entitling accused to an acquittal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. — 789.]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Claudio Liera was convicted of murder in the second degree, and he appeals. Affirmed.

Walton J. Wood, Public Defender, and David R. Faries, Deputy Public Defender, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. The appellant, Liera, having been convicted of the crime of murder in the second degree, was sentenced to state prison for a term of years. His appeal is from the judgment.

At about 11 o'clock on the night of June 7, 1914, the deceased, Teofilo Gonzales, was asleep in the house of Alberto Hernandez, in the county of Los Angeles. Several members of the Hernandez family were in the house and all had retired for the night. At this time the defendant, together with Juan Lopez and Tomas Estrada, came to the house and knocked at the door. These men were followed in a few minutes by Mrs. Hermana, who lived with Lopez. Shortly afterward, some controversy having arisen, these visitors and some of the Hernandez household were talking together near the house. Thereupon Teofilo Gonzales, roused from sleep by the disturbance, came out, and as he came out he asked, "What is the difficulty?" Juan Lopez replied, "Whatever you want," and at the same time struck Gonzales on the left side of the head in the temporal region with a beer bottle. Gonzales fell backward to the ground, and immediately thereafter the defendant, Liera, fired five times with a

pistol, putting five bullets into the body of Gonzales.

[1] Appellant's first contention is that the evidence shows that Gonzales was killed instantly by the blow received from Lopez, and was dead when the shots were fired by defendant. This contention is not conclusively established by the evidence, and the exact moment of the death of Gonzales is not shown. The testimony of the coroner's physician who examined the body was that the immediate cause of death, in his opinion, was probably a fracture of the skull, and that either one of the injuries would have caused death. All of the physicians agreed that the blow might have caused instantaneous death, but none of them insisted that it necessarily produced that effect. All agreed that the gunshot wounds were sufficient to have caused death. Under these circumstances the jury might have found that Gonzales was alive when the shots were fired by defendant, and that the effect of those shots was to hasten the death. If this were so, the appellant's own acts in firing the shots would be held to have been sufficient to justify his conviction.

[2] The court by its instructions assumed that the evidence might tend to show, and that the jury might find, that although the immediate cause of death was the blow administered to deceased by Juan Lopez, yet that the defendant might be convicted as an accomplice of Lopez in that assault, if the jury should find that his actions were those of an accomplice. It does not appear that the defendant had any quarrel with the deceased either before or at the time of the above-mentioned transactions, or that any ill will existed between them. If there is any ground for the finding that the defendant was accessory to the act of Lopez in making the attack upon the deceased, such ground exists solely in the circumstance that the defendant was present when the blow was struck by Lopez, and that he instantly thereafter followed that blow by firing those shots which made the death an assured fact, if it was not already inevitable. The court instructed the jury:

"That in order to render a person an accomplice he or she must in some manner knowingly and with criminal intent aid, abet, assist, or participate in the criminal act."

Also:

"That an accomplice is one who, knowing that a crime is being committed, willfully and with criminal intent intentionally aids, abets, and assists another in the commission of such crime or criminal act, and whether or not one is an accomplice as defined in these instructions, is for the jury to determine from all the testimony and circumstances in proof in the case."

Also that:

"For one person to abet another in the commission of a criminal offense simply means to knowingly and with criminal intent aid, promote, encourage, or instigate, by act or counsel, or by both act and counsel, the commission of such criminal offense."

The court further instructed the jury:

"You are instructed that the distinction between an accessory before the fact and a principal in case of a felony is abrogated in this state, and all persons concerned in the commission of a felony, whether they directly commit the act, constituting the offense or aid and abet in its commission, though not present, shall be prosecuted, tried, and punished as principals. You are further instructed that, if you believe from the whole evidence beyond a reasonable doubt that this defendant, together with Juan Lopez, at the time and place alleged in the information, made an assault on the person of the deceased, and in the furtherance of a common purpose to assault said deceased inflicted injuries which caused his death, then you are instructed that it is immaterial, if you find that there was more than one injury inflicted of a character to produce death, which of said injuries it was, in fact, that produced the death of the deceased. It is sufficient that any one or more of said injuries was of a character to, and did in fact, produce the death of the deceased."

The information was in the ordinary form, charging appellant with the crime of murder, and it made no reference to the act of Juan Lopez or the means by which death was produced. Appellant's counsel contend that these instructions assume a complicity by defendant which could not exist under the information, and which was utterly unproven by the evidence. In order to sustain these objections it would be necessary for us to hold that where two men have made an unprovoked attack upon a third person, and each one has administered a blow capable of causing the death, but the death actually occurred from the first blow, that the one who administered the second blow could not be convicted of the murder without direct testimony showing that he had advised, aided, or abetted in the striking of the first blow. To adopt this theory would take away from the jury the right to find as a fact from the circumstances that the attack was a joint enterprise from beginning to end. We are not able to agree with this contention. We do agree that the court is not entitled to give instructions assuming the finding of facts of which there is no evidence; but we think that the case presented here is not an illustration of that rule.

It is further claimed that these instructions relating to the accomplice theory are objectionable for the reason that the prosecution tried its case upon the theory that defendant acted solely as a principal and upon the theory that his act was the sole and efficient cause of the death, and that the judge by these instructions injected into the case a theory foreign to that upon which the evidence had been presented. We think that this objection is not sustained by the record. The evidence produced on behalf of the prosecution included a full account of the transaction, including the acts of Juan Lopez. The mere fact that the information charged the defendant solely as a principal is not sufficient to prevent his conviction as such principal, even though he acted as an accomplice, or as accessory to another in the com-

mission of the unlawful acts. Pen. Code, §§ 31, 971.

[3] Complaint is made that the court refused to give certain instructions requested by the defendant. The propositions involved in these instructions were: (1) That, if the jury believed from the evidence that Gonzales died as a result of a blow on the head inflicted by Juan Lopez with a beer bottle, it was their duty to acquit the defendant; (2) that, if they believed from the evidence that Gonzales was dying as a result of the fracture of his skull inflicted by a blow on his head by Juan Lopez when the shots fired by the defendant struck him, and that the death of the deceased was not hastened as a result of the pistol shot wounds, it was their duty to acquit the defendant. The court was justified in refusing these instructions, for the reason that they ignored and excluded from consideration any evidence tending to show and from which the jury may have believed that under the circumstances shown the defendant was accessory to the acts of Lopez in the attack made upon the deceased.

[4] Counsel for appellant complain that the court did not give three other instructions, and specify that one of these instructions "was not given elsewhere in so far as applicable." This last-mentioned instruction was that:

If there is in your minds any reasonable doubt as to what caused the death of the deceased, it is your duty to give the defendant the benefit of such doubt and to acquit him."

The only doubt that could have been produced by the evidence with respect to the cause of the death of Gonzales would be a doubt as to the relative results of the blow administered by Lopez and of the shots fired by the defendant. Manifestly, such doubt might have existed without entitling the defendant to a verdict of acquittal.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

27 Cal. App. 336

ANDERSON v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA et al.
(Civ. 1535.)

(District Court of Appeal, First District, California. May 6, 1915.)

1. PHYSICIANS AND SURGEONS — 11 — EMPLOYMENT BY DENTAL PRACTITIONER OF UNLICENSED PERSON — KNOWLEDGE — STATUTE.

Where a dental practitioner was charged with a violation of St. 1901, p. 564, as amended, regulating the practice of dentistry, by having knowingly employed an unlicensed person in his office to perform operations on human teeth, and for having knowingly permitted such person to use his offices and the paraphernalia therein, and was suspended therefor by the board of dental examiners, it was no defense to such practitioner that he did not know that his employé was not possessed of a license to practice dentistry, since the duty was on him

to ascertain that fact before taking such employé into his service.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. — 11.]

2. EVIDENCE — 1 — JUDICIAL NOTICE — TRIBUNALS.

The exercise of judicial notice is not confined to courts of record, since the doctrine is based on convenience and expediency.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1; Dec. Dig. — 1.]

3. PHYSICIANS AND SURGEONS — 11 — JUDICIAL NOTICE — EXERCISE BY BOARD OF DENTAL EXAMINERS — STATUTE.

The board of dental examiners, created by St. 1901, c. 175, as amended, regulating the practice of dentistry, in determining whether a practitioner was subject to suspension for having violated the act by employing in his office as a dental surgeon a person unlicensed by such board, could take judicial notice of its own records to determine whether such employé of the practitioner had been duly licensed.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. — 11.]

Application for writ of review by R. C. Anderson against the Board of Dental Examiners of California, and others. Denied.

Herbert Choynski and John T. Williams, both of San Francisco, for petitioner. Oliver Dibble, of San Francisco, for respondents.

PER CURIAM. This is a hearing upon an application for a writ of review directed to the board of dental examiners of the state of California, requiring said board to certify to this court its proceedings in the matter of the suspension of the license of the petitioner herein to practice the profession of dentistry for the period of one year. The entire record of the board in such matter is before the court in response to said writ; and from such record it appears that on the 16th day of April, 1914, one Carl Schroeder filed with the board of dental examiners a verified accusation, wherein it was set forth in substance that the petitioner herein, himself a regularly licensed and practicing dentist, maintaining offices at a fixed place of business in the city of San Francisco, had been guilty of unprofessional conduct, consisting in the violation of the provisions of the "act to insure the better education of practitioners in dental surgery and to regulate the practice of dentistry in the state of California," approved March 23, 1901 (St. 1901, p. 564), and variously amended up to 1913; which alleged violation of said act consisted in the alleged fact that the petitioner herein had knowingly employed one James V. Munn in his dental offices for the purpose of performing operations on and treating lesions of the human teeth and jaws, and had knowingly permitted said Munn the use of his said offices and of the paraphernalia therein for the purpose of practicing dentistry as the same is defined in said act, and that at the time of his said employment and permission

the said Munn was not licensed to practice dentistry in the state of California, which fact was during said time known to the petitioner herein.

Upon the filing of said accusation the board issued a citation to said petitioner, directing him to appear at a stated time and place and answer the same; and, the petitioner having appeared and presented a demurrer to the sufficiency of said accusation, and also a denial of its material averments, a hearing thereon was had, at which testimony pro and con was taken, at the conclusion of which the said board made its findings that the averments of the accusation had been sustained, and entered its decision and order thereon that the license of the petitioner be suspended for the period of one year.

Upon the hearing before this court it was conceded on the part of the petitioner that the board of dental examiners had jurisdiction to entertain and try an accusation of the kind presented under the terms of the aforesaid act creating and defining the powers of said board. It was, however, contended by the petitioner, and conceded by the respondent, that if, upon the hearing of such accusation before said board, the evidence entirely failed to sustain any material averment thereof, the board would not have jurisdiction to make the order in question, and that its attempted action in that regard would be beyond its jurisdiction, and hence subject to review in this form of proceeding; the petitioner having no right of appeal nor any other plain, speedy, nor adequate remedy from the effect of such order.

It was the contention of the petitioner at the hearing upon this writ that the proofs offered in support of the accusation before the board of dental examiners had utterly failed in the following material respects: First, that there was no evidence adduced showing, or in any way tending to show, that the petitioner herein was ever, prior to said accusation, informed, or that he ever knew, that said Munn was not duly licensed to practice dentistry; and, second, that the proofs adduced at said hearing further failed utterly to show, that said Munn was not at all times during the period of his employment by the petitioner as a dental operator, and of his permission to practice dentistry in the petitioner's offices, and to make use of his paraphernalia therein for that purpose, a duly licensed dental practitioner under the laws of this state.

[1] As to the first of these propositions, the respondent contends, and we think correctly, that if it be the fact that the said Munn was not the possessor of such license to practice the profession of dentistry as would make him an available subject of employment by the petitioner for the purposes for which the evidence shows he was utilized in the latter's offices, or to have permission to use said offices and the paraphernalia therof

for the practice of dentistry, which the evidence sufficiently shows he did, the duty was cast upon the petitioner to ascertain that fact before taking Munn into his service for such purposes, or permitting him to make use of his offices and appliances for the practice of dentistry, and hence his knowledge of the fact, if it be a fact, is to be assumed.

The question involved in the second contention is as to the power of the board to take judicial notice of its records for the purpose of ascertaining whether or not a dental license was ever issued to the person alleged to have been wrongfully employed.

Section 1875 of the Code of Civil Procedure attempts to enumerate the subjects of which judicial cognizance will be taken. The interpretations that the courts of different jurisdictions have placed upon these and similar provisions are not uniform, so it is impossible to state a general rule upon the subject. It has been held that courts will take judicial notice of their records and officers. *Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57; *Pitkin v. Cowen* (C. C.) 91 Fed. 599; *Dyer v. Last*, 51 Ill. 179; 7 Ency. of Evidence, 1009; *Ferris v. Commercial Nat. Bank*, 158 Ill. 237, 41 N. E. 1118; 16 Cyc. 915.

[2] Judicial notice is based upon convenience and expediency, and its application is not confined to courts of record. Thus it has been held with respect to proceedings in a municipal court, instituted for the express purpose of enforcing municipal ordinances, and vested with full jurisdiction for that purpose, that the ordinances are the peculiar law of the forum, and the court is bound to take judicial notice of their existence. *Ex parte Davis*, 115 Cal. 445, 47 Pac. 258.

[3] There are in addition to courts certain boards and special tribunals for determining certain classes of rights; and while they are not strictly courts, they partake of their nature, and their findings partake of the nature of judgments. The jurisdiction of such bodies rests upon the same basis as inferior courts, and they, too, may take judicial notice of certain matters. Thus in *People v. Board of Excise*, 17 Misc. Rep. 98, 40 N. Y. Supp. 741, the board was given power to revoke licenses where the licensed premises were kept as a disorderly house; and it was held that, although no proof was offered before the board upon the inquiry that the premises (where the alleged unlawful acts were committed) were ever licensed, such lack of proof did not affect the judgment of the board, as it could take judicial notice of the premises that it had licensed. Statutes or ordinances creating tribunals of the character of the board of medical examiners seldom prescribe the practice to govern such bodies in determining cases instituted before them. No such guide is provided under the medical act for the revocation of licenses; and while the exercise of these powers is a quasi judicial function, still such exercise

should not be governed by the strict legal rules applicable to courts. Learning in the law is not one of the qualifications required of the members composing the board; and to hold under these circumstances that the board's investigations should be conducted according to technical legal rules would have the effect of seriously impairing the successful performance of the duties for which that body was created. *Munk v. Frink*, 81 Neb. 631, 116 N. W. 525, 17 L. R. A. (N. S.) 439. It would have been an easy matter for petitioner to produce proof of the fact that Munn had been licensed, if such were the fact, for by the statute the board is charged with the duty of keeping a roll of licensed practitioners; and under these circumstances it would be idle to say that it could not judicially notice who were and who were not duly licensed.

For the reasons stated the petitioner's application is denied.

27 Cal. App. 381

PHENEGAR v. PAOLINI et al. (Civ. 1351.)
(District Court of Appeal, Third District, California. May 10, 1915. Rehearing Denied by Supreme Court July 8, 1915.)

1. FRAUDULENT CONVEYANCES — 295 — ACTIONS — EVIDENCE — SUFFICIENCY.

In a judgment creditor's suit to set aside a transfer of mortgages and notes claimed to be fraudulent as to plaintiff, a judgment for defendants *held* warranted.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 867-875; Dec. Dig. — 295.]

2. APPEAL AND ERROR — 1058 — REVIEW — HARMLESS ERROR.

The sustaining of an objection to a question was harmless, if erroneous, where other questions making the same inquiry were allowed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200-4205, 4206; Dec. Dig. — 1058.]

3. WITNESSES — 268 — EXAMINATION — SCOPE OF EXAMINATION.

Where an extended examination showed that the witness had no recollection on the subject on which he was questioned, a refusal of the court to permit continued cross-examination was not erroneous; the court having a wide discretion in such matters.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 931-948, 959; Dec. Dig. — 268.]

4. WITNESSES — 406 — IMPEACHMENT — HEARSAY — ADMISSIBILITY.

In a suit to set aside a conveyance of mortgages and notes as fraudulent to creditors, plaintiff sought to show that statements in a letter written by defendant to his agent disclosed a fraudulent intent. The letter was lost, and the agent could not recollect its contents. *Held*, that defendant, having testified to the bona fides of the transaction, could not be impeached by evidence of declarations made by the agent to a third person as to the contents of the letter, such evidence being the merest hearsay.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1276-1279; Dec. Dig. — 406.]

5. PLEADING — 237 — AMENDMENT — RIGHT TO AMEND.

In a judgment creditor's suit to set aside an assignment of mortgages and notes, the com-

plaint averred that the mortgages and notes were deposited under an agreement for delivery to the debtor if he held the payees harmless on a bail bond, and that the debtor thereafter assigned them to one M. *Held* that, as the theory of the complaint was that the ultimate assignment to M. was fraudulent, and plaintiff having been allowed all latitude in proving fraud therein, a refusal of the court to permit an amendment to change the complaint so as to conform it to the proof that the deposit as security and the assignment conditionally to M. was a single transaction was not error, plaintiff having enjoyed all the rights the amendment would have given him.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 603-619; Dec. Dig. — 237.]

6. APPEAL AND ERROR — 612 — MATTERS REVIEWABLE — MOTION.

Before the court rendered its decision plaintiff's counsel moved to reopen the case. Plaintiff's exceptions to the denial of his motion were preserved in a bill of exceptions appearing as part of the proceedings of the trial. *Held*, that the matter was sufficiently authenticated to be reviewed on appeal, the order overruling the motion not being itself appealable, and court rule 39, requiring authentication of certain motions, applying only to those orders in which an appeal might be taken.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2694-2701; Dec. Dig. — 612.]

7. TRIAL — 68 — REOPENING OF CASE — DISCRETION.

The reopening of a case after the close of the evidence is in the discretion of the trial court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 153-163; Dec. Dig. — 68.]

8. FRAUDULENT CONVEYANCES — 310 — ACTION TO SET ASIDE — FINDINGS — SUFFICIENCY OF FINDING.

In a suit to set aside a conveyance as a fraud on creditors, a finding which did not determine the interest of persons whose rights were admitted in the pleadings is not defective.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 959-961; Dec. Dig. — 310.]

9. ESCROWS — 1 — WHAT CONSTITUTES.

An owner of property sold it, receiving notes secured by mortgages in payment. The notes and mortgages were made payable to the sureties on his bail bond. The sureties thereafter deposited the notes and mortgages with a bank under an agreement that they should be delivered to the owner in case the sureties were discharged from liability on the bail bond. *Held*, that no conditional title was vested in the sureties, and they merely held a lien in the nature of a mortgage, so the transaction did not constitute an escrow under Civ. Code, § 1057, declaring that a grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and while in the possession of the depository it is called an "escrow."

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. §§ 1-3, 5; Dec. Dig. — 1.

For other definitions, see *Words and Phrases*, First and Second Series, *Escrow*.]

10. FRAUDULENT CONVEYANCES — 310 — ACTION TO SET ASIDE — FINDINGS — SUFFICIENCY.

In a suit to set aside a conveyance of notes secured by mortgages, the court found that at the time of seizure and sale of the notes under plaintiff's execution they belonged to one M., but made no finding as to the right of the ostensible payees, who, it was admitted in the pleadings, held them merely as security. The conclusions of law were that plaintiff never had

any interest in the notes, except such as he might have acquired by purchase at execution sale, and that the levy of execution on the securities was wrongful. *Held*, that there was no conflict between the finding and the conclusions of law.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 959-961; Dec. Dig. ☞310.]

11. APPEAL AND ERROR ☞1071 — REVIEW — REASONS FOR DECISION.

Where the findings of fact supported a judgment, it will not be disturbed because of conflicts between conclusions of law.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4234-4239; Dec. Dig. ☞1071.]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by C. A. Phenegar against P. R. Paolini and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Geo. Cosgrave, of Fresno, for appellant. W. D. Crichton and C. K. Bonestell, both of Fresno, for respondents.

HART, J. The plaintiff, as a judgment creditor of the defendant E. Desperati originally proceeded in this action by way of a creditor's bill for the purpose of obtaining a decree declaring void and setting aside a transfer by the latter to the defendant Marchetti of certain notes and mortgages upon the ground that said transfer had been made with the intent to defraud the plaintiff of his claim against the said defendant Desperati.

The third amended and supplemental complaint, upon which, with the answers thereto and a cross-complaint by the defendant Marchetti, the present action was tried, was filed after the plaintiff had obtained a judgment against Desperati upon the claim held by the former against the latter and after execution had thereupon been issued and levied upon the notes and mortgages in question, the latter sold by the sheriff under said execution, and the proceeds of said sale applied toward the satisfaction of the plaintiff's judgment. The object of the present action is, in effect, to secure a judgment quieting plaintiff's title to the notes and mortgages in dispute.

It appears, from the complaint that Desperati, in September, 1908, "and at all times thereafter," was indebted to the plaintiff in the sum of \$1,826.28, and that the plaintiff, on March 14, 1911, brought an action against Desperati to recover said sum, in the superior court of Fresno county, recovering judgment in the sum so sued for on the 24th day of August, 1911.

Departing now from the order in which the facts are stated in the complaint, these may here be stated:

The defendant Desperati, prior to the time at which the notes and mortgages in dispute were transferred, had been convicted of the

crime of grand larceny in the superior court of Fresno county, and judgment of sentence thereupon pronounced against him. He, however, took and prosecuted an appeal to the court of appeal from the judgment of conviction, and was by the trial court admitted to bail, pending the determination of said appeal. He subsequently gave said bail, the defendants P. R. Paolini and A. G. Leverone becoming sureties thereon. At and prior to this time Desperati was the owner of two certain tracts of land which are situated in Fresno county and specifically described in the complaint. The title to both these tracts of land, on the 30th day of March, 1910, stood in the names of and was held by the defendants Paolini and Leverone, but, so the complaint alleges, "neither of said defendants at any time had any interest therein save as trustees only for the benefit of said E. Desperati." On September 19, 1910, Desperati, acting through his said trustees as aforesaid, sold one of said tracts of land to one Adolfo Pierini and the other to one Guido Dami, and executed deeds to the said grantees, respectively, to said tracts of land. As a part of the purchase price of the land so purchased by Pierini, the latter executed and delivered to Paolini and Leverone his three several promissory notes, each being dated September 19, 1910, and payable as follows: The first, for \$1,176.66, on the 1st day of October, 1914; the second, for \$1,176.66, on October 1, 1915; and the third for \$1,476.66, on October 1, 1916—each of said notes providing for interest at the rate of 7 per cent. per annum, and all secured by a mortgage upon the land sold to Pierini. Dami, who purchased the tract of land secondly described in the complaint, as a part of the purchase price thereof, on the date of the transfer, likewise executed and delivered to Paolini and Leverone his three several promissory notes for \$575 each, due and payable October 1, 1914, October 1, 1915, and October 1, 1916, respectively, each bearing interest at the rate of 7 per cent. per annum and secured by a mortgage upon the land so sold to him. Both said mortgages were duly recorded in the office of the county recorder of Fresno county.

It is alleged in the complaint that, the said Paolini and Leverone having become sureties on the bail bond of Desperati, as above explained, Desperati authorized and caused each of said notes and mortgages to be made and the same were made and taken in the names of said bondsmen (Paolini and Leverone) as payees and mortgages thereof, "instead of in the name of E. Desperati, the real owner thereof"; that the defendants Paolini and Leverone "at all times held the same in trust for said Desperati to indemnify themselves against any liability upon said bail bond as hereinbefore alleged, and not otherwise."

On October 3, 1910, so the complaint de-

clares, Paolini and Leverone, acting under instructions and by the direction of Desperati, "and not otherwise," indorsed all the notes above mentioned in blank and prepared and executed an assignment of the mortgages given to secure said notes to the defendant Frank Marchetti, and thereupon deposited in the Bank of Central California, as depository, the said assignment, together with the notes and mortgages, with instructions to said bank to deliver the same to said Marchetti whenever and in the event that the judgment of conviction of grand larceny against Desperati was reversed by the District Court of Appeal, to which an appeal from said judgment had been taken, and the sureties on the latter's bail bond, Paolini and Leverone, were thereupon released and discharged from the obligations of said undertaking. Prior, however, to the decision by the appellate court in the criminal case against Desperati, and before the sureties were released from the obligations of said bail bond, and consequently before the delivery of the notes and mortgages under the assignment to Marchetti, said notes and mortgages were, as before stated, seized by the sheriff under the writ of execution issued upon the judgment obtained by the plaintiff in the action above referred to, and, after due proceedings, sold by that officer to the plaintiff, who paid therefore the sum of \$1,505, which sum was by the sheriff credited on said judgment.

The complaint charges that the purported assignment of the notes and mortgages to Marchetti was executed without any consideration, and that it was made by Paolini and Leverone, under the express direction of Desperati, with the fraudulent intent on the part of all the defendants and for the sole purpose of placing said notes and mortgages beyond the reach of the claim of the plaintiff against Desperati, and to prevent the plaintiff from securing satisfaction of said claim.

The complaint further alleges that, notwithstanding the ownership of said notes and mortgages by the plaintiff, the defendants still claim ownership thereof on behalf of said Marchetti, and "obstruct and annoy the plaintiff in the possession and enjoyment thereof, and do now prevent plaintiff from collecting the interest due upon said notes and mortgages, and said defendants, in pursuance of the design of all of said defendants to place said notes and mortgages beyond the reach of this plaintiff, claim ownership thereof in said Frank Marchetti by reason of said fraudulent assignment, and do thereby jeopardize the title of this plaintiff in and to the same." The prayer asks that the plaintiff be declared the owner of the notes and mortgages, and that the purported assignment of the same to Marchetti be ordered delivered up and canceled.

Marchetti filed an answer and a cross-complaint. In the former he specifically denies each and all the allegations of the complaint involving the charge of fraud in the transac-

tion whereby the notes and mortgages concerned here were transferred to him, and admits that he claims ownership of the said notes and mortgages.

His cross-complaint contains, substantially, the same allegations as are contained in the plaintiff's complaint respecting the circumstances under which the tracts of land and the notes and mortgages described in said complaint were transferred to Paolini and Leverone. He then alleges that said notes and mortgages were transferred to him by Paolini and Leverone, by the direction of Desperati, in consideration of an indebtedness of \$5,000, or thereabouts, due from Desperati to him, and which indebtedness had existed before and at the time of the execution of said transfer; that the assignment to him was, as stated in the plaintiff's complaint, deposited in the bank therein named, and was to take effect whenever and in the event of a decision on appeal favorable to Desperati in the criminal case pending against him; "that said assignment was not made for the purpose of defrauding any creditor of the defendant Desperati, but for the purpose of preferring this cross-complainant as a bona fide creditor of said Desperati's," etc. He asked for a decree adjudging him to be the owner of the notes and mortgages in question and compelling the plaintiff to deliver the same to him.

The defendants Paolini and Leverone, jointly answering the complaint, denied the allegations of fraud in the transfer of the notes and mortgages to Marchetti, and admitted the claim of ownership thereof by the latter, and allege that he is the owner thereof.

The plaintiff by specific denials answered the cross-complaint.

Upon the issues thus framed the cause was tried by the court without a jury, and the court found the facts substantially as they are stated in the cross-complaint of Marchetti, and further found:

"That, at the time of said transfer by the said Desperati to the said Marchetti, the former had property in this state other than hereinabove referred to, which plaintiff could have compelled defendant Desperati to apply to the satisfaction of said Desperati's indebtedness to him."

Upon said findings and the conclusions of law following therefrom judgment was entered in favor of the defendant and cross-complainant Marchetti adjudging him to be the owner of said notes and mortgages, and requiring the plaintiff to deliver the same to the possession of Marchetti and to account to the latter for any amounts which the plaintiff may have collected upon said notes and pay the same over to said cross-complainant.

This appeal is prosecuted, upon a bill of exceptions by the plaintiff from the said judgment and the order denying his motion for a new trial. The motion for a new trial was based upon the asserted insufficiency of the evidence to justify the findings, of errors in law occurring at the trial, and upon the al-

leged error of the trial court in denying the plaintiff's motion to reopen the case after the same had been submitted and prior to the decision, "for the admission of evidence in rebuttal and in furtherance of justice." And these are the general points upon which the claim for a reversal is here advanced.

There is no dispute as to the indebtedness of Desperati to the plaintiff in the sum for which the latter obtained judgment against the former; nor is it disputed that the plaintiff bought the notes and mortgages at the sheriff's sale under the execution issued upon the said judgment. And the evidence shows, as the pleadings admit, these facts: That Desperati was, on the 15th day of March, 1910, convicted of the crime of grand larceny; that he appealed from the judgment of conviction to the Court of Appeal, and that the trial judge admitted him to bail pending the determination of his case on appeal, and that he gave a bail bond, Paolini and Leverone qualifying as sureties thereon; that Paolini and Leverone, as a condition to becoming such sureties, exacted from Desperati indemnity against loss in the event that he (Desperati) failed to obey the requirements of said bond; that Desperati thereupon, and for the purpose of indemnifying his bondsmen, executed a deed of trust to the two tracts of land described in the complaint to Paolini and Leverone; that thereafter Desperati left the state of California and went to Canada, and remained there for some time; that the trustees, by the direction of Desperati, subsequently sold the two tracts of land, taking as part payment therefor the notes and mortgages in dispute, and holding the same for the purpose for which the property had previously been conveyed to them in trust, as above explained; that the transfer of said notes and mortgages was, under instructions from Desperati, made to Marchetti by Paolini and Leverone on the 3d day of October, 1910, the same to be delivered to the transferee by the Bank of Central California, with which they were deposited, "whenever and in the event that the judgment of conviction theretofore had and taken in the said action * * * wherein said Desperati was convicted of grand larceny, was reversed by the District Court of Appeal."

[1] The specific contention of the plaintiff is, however, that the evidence does not support the finding that the transfer of the notes and mortgages by Desperati to Marchetti involved a bona fide transaction or one founded upon a valuable consideration. This constitutes the subject and the crux of the controversy so far as the evidence is concerned.

It must be conceded that the testimony of both Desperati and Marchetti appears to be full of self-contradictions upon certain of the material circumstances of the alleged indebtedness of Desperati to Marchetti in the sum

of \$5,200, to extinguish which was the object of the transfer of the notes and mortgages to Marchetti; yet we cannot say that the trial court's conclusion as to that matter was not justified or is not supported, since it appears that both Desperati and Marchetti positively testified that they had been partners in the business of farming for a considerable portion of the period of ten years; that during a part of that period Marchetti was employed by Desperati, and that at no time in that period was there ever a settlement between them, and that they never had had a settlement until a short time prior to the transfer of the notes and mortgages to Marchetti, when it was ascertained that Desperati was indebted to Marchetti in the sum for which said transfer was executed; that the settlement between Desperati and Marchetti and the transfer of the notes and mortgages to the latter transpired before the sheriff seized and sold the notes, etc., under the execution issuing on the plaintiff's judgment.

It is not our intention, nor is it necessary to point out herein the apparent inconsistencies in the testimony of Desperati and Marchetti and some of the other witnesses who were introduced in support of the claims of the defendants. It is deemed enough to say that, while it was important to emphasize the alleged contradictions before the trial court, we cannot perceive that an examination or consideration of them by this court can lead to a result different from that arrived at by the trial judge, since there is nothing in the inconsistencies themselves which justify us in holding that they stamp the entire testimony of the witnesses as so intrinsically unbelievable as to render it insufficient to support the decision. While a reviewing court cannot always say that the evidence justified the decision, it can in the general run of cases, with no difficulty, or without hesitation, hold that the evidence, as it appears to it, supports the decision. This results from the fact that in all cases, as is true here, the sole question, so far as the evidence is involved, is one as to the credibility of the witnesses, and its solution a function of the trial court or jury to which the questions of fact are submitted for determination. But it may be remarked that there was at least an attempt to explain the alleged contradictions. It is further to be observed that both Desperati and Marchetti are foreigners, and neither was able to speak the English language clearly and distinctly, as we are justified in judging from the manner in which they expressed themselves. In truth, Marchetti, who was not present at the trial, but whose deposition was read thereat, gave his testimony through an interpreter. Desperati explained the several transactions connected with the controversy here in "broken English." We cannot tell, of course, what impression the several witnesses made

upon the trial judge by their manner of testifying, except by the result of the trial of the issues of fact as evidenced by the decision. But it can readily be apprehended how witnesses who are not sufficiently familiar with our language to express their thoughts therein clearly, distinctly, and aptly might easily be led into apparent discrepancies in their statement of the facts of the transactions to which their testimony is addressed, and at the same time give their version of the vital facts of such transactions in a manner to persuade the conviction that, in the main, they have told the truth. It is to be admitted that both Desperati and Marchetti seem to have become confused respecting certain dates of the series of events constituting the transactions from which the claimed indebtedness arose, and there was some testimony from which, unexplained, the inference would seem to be justified that the extent of Desperati's indebtedness to Marchetti did not at any time exceed the sum of \$1,200, and that of that amount the sum of \$700 was paid to Marchetti at the time the lands described in the complaint were sold to Pierini and Dami by Paolini and Leverone, as trustees. These matters Desperati in his own way attempted to explain consistently with the claim that the amount of his indebtedness to Marchetti was the sum for the payment of which he transferred the notes and mortgages to the latter, and his explanation thereof seems to have been satisfactory to the trial judge. We see no such inherent weakness or fault in said explanation as to justify us in holding that, in accepting it, the trial judge made a mistake; nor can we say, as before stated, even if the explanation was not as satisfactory as might be desired, the testimony of the witnesses generally was so affected by the apparent discrepancies referred to as to render it inherently improbable or insufficient, as a matter of law, to sustain the findings vital to the support of the judgment.

[2] 2. The attorney for the plaintiff asked the witness Paolini the following question:

"Didn't Marchetti tell you at that time [referring to the occasion on which the lands were sold to Pierini and Dami] that he had to have all his money?"

Objection to said question by counsel for the defendants upon the ground that it was leading and suggestive in form was sustained by the court, and the ruling is here assigned as erroneous and prejudicial. The ruling turned out to be harmless, for the identical question was propounded in a different and proper form, and, while the answer thereto, as well as answers to other questions seeking like information, were not very satisfactory, the witness appearing to have no memory upon the subject, they disclosed that therefrom the witness very clearly understood what counsel desired to get from him through the question a reply to which was disallowed under the ruling complained of.

[3] 3. The court, upon objection by counsel for the defendants, in effect ruled against the effort of the plaintiff's attorney to secure a statement from Paolini that a certain letter written and addressed to Paolini, and which had been lost or destroyed before the trial, contained language showing that Desperati still claimed to be the owner of the notes and mortgages after the alleged settlement with Marchetti had been effected, and he (Desperati) had directed Paolini and Leverone to transfer to Marchetti said notes and mortgages in extinguishment of the indebtedness ascertained by said settlement to be due Marchetti. The ground of the objection was that the witness had previously been exhaustively examined relative to the contents of the letter, and that it was thus disclosed that he had no definite recollection of the contents of the letter. The court remarked that it would be idle further to question the witness concerning the subject-matter of the letter, since he had already been fully examined with respect thereto and found to be unable to recall the contents of the letter, "unless," added the court, "you can refresh his memory." The inquiry was not further pressed, the attorney for the plaintiff merely replying to the court's remarks: "We will take a ruling." The record shows that previously to the ruling complained of the attorney for the plaintiff had subjected Paolini to an extended examination in an effort to procure from him a statement of the contents of the letter, but without avail; the witness declaring that he had little recollection of the particular matters referred to in the letter. We think that, under the circumstances, the question whether further inquiry into the subject-matter of the letter should be permitted was one resting in the discretion of the court, and we cannot say that, in foreclosing such further inquiry, the court abused its discretion. There must be a limit somewhere to the examination of a witness upon a particular subject, and where, as seems to have been true here, it is evident to the trial court, after a full and exhaustive examination of the witness upon the subject concerning which particular information is desired and desirable, that nothing more can be accomplished by continuing the inquiry than has already been accomplished, then it is clearly within the discretion, and, indeed, the duty, of the court to put an end to the further prosecution of the examination.

[4] 4. The court did not err in disallowing the witness Kirkner to testify to what Paolini told him that the letter mentioned above contained; the object of the testimony being to show that Paolini had said to the witness that in the letter Desperati made a statement showing that he then claimed ownership of the notes. The ultimate purpose sought to be achieved by this testimony was doubtless to contradict the testimony of Desperati that the notes and mortgages had been transfer-

red to Marchetti before the letter was written, but it was manifestly incompetent for that purpose, for it was hearsay, pure and simple. The letter was written in the Italian language, and was not read by Kirkner himself. And the fact that Paolini might have been the agent of Desperati at the time of the receipt of the letter (and it is not clear that he was) would not make the testimony any the less hearsay, for its obvious purpose was to impeach Desperati, and the question here does not present a case where it was attempted to prove that the agent himself, assuming Paolini to have been Desperati's agent then, had previously made declarations concerning the ownership of the notes at variance with testimony given by him at the trial, but it is a case of trying to prove that the agent had told a third party of a statement previously made by his principal which was inconsistent with the testimony given by said principal at the trial. The testimony of a witness cannot be impeached in that way.

[5] 5. The next assignment involves the complaint that the court erred to the prejudice of the plaintiff in refusing him leave to amend his complaint so that it would conform to certain facts developed by the evidence relative to the time at which the assignment of the notes and mortgages was made to Marchetti. The notes and mortgages, as has been shown, were executed in the names of Paolini and Leverone, and an assignment thereof executed by the latter and placed with the bank in which the notes and mortgages had been deposited, with instructions to said bank to deliver the same to Desperati in the event that the judgment in the criminal action against him was reversed on appeal. This assignment was executed in September, 1910; the day not being named. The proof disclosed that the transfer to Marchetti was made on the same assignment on October 3, 1910. The claim is that the court should have permitted the plaintiff so to amend his complaint as that it would therein appear, as the evidence disclosed to be the fact, that, in the place of making an assignment directly to Marchetti, the original one to Desperati had been changed so that, by a notation on the margin thereof, it was made to run to Marchetti. We cannot perceive wherein the plaintiff suffered injury by the refusal to allow the proposed amendment. The theory and the sole ultimate issue in this case is that the transaction culminating in the transfer of the title to the notes to Marchetti was fraudulent and carried out with the intent to defraud the creditors of Desperati. Under this theory, notwithstanding that the complaint avers, and all the pleadings of the defendants admit, that the purported transfer was made on the 3d day of October, 1910, the plaintiff was at liberty, in the proof of the charge of fraud, to present any fact or circumstance in connection with the transaction which might prove or which would tend to prove said transfer to

have been conceived and executed in fraud and with the dishonest intention of preventing the plaintiff, as a creditor of Desperati, from enforcing or satisfying his claim against that defendant. It was, therefore, eminently proper, under the averments of fraud as contained in the complaint, that the plaintiff should have been permitted to show the circumstances under which the transfer of the notes and mortgages was made to Marchetti, when it was made, if at all in reality, and when the settlement leading to the transfer was had, or to show by any circumstances available to him the bad faith or mala fides of the transaction, if such was its character. And this is precisely what the court allowed the plaintiff to make the attempt to do. In other words, the plaintiff was properly given, under the rulings of the court, the full benefit of the proof to which his proposed amendment would have been in strict or specific conformity, and the proposed amendment, if allowed, could have added no strength to his case, and was, consequently, wholly unnecessary.

[6] 6. Before the court rendered its decision the attorney for the plaintiff made formal application for the reopening of the case, basing the motion on an affidavit in which he set forth that he was taken by surprise by the proof that the assignment of the notes and mortgages was originally made to Desperati in September, 1910; that the plaintiff had no knowledge of that fact up to the time of the introduction of the proof showing it; that, if given an opportunity, he would be able to show (stating it in a general way) that the testimony of Leverone and Desperati as to the time a settlement was made and a balance struck between the latter and Marchetti was not true; that, when the assignment was made, in September, 1910, the instructions were to make it to Desperati himself, and not to Marchetti; that, if given an opportunity, he could prove that the testimony of Desperati that he was indebted to Marchetti in a greater sum than \$1,240 was false, etc. The court denied said motion, and the ruling is assigned as error.

Preliminarily, however, objection is made that the ruling cannot be reviewed because it is not properly authenticated. The proceeding on the motion is in the bill of exceptions which was settled and approved by the trial judge, and appears therein as a part of the proceedings of the trial. The motion having been made before the cause was decided, we think it should be held to be a proceeding arising as a part and during the course of the trial. Besides, the order overruling the motion is not appealable, and rule 39 of this court, requiring the authentication of certain orders when appeals are taken therefrom, applies exclusively to those orders which are appealable.

[7] But there is no merit in the point urged against the order overruling the motion. Whether the cause should be reopened for

the taking of further testimony upon the showing made by the plaintiff was a matter wholly within the discretion of the trial court, and we cannot say that that discretion was not wisely and soundly exercised in the action of the court denying the motion.

[8] 7. We can see no merit in the next point discussed by counsel and which involves the contention that the finding that, at the time of the seizure and sale of the notes and mortgages by the sheriff under the execution issued on the plaintiff's judgment, the latter had acquired no right, title, or interest in or to said notes, etc., as against said Marchetti, cannot stand because the court failed to find or decide what claim or interest, if any, Leverone and Paolini had thereto or therein. The complaint explained that the notes and mortgages were to be delivered to Leverone and Paolini only in the event that the criminal case against Desperati was decided adversely to him on appeal, and further stated that the purpose of that arrangement was, not at any time to vest title to the notes and mortgages in those parties, but to indemnify them against loss in case Desperati failed to respond to the requirements of his bail bond, upon which Leverone and Paolini were sureties. The answers of the defendants and the cross-complaint of Marchetti admitted the truth of those allegations, and it was therefore unnecessary to make a specific finding as to the interest Leverone and Paolini had in the notes and mortgages, even if such a finding were in any event necessary, so far as the plaintiff was concerned.

[9] And the transaction involving the notes and mortgages between Desperati on the one hand and Leverone and Paolini on the other did not constitute an escrow, as the plaintiff contends. No conditional title was vested in them. They merely held a lien in the nature of a mortgage on the securities. Section 1057, Civ. Code; 11 Am. & Eng. Ency. of Law (2d Ed.) p. 333; Commercial Bank v. Pritchard, 126 Cal. 600, 604, 59 Pac. 130.

[10] 8. It is further contended that the conclusions of law are inconsistent; the specific point in this regard being that the finding above referred to is, in fact, a conclusion of law, and that it is in conflict with the conclusion of law No. 1, whereby the court concludes, as a matter of law, that the plaintiff never at any time acquired any interest in or title to the notes or mortgages, except such as he might have acquired by purchasing the same under the execution sale to satisfy his judgment. But, as seen, the court found that Marchetti, at the time of the levy of the execution, was the owner and entitled to the possession of the notes and mortgages, and conclusion of law No. 2 declares that the levy of the execution, on the securities to satisfy the plaintiff's judgment was wrongful, inasmuch as the property, when attached or

levied upon under the execution, belonged to Marchetti. Thus it is very clear that there is no conflict between the finding (or conclusion of law, if it may strictly be so regarded) referred to and the conclusions of law mentioned.

[11] In any event, if the conclusions of law may be said to be conflicting, assuming the finding mentioned to be a conclusion of law, the other findings support the judgment, and the settled rule is that, where this is true, inconsistencies between certain conclusions of law are immaterial, and cannot operate to vitiate the judgment. *Spencer v. Duncan*, 107 Cal. 423, 426, 40 Pac. 549; *Roberts v. Hall*, 147 Cal. 434, 437, 82 Pac. 66; *Lange v. Waters*, 156 Cal. 142, 144, 103 Pac. 889, 19 Ann. Cas. 1207.

There are no other points requiring special notice.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

27 Cal. App. 366

SCHMIDT et al. v. UNION OIL CO. OF CALIFORNIA. (Civ. 1368.)

(District Court of Appeal, Third District, California. May 10, 1915. Rehearing Denied by Supreme Court July 8, 1915.)

1. EXPLOSIVES ⇐9—OIL—QUALITY AS CAUSE OF EXPLOSION—SUFFICIENCY OF EVIDENCE.

In an action for injuries caused by an explosion of oil in an incubator lamp, evidence held sufficient to support finding of jury that the explosion and injury were due to the inferior quality of the oil, and not to plaintiff's negligence.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. ⇐9.]

2. EXPLOSIVES ⇐9—TRIAL ⇐248—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

In an action against the seller of oil for injuries received when an incubator lamp exploded, an instruction that courts will take judicial notice of the qualities of such things as artificial gas, kerosene, gunpowder, dynamite, and the like was properly refused as being abstract on the issue whether the oil furnished by defendant was of inferior quality, unsafe for the use to which it was put, and as tending to mislead the jury.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. ⇐9; Trial, Cent. Dig. §§ 582, 583; Dec. Dig. ⇐248.]

3. EVIDENCE ⇐7—JUDICIAL NOTICE—QUALITIES OF EXPLOSIVES.

A court will probably take judicial notice of the qualities of such things as artificial gas, kerosene, gunpowder, and dynamite.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 6; Dec. Dig. ⇐7.]

4. TRIAL ⇐121—ARGUMENT OF COUNSEL—COMMENT ON EVIDENCE.

In an action against the seller of oil for injuries to plaintiff from the explosion of an incubator lamp, where the defendant introduced in evidence a report as to the testing and inspection of its oil, signed by an inspector and a tester, and with the initials of a special agent, but failed to supplement such report by the tes-

timony of the parties who made it, the argument of plaintiff's attorney stating that there must have been something very peculiar about the oil, or else the defendant would have had witnesses in court to prove what its test as to explosiveness was, and that the report, admitted over objection, was of no value as not supported by any testimony in court, was not improper, since the significance of the report would have been greatly emphasized if supplemented by the testimony of those who made it, and counsel for the plaintiff was entitled to comment on the invalidating circumstance that such parties were not called as witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294-298, 300; Dec. Dig. § 121.]

5. TRIAL § 121—**ARGUMENT OF COUNSEL—COMMENT ON ADMISSION OF EVIDENCE.**

It is not proper for counsel to criticize before the jury the action of the court in admitting particular evidence over objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294-298, 300; Dec. Dig. § 121.]

Appeal from Superior Court, Fresno County; M. L. Short, Judge.

Action by C. H. Schmidt and Lizzie Schmidt against the Union Oil Company of California. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 168 Cal. 617, 143 Pac. 776.

W. A. Sutherland, of Fresno, and Thos. O. Toland, of Los Angeles, for appellant. Harris & Hayhurst, of Fresno, Joel H. Smith, of Selma, and Geo. Cosgrave, of Fresno, for respondents.

BURNETT, J. Plaintiffs are husband and wife, and the judgment was in their favor for \$12,500 as damages for injuries sustained by Lizzie Schmidt in an explosion of oil purchased from defendant. The appeal is from the judgment under the alternative method. Code Civ. Proc. § 953c.

It is alleged in the complaint that plaintiffs were engaged in the poultry business, and, in the prosecution of said business, used incubators for the purpose of hatching eggs by artificial heat; that, to generate such heat, they burned kerosene oil which they bought from defendant; that the use of said oil of ordinary quality for such purpose is entirely safe, and attended with no danger of explosion; "that prior to about March 15, 1911, they had purchased oil of this character from defendant which was entirely safe; that defendant at all times knew the use to which the oil purchased from it by plaintiffs was put; that on or about March 15, 1911, they purchased a quantity of kerosene oil for their incubator lamps believing it to be of the same quality as that theretofore sold them by defendant, but defendant, disregarding its duty in that behalf, negligently and carelessly sold them oil of a highly dangerous and explosive character; that on March 29, 1911, while plaintiff Lizzie Schmidt was using a part of the oil so purchased from defendant in the incubator lamps in the ordinary and customary manner, and without any fault or negligence on the part

of plaintiffs, the oil ignited and exploded and shattered the lamp, and seriously burned plaintiff Lizzie Schmidt, to the damage of plaintiffs in the sum of \$25,000."

A second cause of action was afterward added by consent, containing the additional allegation:

"That all of the oil sold by defendant to plaintiffs as herein described was manufactured by said defendant."

This was for the purpose, so it is stated by respondents, of showing a statutory warranty.

[1] Mrs. Schmidt testified that in March 1911, they were running 14 incubators, and her particular business in the matter was caring for the lamps. She "was attending to the wicks, and keeping them perfectly clean, and seeing that they were in good shape and in perfect order when they were attended to," and she gave each lamp a thorough cleaning once a day; that prior to the month of March the oil they had been getting from the Union Oil Company gave good satisfaction, but later "it burned badly for one thing, and smoked more or less, and didn't give good satisfaction in a general way; it would not burn bright or clear;" the oil was delivered at the house from the company's tank wagon; that she complained to the driver of the wagon "about the quality of the oil, or, that is, that it was not giving good satisfaction at the time we were using it"; that on the 29th of March, in the afternoon, she started to clean the lamps. As she stooped down and "unhooked the little hooks that carried the lamp and brought it, as I should, to set it down, it exploded with a great force in my face, and had a report like a gun, went off immediately with a great splash in my face, and, of course, naturally caught me on fire all over my shoulders, my dress, and my hair." She had not opened it, and did nothing whatever to the lamp except to take it off the hook. At the time of the explosion she was holding the lamp with both hands in front of her, "going to put it on top of the incubator." After the explosion she rushed from the building all ablaze, and she and her husband extinguished the flames. It is not disputed that she was frightfully injured and disfigured, nor is it claimed that the amount awarded is disproportionate to the degree of severity of her injuries. In fact, it is apparent from the record that the full amount claimed would be no more than just recompense if defendant was liable at all, and as, in the closing brief, appellant recedes from the position taken in its opening, that the verdict was excessive, we need not dwell upon the shocking features of the injury.

The oil, as it was received from the defendant's tank wagon, was placed in a large 60-gallon tank close to where the incubators were kept, and from this she drew it in a gallon can from which she filled the lamps. She testified further that, in cleaning the

lamps, "I would always look at it to see that the wick was perfectly clear from any char here; it was always trimmed and always cleaned off," and she had a little brush and always carried a cloth to see that the lamp was perfectly clean, and she had a pair of little scissors to trim the wick, and she always kept the lamp "absolutely clean. It was just like almost a new lamp; of course, it would not look as bright and clean as that, but it would be in perfect order."

Mr. Schmidt corroborated his wife as far as his knowledge extended. He called attention to one additional circumstance, that the oil tank from which they received the oil had several compartments, one of which contained coal oil and another gasoline, and that the faucet to each compartment was similar to all the others. These faucets were at the back of the wagon, six or eight inches apart. Once Mr. Schmidt had asked the driver if he ever made a mistake on account of the faucets being alike, and the latter said: "Well, I did make a mistake at one time, but I corrected it myself before any trouble happened." The driver also told him that the compartments were not the same size, and they used them interchangeably for the different products, oil and gasoline, as their business required. As to the technical test of the quality of the oil, Mr. Schmidt testified that, on the 5th of April, following the explosion, he drew about a quart of the oil from the 60-gallon tank and sent it to F. E. Twining, a chemist in Fresno; that no oil had been put into the tank between the time of the accident and the taking of the sample; and that there was no way for anything to get into this tank unless it came from the wagon.

It appeared that oil was delivered to plaintiffs on the 6th, 13th, 20th, and 29th of March, and it was stipulated that defendant had made two shipments of oil "from its refinery at Oleum to the substation at Reedley, one in January, and the other one arriving in Reedley on the 16th of March, and that it was from this oil delivery sent down to Reedley and arriving on the 16th of March that the oil in question and burning in the lamps on the 28th and 29th of March, 1911, was taken, and that which was delivered also on the 29th was from the same oil as delivered on the 16th of March, from the same car."

F. E. Twining qualified as a chemist, and he testified that he made a flash test of the oil that he received from Mr. Schmidt. He found the flash test was 88°. The flash test is indicative of the amount of volatile vapor, that is, inflammable vapors, in the oil. The lower the flash test the more dangerous is the oil. The flash test is the temperature at which oil will give off vapor enough to ignite. The flash test of oil regarded as safe is 110°. The witness did not consider it a safe oil. The apparatus by which he determined the flash point was what he calls an Elliott tester, but he claimed that it belongs to the class known as open testers. The closed test-

er, it may be said, shows the flash point at about 20 degrees lower than does the open tester. He also ascertained this point by the Tagliabue method, which is the method recognized on the Pacific Coast, and found it to correspond substantially with the other, placing it at 88°. He also made a chemical analysis of the oil by distillation, and found that it contained 2.98 per cent. of the naphtha group, which would account for the low flash test, and for that reason he did not consider it a safe oil for use in an incubator.

W. A. Smith was employed by plaintiffs, and was on the premises at the time of the accident. He went into the basement immediately after the explosion and picked the lamp off the floor six or eight feet from where the accident happened. The bottom of the lamp was lying on top of the incubator. The burner was lying off in a different direction from the lamp.

W. C. McFarlane, an expert poultry raiser, and who was familiar with the use of incubators, testified that he had been agent for the Jubilee incubators for 18 years (the one in question being a Jubilee incubator), and that they were what are known as the sun hinge burners and were the best made—as good as could be produced. On cross-examination he was shown the lamp that exploded and asked if it looked as though an explosion had blown the burner out of the collar, and he gave it as his opinion that the burner had been blown off.

We think it cannot be doubted that the foregoing justifies a rational inference that the explosion and consequent injury to Mrs. Schmidt were due to the inferior quality of the oil, and not to any want of ordinary care on her part. The evidence would seem to be ample to support the finding of the jury in that respect. However, we may notice a little more in detail the criticism of that evidence by appellant and devote some attention to what are claimed to be errors in the trial of the cause.

Appellant questions the veracity of Mrs. Schmidt as follows:

"If the lamp, hanging in under the incubator, only about two feet from the ground, exploded the moment she touched it or started to take it out, how did the flames catch her, in the face and breast and on her shoulders and back, and on no other part of the body or lower limbs? If she was down in under the incubator when the explosion occurred, so that the flames could have reached her in that manner, then how did the incubator come to be burned on top and not on the bottom or lower part of the sides or ends? And how did the lamp's bottom get on top of the incubator?"

To this it is proper to reply that her testimony as a whole must be considered, and she cannot be judged by a single detached sentence. It is true that she answered, "Yes, sir," to the question, "And it exploded the moment you unhooked it?" but she explained further by stating what we have already quoted to the effect that she had brought it to the top of the incubator and was about to set it down when it exploded.

But, aside from this, it would hardly be fair to require any witness, under the same circumstances, to detail with strict accuracy such a startling, unexpected, and disastrous occurrence. It is quite likely that she did better than most persons could if subjected to the same trying experience. Whatever criticism may be made of isolated statements of the witness, it is entirely clear that her completed story is not improbable, and an appellate court cannot say that the jury were not authorized to accord full credence to her testimony. Believing, as the jury undoubtedly did, that she was trying to tell the truth, they could reach no other conclusion than that the explosion was not due to her carelessness or want of attention to the lamps.

Appellant, probably, has more confidence in the point that the evidence is not sufficient to support respondents' theory as to the quality of the oil. Herein, though, we may say, with proper respect for the able counsel for appellant, that they seem to mistake the function of this court for that of the jury or the trial judge. Much of the argument as to this point, we think, could with greater propriety have been addressed to these other tribunals. We do not see how it can be said that there was no substantial showing that said oil was of inferior quality and dangerous.

Appellant declares:

"The oil that was in the lamp which exploded was delivered March 20th. There was another delivery of oil in said tank on the 29th day of March, which filled the tank to the amount of 60 gallons. Plaintiffs continued to use the oil from this tank for several days after the 29th of March, or until it was about all used up."

Attention is further called to the fact that the sample was taken from the tank "7 days after the last delivery of oil from the Union Oil Company and 16 days after the delivery of the oil which was in the lamp at the time of the explosion, which, according to plaintiffs' testimony of the amount of oil used daily, would show but very little, if any, of the oil delivered on March 20th and that mixed with the oil delivered on March 29th." These suggestions seem to be made to create the impression that the proof fails at the point of identity of the oil analyzed and tested with that in the lamp at the time of the explosion or of similarity in quality between the two. This apparent weakness, however, is removed by the stipulation to which we have already referred. Of course, the oil sent to Mr. Twining was not the same oil as was in the lamp when the unfortunate accident occurred, for a very obvious reason, but, according to the stipulation, the two quantities were taken "from the same oil." It was therefore at least a fair, if not necessary, inference that they were alike. Manifestly, no proof of the certainty of mathematical demonstration could be made of the quality of the oil which exploded, but the evidence furnished by plaintiffs seems to

have been legitimate, plausible, and persuasive.

It is also claimed by appellant that the proper inference from Mr. Twining's testimony is that the oil in question was good commercial oil. Part of his testimony is quoted, and it is insisted that from this the conclusion follows that his experiment was made in a closed cup, and "that his result of 88 is equivalent to from 108 to 113 degrees made by the uniform Pacific Coast test, the open cup test, which shows that the oil complained of was not oil of a highly dangerous, volatile, inflammable, and explosive nature and character, but was good commercial oil of the ordinary grade, of the ordinary flash test as understood by the manufacturers and dealers along the Pacific Coast."

Here again, though, as we conceive it, appellant has failed to give proper consideration to the entire testimony of the witness. We need not quote extensively from it, but he entered elaborately and apparently with learning into an explanation of the different scientific methods of ascertaining said quality, and he did say:

"Well, the Elliott test is test as I have it, is not a closed test."

And, furthermore, the record shows:

"The Court: Did you start in with the Elliott test or open test, or the one in the open test?
A. The Elliott; it is practically the open cup."

But it also appears that he made a test with the Tagliabue outfit, which is admittedly an open test, and as to that he declared that the result was just .6 of a degree lower than that obtained by the other, or so-called Elliott test. In addition, as we have already seen, he ascertained the character of the oil by distillation, which is asserted by respondents to be "the only accurate method." We need not dwell further upon this phase of the case. Certainly, the just inferences from the testimony of Mr. Twining are all in favor of respondents' position.

Appellant also directs attention to certain circumstances—for instance, the lack of sufficient ventilation in the basement where the incubators were operated—as evidence that the explosion was due to another cause than the quality of the oil, but their probative force was obviously for the jury, and we think we are not called upon to consider them further.

There is quite a number of assignments of error, but most of them we view as entirely destitute of merit. The following examples may be selected, possessing probably as much merit as the other specifications:

[2, 3] There was surely no error in refusing this instruction:

"Courts will take judicial notice of the qualities of such things as artificial gas, kerosene, gunpowder and dynamite and the like."

It is probably true that the court would take judicial notice of the general quality or character of these substances, but that was of no concern to the jury in the present case.

The question here was whether the oil was of inferior quality, below the ordinary standard, and therefore unsafe for the use to which it was put, and that obviously was a consideration for the determination of the jury. Of course, no one would contend that such question should have been withdrawn from the jury, and the instruction, if abstractly correct in a general way, could not have aided the jury in deciding the issues submitted to them, but, on the contrary, if given, it would likely have confused and misled them.

[4, 5] Appellant took exception to the following portion of the closing argument of respondents to the jury:

"In the first place, I believe that, if there hadn't been something very peculiar about that oil, they would have had witnesses in here to prove what the flash test point was. Now, what have they introduced on that point? They have introduced this paper here, signed by somebody that signed his name as inspector, and by somebody else who signs his name as tester, and the initials of somebody, a special agent. Now, this was done in 1911, 4th of March. The judge admitted this over our objections simply for what it was worth. Now, you remember, gentlemen of the jury, that the men who signed this, there is no evidence that they ever made this test. You don't know but what they just signed this up without looking into it. You don't know how careless they were. You don't know what tests they made, or anything of that kind. This was put in here, and they, for some reason, are not here. We couldn't bring them here. We couldn't tell who was the tester. We didn't know that this report was going to be asked to be introduced. I have no doubt that these men, at least two of them, are still in the employ of this company. We must assume that. Why didn't they have them here, so that we could cross-question them?"

We think the foregoing is within the legitimate range of argument. Our attention is not called to any portion of the transcript that discredits any statement of fact in said argument, and, of course, we must assume that the learned counsel for respondents was acting in good faith with no desire to make an unwarranted appeal to the passion or prejudice of the jury. The said tester's and inspector's report which was admitted in evidence purported to be signed as follows:

"Union Oil Co. of Cal., Reedley, Cal. C. H. Stamm, Inspector; J. P. Blowski, Tester; R. H. H., Special Agent."

It would not have been proper for respondents to criticize, before the jury, the action of the trial court in admitting said document in evidence over their objection, nor can they complain of it here, since they are not appealing. But it is quite plain, we think, that the significance of the report would have been greatly emphasized and enhanced if it had been supplemented by the testimony of the parties who made it, and we can see no reason for precluding comment upon the circumstance that said parties were not called as witnesses.

We have made a careful examination of the record and briefs, and, while not noticing here specifically all the points made by ap-

pellant, we are persuaded that there is ample evidence to support the verdict, and that no prejudicial error was committed in the court below. Indeed, we may say that the record discloses the utmost care on the part of the trial judge to secure a fair and impartial trial, and we cannot say that appellant has any just cause for complaint at the result.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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